'Anti-Suit' Injunctions Enforcing Arbitration Agreements in the EU: Analytical Failings After Gazprom and the Brussels (Recast)

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I. Introduction

In the European Union, injunctions issued by a Member State court enjoining an entity from litigating before another Member State court are prohibited for being 'incompatible' with the Brussels Regulation ['the Regulation'].[1] The European Court of Justice's ruling in *Turner v Grovit* first forbade those injunctions issued by courts enjoining an entity from bringing an action which was 'vexatious and oppressive'.[2] Subsequently, the Court held in *West Tankers* that injunctions issued by Member State courts to enjoin litigation brought in breach of an arbitration agreement ['Arbitration Agreement-Enforcing Injunctions', or 'AAEIs'] were also prohibited, even if the injunction were issued in proceedings which themselves fell within Brussels' 'arbitration exception'.[3] But what would otherwise appear as a categorical ban on anti-suit injunctions supporting arbitration has been complicated by two developments of late.

The first is the *Gazprom* decision,[4] which appeared to hold that orders by an arbitral tribunal enjoining a party from commencing or proceeding with parallel

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1 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Regulation (EU) 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) ("Recast").

2 Case C-159/02 *Turner v Grovit* [2004] ECR I-3565.

3 Case C-185/07 *Allianz v West Tankers* [2009] ECR I-663.

4 Case C-536/13 *Gazprom OAO* EU:C:2015:316.

litigation, as with judicial orders enforcing them, were not subject to the *West Tankers* prohibition. The second is the advent of the Brussels Regulation (recast) (hereinafter 'Recast'), which incorporated a Recital (12) that sought to explain the 'arbitration exception' in Art 1(2)(d).[5] Some, including AG Wathelet in his *Gazprom* opinion, had argued that Recital (12) had displaced the *West Tankers* prohibition.[6] The *Gazprom* Court, however, omitted to address whether—and how far—its Advocate General was right.

The upshot of these two developments, then, is a juridical morass that demands closer analysis than has been accorded. Perhaps owing to its 'pro-arbitration' result, the *Gazprom* decision has been described as 'unremarkable', 'perfectly practical', and 'perfectly comprehensible'.[7] Conversely, AG Wathelet's arguments relating to the Recast have been criticised even by 'pro-arbitration' critics of *West Tankers*.[8] In response to these contentions, this article counsels closer scrutiny of the two developments, arguing that the juridical configuration emerging is more uncertain and intricate than might first appear.

The article proceeds as follows. After a summary explanation of what an AAEI is, we shall argue that *Gazprom* is not as 'unremarkable' or 'comprehensible' as commentators would have it.[9] Outcome aside, *Gazprom*'s reasoning fails to explain how judgments or equivalent orders by a court enforcing arbitral 'anti-suit' awards are exempt from the *West Tankers* prohibition even if they technically involve the same remedial mechanisms and can be as disruptive of a court's jurisdiction as judicial AAEIs. We shall argue, therefore, that *Gazprom*, involves a conceptually inexplicable backtracking from the ethos of *West Tankers*, under which any judicial act which interfered with a court's exercising of Brussels-conferred jurisdiction was inconsistent with it. We shall further demonstrate that *Gazprom does not* conclusively establish that all manner of judicial acts enforcing arbitral awards are exempt from

5 Recital (12) and Art 1(2)(d), Recast (n 1).

6 Opinion of AG Wathelet, Case C-536/13 *Gazprom* (n 4).

7 See Adrian Briggs, 'Arbitration and the Brussels Regulation Again' (2015) LMCLQ 284, 286–287; Vesna Lazic and Steven Stuij, *Brussels Ibis Regulation* (Springer 2016) 143–49; Chukwudi Ojiegbe, 'Arbitral tribunals are not bound by the principle of mutual trust' (2015) 18(4) Int ALR 74, 75; Ewelina Kajkowska, 'Anti-suit injunctions in arbitral awards: enforcement in Europe' (2015) 74(3) CLJ 412, 415; James Drake, 'Gazprom: The Report of the Demise of West Tankers is Greatly Exaggerated' (2015) CIArb Bulletin 5; Eva Storskrubb, 'Gazprom OAO v Lietuvos Republika: a victory for arbitration?' (2016) 41(4) EL Rev 578; Jae Sundaram, 'Case Note' (2015) 27 Denning LJ 303, 322, *inter alia*.

8 ibid 287; George Bermann, 'The Gazprom Case: 'Sounds' and 'Silences' in Relations between EU Law and International Arbitration' (2015) 22(8) Maastricht JEL 899–903.

9 See eg Drake (n 7); Briggs (n 7); Trevor Hartley, 'Antisuit Injunctions in Support of Arbitration: West Tankers Still Afloat' (2015) 64 ICLQ 965; Chukwudi Ojiegbe, 'From West Tankers to Gazprom: anti-suit injunctions, arbitral anti-suit orders and the Brussels I Recast' (2015) 11(2) JPIL 267, 289ff.

the *West Tankers* prohibition, and so leaves the resulting rule uncertain. In respect of the Recast, we shall argue that Recital (12) does little to address the *West Tankers* prohibition. In that respect, we shall argue that AG Wathelet's arguments are problematic and unlikely to be accepted by the Court.

The article's bottom line, consequently, is deliberately provocative: Gazprom, regardless of the desirability of its outcome, is analytically problematic, and the Recast does not salvage it.

II. The '"Anti-Suit" Injunction Supporting Arbitration'

The AAEI is a device largely peculiar to the common law jurisdictions.[10] It is a judicial or arbitral order that specifically enforces the negative obligation undertaken by a party to an arbitration agreement to not litigate an issue exclusively meant for arbitration.[11] Though theoretically discretionary, an AAEI will be granted by a court upon proof that an enforceable arbitration agreement 'highly probably' exists and is, or is threatened to be, breached.[12]

Because the AAEI enforces a contractual obligation which a party has assumed under an arbitration agreement not to litigate a claim meant for arbitration,[13] it is distinguishable from the other kinds of 'anti-suit' injunctions issued in response to equitable wrongdoing like a litigant's 'vexatious and oppressive' conduct.[14] Unlike those,[15] the AAEI involves the specific enforcement of a pre-existing contractual obligation not to litigate a claim meant for arbitration.[16] This functionality exists because the negative obligational aspect of an arbitration agreement is regarded special.[17] Being twinborn of the choice to arbitrate a claim exclusively,[18] a party's breach of its negative obligation is regarded as pecuniarily incompensable,[19] because the trouble of having to litigate in another forum is the very mischief which the parties to an arbitration agreement are deemed to have 'aimed and

[10] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer 2014) 1290–96.

[11] See *Ust-Kamenogorsk Hydropower Plant v AES Ust-Kamenogorsk* [2013] UKSC 35, [1], [20]–[25]; cf *Donohue v Armco* [2001] UKHL 64, [24].

[12] *AES*, ibid; *Ecobank Transnational Inc v Tanoh* [2016] 1 WLR 2231, [82] – [122]; *The Angelic Grace* [1995] 1 Lloyd's Rep 87; *OT Africa Line v Magic Sportswear Corpn* [2006] 1 All ER (Comm) 32, [30]–[34].

[13] *AES* ibid, [25], citing *The Angelic Grace*, ibid 96.

[14] *The Angelic Grace*, ibid; Adrian Briggs, *Civil Jurisdiction and Judgments* (Routledge 2015) 551–557

[15] See eg *OT Africa Line* (n 12) [30]–[34].

[16] Briggs (n 14) 552.

[17] *AES* (n 11), [25]; Adrian Briggs, *Private International Law in the English Courts* (OUP 2014) 1014–16; cf *Doherty v Allman* [1878] 3 App Cas 70, 719–23.

[18] See Born (n 10) 1274–75, 1393–94.

[19] *Starlight Shipping v Tai Ping Insurance Co* [2007] EWHC 1893 (Comm), [12]; *AES* (n 11), [25].

bargained to avoid' *ex ante*,[20] and so cannot easily be reduced to an exigible sum.[21]

III. West Tankers and its Categorical Prohibition on Judicially-Issued AAEIs in the European Union

The European Court of Justice in the West Tankers decision ruled that the AAEI was prohibited. In that case, a party to an arbitration agreement brought a suit in an Italian Court for claims in tort arising from a collision in Italian waters. In response, West Tankers, a party to an arbitration already ongoing in London concerning the same claim, applied to the English High Court for an injunction enjoining that suit on grounds that it was brought in breach of the arbitration agreement. The injunction was granted. On leapfrog appeal, the House of Lords referred to the ECJ the question of whether it was 'incompatible with Regulation No 44/2001 for a [Member State court] 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, even though Article 1(2)(d) of the regulation excludes arbitration from the scope thereto'.[22] The Court answered the question affirmatively, but its reasoning must be understood in light of the dialectic between the referring court's apologia for the AAEI and the Advocate-General's outright rejection of the same.

A. The dialectic between the UKHL, the Advocate-General, and the Court in West Tankers

In its reference, the UKHL, in hopes of influencing the ECJ, answered the question it referred in the negative.[23] Chiefly, Lord Hoffmann argued that an application of the 'subject matter' test expounded in previous case law made it that the proceedings concerned only '…the contractual right to have the dispute determined by arbitration' and were thereby exempted by Article 1(2)(d) of the Regulation.[24] Consequently, cases like *Gasser* and *Turner* were distinguishable because those cases had concerned a subject matter outwith the Regulation's scope.[25]

Their Lordships' exhortations, however, were rejected by Advocate-General Kokott, whose arguments the ECJ later adopted. AG Kokott professed

[20] *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA* [2007] UKHL 4, [28]–[30].
[21] See Martin Illmer, 'Brussels I and Arbitration Revisited' (2011) 75(3) RabelsZ, 645, 654.
[22] ibid [23].
[23] ibid [14]–[15], [28]–[30].
[24] ibid [10]–[14], referring to Case C-190/89 *Marc Rich v Impianti* [1991] ECR I-3855; Case C-391/95 *Van Uden Maritime BV v Deco-Line* [1998] ECR I-7091.
[25] Case C-116/02 *Erich Gasser v MAAEIT* [2003] E.C.R. I-14693; *Turner* (n 2).

a fundamentally different understanding of the Regulation and the Article 1(2)(d) 'arbitration' exception.[26] The Advocate-General first objected at their Lordships having '... regard[ed] as irrelevant the effect of the anti-suit injunction on the proceedings before the [Italian court]'.[27] For AG Kokott, the operative question was not whether the anti-suit proceedings in London fell within the Regulation's material scope, 'but whether the proceedings *against which* the anti-suit injunction [was] directed [i.e. the Italian proceedings]' did.[28] One had to look at the *receiving end* of the injunction, [29] because an act which did not itself fall within the Regulation's scope could nevertheless impair its 'practical effectiveness' by the *effects* it had on another court's jurisdiction.[30] So it mattered not that Colman J's order was issued in proceedings exempted by Article 1(2)(d),[31] but that the proceedings in the Italian court *did* fall within the Regulation for involving a tort and contract claim.[32]

The Grand Chamber essentially adopted the views of AG Kokott. The Court began by conceding that the anti-suit proceedings themselves were excepted by Article 1(2)(d).[33] However, it then proceeded to hold that the mere fact that the injunction proceedings fell outside the material scope of Brussels I did not mean that it was necessarily consistent therewith.[34] Instead, the Court identified the operative rule to be that judicial acts having consequences which 'undermine[d] [Brussels I's] effectiveness [by] preventing the attainment of [its] objectives...' were 'incompatible' with the Regulation.[35] Applying the rule, the Court found that Colman J's AAEI enjoining Allianz from proceeding with its suit in Italy did 'undermine [the Regulation's] effectiveness'. The Court gave three reasons:

1. That Colman J's act 'necessarily amount[ed] to stripping the [Italian court] of the power to rule on its own jurisdiction', conferred upon it by the Regulation[36] to consider the claim brought before it.
2. That the injunction's interference with the Italian court's jurisdiction was contrary 'to the trust which the Member States accord to one another's legal

[26] *Allianz* (n 3), Opinion of AG Kokott.
[27] ibid [32]–[33].
[28] ibid [33].
[29] ibid [37].
[30] ibid [35]–[37].
[31] ibid [43]–[49].
[32] ibid [54].
[33] *Allianz* (n 3) [22]–[23].
[34] ibid [24]–[32].
[35] ibid [24]. See further Hartley (n 9) 967.
[36] ibid [28]–[29].

systems and judicial institutions and on which the system of jurisdiction under [Brussels I was] based'.

3. That the injunction had the effect of 'barr[ing] [Allianz] … [from] access to a court' and so denied it 'of a form of judicial protection to which it [was] entitled'.[37]

Before the Court concluded so, however, it had first to find that the proceedings brought before the Italian court had, as their 'principal subject matter', [38] a claim in tort within the jurisdiction granted by Article 5(3) of the Regulation (or what is now Art 7(2) of the Brussels Recast), because the challenge to the arbitration agreement was merely a 'preliminary issue' to the main proceedings involving the tort claim. [39] On those grounds, the Court concluded that all such AAEIs were 'incompatible' with the Regulation. [40]

B. West Tankers established an 'Effects' Principle securing the effet utile of the Brussels Regulation

West Tankers broke new ground from the Court's jurisprudence by its undertaking an 'Effects'-based analysis which forbade all that, in effect, potentially interfered with the exercising of Brussels-given jurisdiction.[41] The Court in *Gasser* and *Turner* did hold that an injunction issued in proceedings *themselves* falling within the Regulation's material scope would be prohibited if it interfered with the jurisdiction of another court seised of a Regulation-governed claim. But both cases left open the question of whether that same logic would (1) apply when the injunction was issued in proceedings *not themselves falling* within the material scope of the Regulation to begin with; and (2) would thus apply to AAEIs like that issued by Colman J.[42] The Court in *West Tankers* answered that question affirmatively.

Professor Briggs has explained[43] that *West Tankers* departed from the logic of such cases as *Owens Bank v Bracco*,[44] and *Hoffmann v Krieg*.[45] These cases stood for the proposition that a court seised of a matter outwith the material scope of the

37 ibid [31].

38 ibid [26]; See also *Marc Rich* (n 24) [26].

39 ibid [26].

40 ibid [34].

41 Briggs (n 17) 200-01; Hartley, (n 9) 907; Patrizio Santomauro, 'Sense and Sensibility: Reviewing *West Tankers*' (2010) 6(2) JPIL 283, 293-94; Burkhard Hess, 'Hess on *West Tankers*' (*COL.net* post, 10 Feb 2009).

42 Adrian Briggs, 'Fear and Loathing' (2009) LMCLQ 161, 163-66; Edwin Peel, 'Arbitration and Anti-Suit Injunctions in the EU' (2008) 125 LQR 365, 366–68.

43 Briggs, ibid 164–65.

44 Case C-129/9, [1994] ECR I-117.

45 Case C-145/86 [1988] ECR 645.

Regulation could permissibly act in a way that contradicted the Regulation's own rules or, *a fortiori*, impaired their effectiveness. They were logically inconsistent with an 'Effects' principle which looked not to the question of whether an act itself fell within the Regulation's scope but the act's effects instead.

Nevertheless, the *West Tankers* court innovated. [46] No longer did it matter that the offending judicial act did not fall within the Regulation's scope. So long as it had the effect of adversely interfering with an action that did fall within Brussels, it was *ipso facto* 'incompatible' therewith. The Court, in accepting AG Kokott's thesis, had engendered a novel and potent 'Effects' principle that would begrudge even remote acts which the Regulation was not directly purposed to regulate.[47]

IV. Gazprom's Uneasy Relationship with West Tankers

Given the aforementioned history, *Gazprom* remains the Court's most recent exposition on AAEIs in the EU to date, and many regard it as holding *ex facie* that *West Tankers* neither prohibits (1) an order issued by an arbitral tribunal having the effect of an AAEI, nor (2) a Member State court from enforcing that order against the party whom it enjoins.[48] As shall be explained, however, the true legal position emerging is not as clear.

In *Gazprom*, the Stockholm Chamber of Commerce, after finding breaches of an arbitration agreement, rendered a final award ordering the Lithuanian Ministry of Energy to withdraw or reformulate the claims it had initiated in the Lithuanian courts.[49] This award, therefore, operated as an AAEI. Gazprom OAO sought to enforce the award in the Lithuanian courts. The Ministry opposed enforcement, arguing that the award 'constituted an anti-suit injunction [whose] recognition and enforcement would be contrary to [the Regulation] as interpreted [in *West Tankers*]'.[50] The Lithuanian Supreme Court, fearing that judicial enforcement of an arbitrally-issued AAEI was foreclosed by *West Tankers*, tendered a preliminary reference.[51] It queried whether a court of a Member State had the 'right to refuse' to an arbitral award which operated like an AAEI on grounds of 'incompatibility'

[46] Briggs, (n 42) 16465; Guido Carducci, 'Arbitration, Anti-suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention' (2011) 27(3) Arb Intl 171, 179–81; Peel (n 42).

[47] See Hess (n 41); Geert Van Calster, *European Private International Law* (Hart 2013) 35-38, 50, christening this '*[t]he Effet Utile Sledgehammer*'; Pietro Ortolani, 'Antisuit Injunctions in Support of Arbitration Under the Recast Brussels I Regulation' (MPILux Working Paper 6, 2014) 9–11.

[48] eg Briggs (n 7); Ojiegbe (n 9); David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (3rd edn, S&M 2015) paras 12.62–12.63.

[49] Final Award of July 31, 2012, SCC Arbitration No. V (125/2011), [225]ff. See also *Gazprom*, Opinion of AG Wathelet, (n 4) [37].

[50] ibid [46].

[51] *Gazprom* (n 4) [31], [26]. Opinion of AG Wathelet, ibid [47].

with the Regulation, and, alternatively, whether a court could, anyway, decline enforcement of such an award because it violated EU public policy.[52]

The Court answered the first question in the negative and evaded the public policy question.[53] In doing so, it visibly reaffirmed its *West Tankers* ruling,[54] recalling that judicial AAEIs were prohibited by *West Tankers* for being 'incompatible' with Brussels I.[55] It further expounded, now, that *West Tankers* was predicated on the general principle of Mutual Trust, being the 'general principle … that every court seised itself determines, under the applicable rules, whether it has jurisdiction to resolve the dispute before it', interference with which '[ran] counter to the trust which the Member States accord to one another's legal systems and judicial institutions'.[56] However, the Court then explained that the arbitral award in question, as with its enforcement by the Lithuanian courts, did not violate Mutual Trust for three reasons:

1. That the principle of Mutual Trust applied only to the courts of Member States and not arbitral tribunals.[57] Concomitantly, the Regulation governed '... only conflicts of jurisdiction between courts of the Member States' and not arbitral acts.[58] Being so, an arbitral award, even where it operated like an AAEI, could not violate Mutual Trust.[59] The Court then briskly reasoned in a single sentence that, simply because '... the order ha[d] been made by an arbitral tribunal', a judicial act enforcing that order was also 'unquestionably'[60] not a violation of Mutual Trust.[61]

2. That arbitral awards enjoining litigation, unlike judicial AAEIs, did not have the effect of denying a claimant the 'right to judicial protection', since those awards could always be contested at the enforcement stage by a claimant in foro, and so did not flout the principle of Mutual Trust.[62]

3. That, the Stockholm tribunal's award, as with its 'legal effects', was distinguishable from judicial AAEIs because its issuance could not result in

[52] ibid [47].
[53] *Gazprom* (n 4) [27]; cf Bermann (n 8) 899, 903.
[54] ibid [32]–[33].
[55] ibid [33].
[56] ibid [33].
[57] ibid [37].
[58] ibid [36].
[59] ibid [37].
[60] ibid.
[61] ibid.
[62] ibid [34], [38]–[39].

'penalties' being imposed upon a claimant by the court of another Member State for non-compliance.[63]

On these three bases, the Court concluded that the Lithuanian court's enforcement of the arbitral award in question was not 'incompatible' with the Regulation.

A. *Gazprom* establishes that member state courts can enforce (some) arbitral AAEIs notwithstanding *West Tankers*

Gazprom clearly establishes that *West Tankers* did not prohibit a court from enforcing an arbitral AAEI which operated as the Stockholm tribunal's award did. That conclusion, apparently, flowed from the premise that arbitral acts fell outwith the Regulation's material scope and were therefore incapable of violating the principle of Mutual Trust.[64] The conclusion was, to many, a welcome conclusion.[65] Critics had previously feared that *West Tankers* made it that '... as long as a matter can be said to have some sort of connection to the Regulation, then ... anything which "undermines its Effectiveness" is prohibited.'[66] Now *Gazprom* had proven that there was at least a limitation to the 'Effects' principle: arbitral awards (and at least some judgments enforcing them).

At the same time, however, the Court expressly affirmed the rest of the *West Tankers* prohibition.[67] *Gazprom* does not revive the logic of *Hoffmann* or *Bracco*.[68] The mere fact that an act has 'arbitration' as its subject-matter need not exempt it from being 'incompatible' with the Regulation.[69] Nevertheless, *Gazprom*'s specific outcome was still largely welcomed by those previously opposing *West Tankers*.[70]

B. But *Gazprom* does not explain why Member State courts can enforce and recognise arbitral AAEIs in spite of *West Tankers*

The whole trouble with *Gazprom*, however, is that various obscurities surround its core ruling that (some) judicial acts enforcing arbitral awards are not

63 ibid [40]; cf Maximillian Sattler 'Abandon ship? West Tankers, Gazprom, and anti-suit injunctions under "Brussels Ia' (2016) 34(2) ASA Bulletin n 19 342, 348.

64 See IV.D(ii) below.

65 Briggs (n 7) 287; Ojiegbe (n 9) 289–90; Berk Dermikol, 'Ordering Cessation of Court Proceedings' (2016) 65(2) ICLQ 379, 381.

66 Briggs (n 42) 166; Margaret Moses, 'Arbitration/Litigation Interface: The European Debate' (2014) 35 Northwestern J Intl LB 1, 26-29.

67 *Gazprom* (n 4) [34]–[35].

68 *Contra* Ojiegbe (n 9) 289-90; cf Hartley (n 9) 973-75.

69 cf *Gazprom* (n 4) [28] [44].

70 eg Briggs (n 7).

'incompatible' with the Regulation.[71]

The Court's reasoning—while reaching an arguably desirable result—does not explain why, in light of its affirmation of *West Tankers*, judicial acts enforcing arbitral AAEIs are not prohibited when ordinary judicial AAEIs are.[72] The *Gazprom* court's proposition that a *court's* enforcing of an arbitral award 'unquestionably' benefits from the same exemption that arbitral awards enjoyed is incompletely explained.[73] It is one thing to say that arbitral acts (i.e. awards) cannot violate Mutual Trust and are not capable of being 'incompatible' with the Regulation, and wholly another to hold that *judicial acts enforcing arbitral acts* (i.e. 'award judgments' or equivalent orders) automatically inherit the same exemptive character.[74] It is submitted that there are two problems inherent in 'leaping' from the premise that arbitral awards are excepted from the Regulation, to the proposition that judicial acts enforcing them acquire that 'exceptionality':

1. Judicial acts enforcing arbitral AAEIs still involve a mediating act of enforcement which is essentially similar to judicial AAEIs; and
2. That very act may effectively be just as disruptive of another court's Brussels-conferred jurisdiction.

(i) There is still a mediating judicial act which essentially shares the same agency as a judicial AAEI

In the first place, the *Gazprom* court does not appear to appreciate that the act of a court enforcing an arbitral act technically involves either a court rendering an independent judgment in terms of the award, or declaring the award to be enforceable in the manner of a true *exequatur*.[75] In England, for example, both avenues are available.[76] Scholars have termed these enforcement orders 'award judgments'.[77] That a judgment (or equivalent order) is rendered either way proves, first, that there is a *mediating judicial act* between the enforcing of an arbitral AAEI and a party being so enjoined. A court exercises an independent power to enforce the award, and by so doing asserts its jurisdiction over the party enjoined.[78] It is just

[71] *Contra* Ojiegbe (n 9) 289-290 and Mukarrum Ahmed, 'PhD Thesis' (University of Aberdeen, 2016) 61, 173n616.

[72] cf Briggs (n 7) and Hartley (n 9), Van Calster (n 42) 56-57, and Sattler (n 63) 348–49.

[73] See *Gazprom* (n 4) [35]–[39].

[74] cf Hartley (n 9) 975, 975n44; Sattler (n. 63) 489–90; Van Calster (n. 47) ibid 56.

[75] See Maxi Scherer, 'Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?' (2013) JIDS 587. On what an 'exequatur' is, see Scherer, ibid 606.

[76] ss 66(1) – (2) and 101(1) – (3) Arbitration Act 1996.

[77] eg Scherer (n 75)) *passim.*

[78] See eg *West Tankers Inc v Allianz* [2012] EWCA Civ 27, [38].

as how, in the case of a judicial AAEI, a court order mediates between the negative contractual obligation and the party breaching it.

More importantly, the Court also appears not to perceive that an award judgment enforcing an arbitral AAEI still effectuates specific performance of the negative obligational aspect of the arbitration agreement. Whether an AAEI is judicially or arbitrally issued, therefore, both acts still do *ultimately* involve the same mechanisms. So the *Gazprom* court's curious insistence,[79] replicated by some,[80] in reckoning *only* a directly judicially-issued order as an anti-suit injunction, but a judgment award enforcing an arbitral 'anti-suit' order as something else altogether, is analytically questionable. They are both 'anti-suit' injunctions if that label should be used, for it cannot sensibly be claimed that an order by a court enforcing an arbitral AAEI enforces a different obligation or enforces it differently from a judicial AAEI. In effect, a court is technically still issuing an AAEI when it renders that award judgment.[81] Notwithstanding that the award which such a judgment recognises and enforces was 'arbitrally made', it is a court that *finally administers* the remedy. Indeed, if said award judgment should be wilfully disregarded by the party enjoined, the same sanctions as are imposable in a case of a judicial AAEI doubtlessly could be imposed.[82]

The difference, therefore, which the Court found significant, is a contextual and not a conceptual one: that the latter involves the enforcement of an arbitral award and the former does not. But just why is this difference of legal significance? To be sure, the intervening judicial act of award enforcement would *itself* fall within Article 1(2)(d). But again, *West Tankers* taught us that such did not matter, because one focused instead on the impact of the judicial act on a court's jurisdiction.

(ii) That mediating judicial act could well be as disruptive of another Member State court's Brussels-conferred jurisdiction

Furthermore, the *Gazprom* court seems totally to neglect the fact that an award judgment enforcing an arbitral AAEI can be just as disruptive of a court's Brussels-conferred jurisdiction as an ordinary AAEI—a consequence which the original 'Effects' analysis of *West Tankers* deems sufficient for a thing to be 'incompatible' with the Regulation. Because, on *Gazprom*'s own particular facts, the arbitral AAEI issued was not actually disruptive, the possibility that *other* awards *could still be* seems to have wholly eluded the Court. Therein, the tribunal issued an arbitral AAEI as a final award, and was thereafter *functus officio*.[83] Thus, there

[79] *Gazprom* (n 4) [25], [30].

[80] Trevor Hartley, 'The Brussels I Regulation and Arbitration' (2014) 63(4) ICLQ 843, 855-57.

[81] cf Joseph (n 48) paras 16.88-16.91.

[82] eg *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3131 (Comm); *SM Shipping Ltd of India v TTMI* [2007] EWHC 927 (Comm).

[83] On the doctrine of *functus officio*, see eg Born (n 10) 748–49.

was therefore no prospect of it making further orders awarding damages or costs if its award enjoining litigation should have been ignored.[84] It was also the case that the Ministry of Energy, a government entity, would probably comply with a Lithuanian court's award judgment, and so there was no real prospect of that court dispensing sanctions for default. And—perhaps most importantly—the enforcing court in *Gazprom* was a Lithuanian court enforcing an award enjoining litigation *in Lithuania* and not before the courts of another Member State.[85] Cumulatively, these facts created a situation wherein the award judgment was not as capable of being potentially disruptive as an ordinary judicial AAEI. But, were one still truly adherent to *West Tankers*' 'Effects' analysis, it is difficult to see why the prohibition should not categorically bite when an award judgment enforcing an arbitral AAEI, as a member of a class of acts, simply *could be* disruptive in the circumstances.

Some might still contend that award judgments enforcing arbitral AAEIs, *post Gazprom*, benefit from the logic of 'that which lays outside stays outside'.[86] So even where a court couples its award judgment with sanctions, or where the award enforced enjoins against the bringing of suit in another Member State, the *mere fact* that the award judgment enforces an arbitral award insulates it from *West Tankers*.[87] That conclusion, however, is highly precipitous. One simply cannot neglect that *Gazprom* affirms *West Tankers* expressly. And *West Tankers* had emphatically demonstrated that injunctive judicial acts did not benefit from the fact that the proceedings in which they were issued were not themselves governed by the Regulation.[88] Otherwise, Colman J's order, falling indisputably within Article 1(2)(d),[89] would have been unobjectionable. The order was disruptive of a court's 'Brussels-given' jurisdiction, and therefore 'inconsistent' with the Regulation *ipso facto*.[90] Being so, there is little assurance against the prospect that the 'Effects' principle might be invoked again to catch award judgments that *were in fact disruptive of another court's jurisdiction.*

C. Two Unanswered Questions Post-*Gazprom* About the Nature and Scope of *West Tankers*' Prohibition

As shall be discussed, two basic questions remain about the nature and extent of the *Gazprom* 'carve-out': (1) whether all judicial acts enforcing arbitral AAEIs are

[84] See *Gazprom* (n 4) [12]–[15].

[85] See Van Calster (n 47) 56–57; Sattler (n 63) 348-49; David Sutton et al (eds) *Russell on Arbitration* (24th edn, S&M 2015) para 7,15ff.

[86] eg Ojiegbe (n 9) 289-91, 292-94; Ahmed (n 71) 173–74. The expression is Briggs' (n 42) 163.

[87] Ojiegbe, ibid 290.

[88] See III.B above.

[89] *Allianz* (n 3) [22]–[23].

[90] See III.A above.

permissible; and (2) whether *West Tankers*' 'Effects-analysis' still remains relevant after *Gazprom*.

(i) It remains doubtful if all judicial acts enforcing arbitral AAEIs are always exempt from the West Tankers prohibition

First of all, one cannot tell from *Gazprom*'s reasoning if all award judgments enforcing arbitral AAEIs would *always* be regarded as 'compatible' with the Regulation just because they enforce arbitral awards.[91]

The *Gazprom* Court did expound that arbitrators could not violate the principle of Mutual Trust and so their acts could not be 'incompatible' with Brussels.[92] But, for starters, we cannot know just how categorical this proposition is, if *West Tankers*' 'Effects' analysis still has any role to play.[93]

Let us nevertheless assume, as many readily have,[94] that the exemption is absolute and that *all* arbitral acts are just exempt. Even so, that does not necessarily indicate whether *all judicial acts enforcing arbitral AAEIs* are categorically exempt.[95] Conversely, it will be seen that three indicia in the *Gazprom* Court's reasoning militate against the hypothesis that it was espousing a claim that strong.

First, interpretive conservatism counsels against assuming that the *Gazprom* Court meant to propound a categorical 'carve-out' from the logic of *West Tankers* when it expounded:

> '... [A]s the order has been 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.'[96]

That sentence could be literally interpreted, as some commentators have, as postulating axiomatically that so long '... as the order has been made by an arbitral tribunal', *West Tankers* would not apply.[97] But such an 'easy' reading isolates the statement from its context, and is not the only possible interpretation. This is because the *Gazprom* Court actually did thrice point out that it was addressing the

[91] Cf Guido Carducci, 'Notes on the EUCJ's ruling in Gazprom' (2016) 32(1) Arb Intl 111, 9-11; Van Calster (n 47) 56-57; Lazic and Stuij (n 7) 147–8.
[92] *Gazprom* (n 4) [36].
[93] cf Hartley (n 9) 975n44, *contra* Ojiegbe (n 9); Ahmed (n 71) 173.
[94] Eg Ojiegbe, ibid; Briggs (n 7); Sundaram (n 7) 322.
[95] cf Satter (n 63) 348–49; Carducci (n 91) 9-11.
[96] *Gazprom* (n 4) [37], [44].
[97] See eg Ojiegbe (n 9); Briggs (n 7); Sundaram (n 7) 322.

specific 'circumstances of the main proceedings' in *Gazprom*.[98] Taken in context, rather, the Court's paragraph 37 remark might just as well be as a necessary *but insufficient* condition for the "carve-out". In other words, it might be that, for the prohibition not to apply: (1) the order must have been made by an arbitral tribunal, *and* (2) in such circumstances as those in *Gazprom* (or being at least sufficiently analogous).

This weaker reading is corroborated by another aspect of the Court's reasoning. Namely, it might plausibly be argued that the Court *did not actually hold* that it followed *only* from the fact that arbitral tribunals were not subject to the general principle of Mutual Trust that judicial acts enforcing them were consequently exempt. Had it done so, its exposition would have ended at paragraph 7. But the Court apparently went on. At paragraphs 38 to 40 the Court gave *two* other seemingly adventitious reasons to support its observation at paragraph 37: it stated that the arbitral award in *Gazprom* (i) did not deny a party of judicial protection for being challengeable (paragraph 38), and (ii) did not 'result in penalties being imposed on the enjoined party by a court of another Member State' (paragraph 40). These, we grant, could conceivably be taken as over-subscriptive reasons unnecessary for *Gazprom*'s outcome. But they could just as well be read as further qualifiers upon the paragraph 37 premise—that it obtained *only* where *those* specific conditions were likewise present,[99] and not when the circumstances differed from those at hand.[100]

In that respect, the point the Court made in paragraphs 40 is highly portentous. One might query what is to happen if a court enforces an arbitral award enjoining a party from pursuing litigation in the courts of *another Member State*,[101] given that *Gazprom* involved a Lithuanian court enforcing an award enjoining litigation in Lithuania. In such a case, paragraph 40 would apparently counsel the converse outcome than that in *Gazprom*, since '... failure on the part of the [enjoined party] to comply with the arbitral award' would then be '... capable of resulting in penalties being imposed upon it *by a court of another Member State*'.[102] This starkly evinces the potential narrowness of *Gazprom*'s 'carve-out'. Assume for example that an arbitral tribunal seated in England issues an award enjoining a party from continuing proceedings in Italy. The award-creditor, for pragmatic reasons, seeks to enforce the award not before an Italian court but an English court. That court then renders a judgment enforcing the arbitral AAEI. In that case, it is not obvious

[98] See *Gazprom* (n 4) [37] – [40].
[99] ibid [38].
[100] ibid [37] – [40]; see Joseph (n 48) paras 12.61–7; Sattler (n 63); contra Sutton et al (n 85) para 7.15.
[101] See Sattler, ibid 348–49; Sutton, ibid para 7.15.
[102] *Gazprom* (n 4) [40].

that *Gazprom* exempts that award judgment just because it is an instance of arbitral award enforcement.

For all the foregoing reasons, it is *arguable* that *Gazprom* might be read as not actually holding that all judicial acts enforcing arbitral awards were exempt from *West Tankers*. Instead, it might have held that those acts were exempt *only when* the reasons it cited obtained, and not otherwise.[103] So a judicial act enforcing an arbitral AAEI might be exempt only where it (1) did not deny a party of judicial protection, and (2) did not result in penalties being imposed by a court of another Member State. Effectively, then, it remains distinctly possible that an enforcing court might be debarred from using its coercive toolkit when enforcing awards and securing compliance with its award judgments. Granted, these are surmises. But the point here is that the *Gazprom* Court's reasoning simply does not admit of only one reading. In light of these competing interpretative possibilities, the convenient proposition espoused by some commentators, that all judicial acts enforcing arbitral acts are exempt from *West Tankers*, cannot unexaminedly be accepted.[104] And, absent a proper analytical understanding of why award judgments enforcing arbitral AAEIs are exempt notwithstanding *West Tankers*, it is impossible even to discern which of these alternative readings of *Gazprom*—in addition to the 'easy' reading adopted by said commentators—is correct.

(ii) Absent a rationalisation of why judicial acts enforcing arbitral AAEIs are exempt, one cannot tell whether and how far West Tankers' 'Effects' analysis still applies

The second question left unanswered post-*Gazprom* is incidental to the first. Namely, because *Gazprom* does not adequately explain just how judicial acts acquire the 'exceptionality' of the awards they enforce, we do not know if *West Tankers*' 'Effects-analysis' still remains relevant after *Gazprom* (as where damages in lieu of an injunction are being awarded by courts).[105]

The uncertainty is further compounded by the Court's reasoning in *Gazprom*—by which it seems to have silently abandoned its erstwhile attitude of being jealous about the *effects* a given judicial act might have on another court's Brussels-conferred jurisdiction. Here, it is unclear if the same rigorous level of scrutiny ostensibly applied in *West Tankers* would be replicated thereafter. Recall that, for *West Tankers*, the *mere possibility* of disruption of another court's jurisdiction sufficed for a thing to be 'incompatible' with the Regulation. In contrast, the *Gazprom* Court

[103] cf Hartley (n 9) 973–75.

[104] cf Sutton et al (eds), (n 85) paras 7-043–7-047.

[105] eg *The Alexandros T* [2013] UKSC 70 and [2014] EWCA Civ 1010. See further Andrew Dickinson, 'Once Bitten – Mutual Distrust in European Private International Law' (2015) 131 LQR 186.

was content to assume that (i) an arbitral award could always be challenged *in foro* and therefore did not deny a claimant her right of judicial protection,[106] and (ii) that such an award did not carry with it the prospect of the same penalties that a judicial AAEI did.[107] The ease of that assumption plainly suggests a resiling from *West Tankers*' 'Effects' ethos. Both premises would very arguably not have stood the scrutiny adopted back in *West Tankers*, on three counts.

First, it was irrelevant for the *West Tankers* Court that, unlike arbitral awards favoured by the New York Convention, a judicially-issued AAEI *need not* always be disruptive. It goes without saying that a judicial AAEI, unlike a Convention award, could always be ignored by a court.[108] The judicial AAEI, as a commentator has vividly remarked, is merely 'a card in the game in which the [other court] holds all the aces'.[109] But this simply did not matter for *West Tankers*, wherein the mere *possibility* of disruption seemingly sufficed for the prohibition.

Second, it was then also apparently irrelevant in *West Tankers* that a claimant seeking to litigate could challenge the AAEI at the place of issuance. It did not matter that there existed such ample internal constraints upon the granting of an AAEI that made it unlikely that a bona fide claimant would actually be unfairly harassed. English courts, after all, do not issue AAEIs without a 'highly probable' showing that an enforceable arbitration agreement exists.[110] Thus, one might seriously inquire why the mere fact that a *presumptively enforceable* arbitral award could be challenged (under narrow Convention grounds)[111] counted for much in *Gazprom*, while the fact that an injunction could just be brushed aside by the other court or successfully resisted by a *bona fide* claimant counted for naught in *West Tankers*.

Third, contrary to the *Gazprom* Court's apparent assumptions, it is not necessarily the case that a party could defy an arbitral AAEI without consequence. Granted, in *Gazprom* itself the award was final and the tribunal thereafter *functus officio*. However, in the general run of cases, an arbitral AAEI could well be an interim award, in which case the tribunal might still be able to award damages or other sanctions for a party's non-compliance.[112] Besides, where the arbitral AAEI is judicially-enforced, it might be reinforced with the same sanctions as exist for non-

[106] *Gazprom* (n 4) [38].
[107] ibid [40].
[108] eg *General Star International v Stirling Cooke Reinsurance* [2003] EWHC 3 (Comm), [16].
[109] Daniel Tan 'Enforcing International Arbitration Agreements in Federal Courts' (2007) 47 VJIL 545, 594.
[110] See *Ecobank Transnational* (n 12) [87]ff.
[111] Article V, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38 (1958). cf *Kanoria v Guinness* [2006] 2 All ER 413, 421.
[112] eg *West Tankers v Allianz SpA* [2012] EWHC 854 (Comm); cf Ortolani (n 47) 13–14, 13n25.

compliance with a court's judgment. In England, for example, an award judgment debtor surely would not be able to defy an award judgment rendered by a court without consequence.[113] Ignoring all of this, however, the *Gazprom* Court readily assumes, at paragraph 40, that non-compliance with an arbitral AAEI would not lead to penalties being imposed on a parallel claimant.[114]

So the impression one gets is that the *Gazprom* court has adopted a materially more lenient standard of scrutiny in making those findings as it did. Yet, there is scant indication as to why, analytically, this should be the case, further compounding an analysis of the precise basis underlying the Court's conclusion that judicial enforcement of AAEIs would not jeopardise the Regulation's *effet utile*.

In sum, the foregoing obscurities suggest that it is difficult to tell just how far the 'carve out' in *Gazprom* extends. They expose the underlying tension between the logic of the two cases. *Gazprom*, by treating (at least some) award judgments as being exempted along with the arbitral awards they enforce, has posited a proposition conflicting with *West Tankers*' original 'Effects' ethos. By the latter's lights, all acts which potentially jeopardised the Regulation's effectiveness, irrespective of whether they fell within Article 1(2)(d), were prohibited. However, *Gazprom* now suggests that, so long as a court enforces an arbitral award, it acquires that award's character of 'exceptionality', notwithstanding that such an act essentially shares the same mechanism as an AAEI and could be equally disruptive.[115] For the reasons discussed above, that suggestion appears neither explicable nor axiomatic. And because one cannot explain *how* judicial acts enforcing arbitral acts inherit their 'exceptionality', one is similarly unable to tell just *when* and *what* judicial acts are so exempted. Consequently, one can neither affirm nor falsify such propositions, made by commentators, as:

> "[Even after *Gazprom*] [i]t is doubtful whether arbitrators can, by themselves, impose and enforce penalties for disobedience to their orders. If a court of a Member State were to enforce a penalty of this nature imposed by arbitrators, that would constitute an antisuit injunction as understood in *West Tankers*."[116]

The resultant uncertainty arising from the analytical mismatches between *West Tankers* and *Gazprom*, causes much concern, demanding a further search for a rationalisation of how the *Gazprom* could have reasoned as it did.

[113] eg *Cruz City* (n 82); cf Born (n 10) 2510ff.
[114] *Gazprom* (n 4) [40].
[115] cf *Gazprom* (n 4) [38]–[40].
[116] Hartley (n 9) 975 n44.

D. Rationalising *Gazprom*'s 'Carve-Out' from the *West Tankers*' Prohibition

Our inquiry then becomes whether *Gazprom*'s 'carve-out'—consisting in its reasoning from the premise that arbitral acts are exempt to the conclusion that judicial acts enforcing arbitral acts are exempt—might be satisfactorily explained in analytical terms.

In what follows, two leading scholarly attempts shall be evaluated. The first, propounded by Professor Adrian Briggs,[117] holds that the enforcing Court's exercise of its jurisdiction when it enforces an arbitral award relevantly differs from that exercised when issuing an AAEI.[118] The second, expounded by Professor Trevor Hartley, treats the inquiry as turning simply on whether the act in question violates the general principle of Mutual Trust as conceptualised by the Court.[119] Both theses shall hereafter be analysed to be individually problematic. The upshot is that there is no intellectually satisfactory explanation of *Gazprom*'s reasoning, other that Mutual Trust has been invoked by the Court as a proxy for analysis as to curtail the potential reach of *West Tankers* whilst still sustaining its prohibition.

(i) Explanation 1: Briggs' 'Auxiliary Jurisdiction' Thesis

Perhaps the most analytically sophisticated explanation tendered in *Gazprom*'s wake, seeking to rationalise how award judgments acquire the 'exceptionality' of the arbitral acts they enforce, is that posited by Professor Briggs.[120]

Briggs has propounded what could be called the 'auxiliary judgment' thesis, which holds that, *whenever* a court acts to enforce an arbitral award, it is merely 'acting as *auxiliary* to a body which stands outside the personal scope of the Regulation', akin to an agent acting for its principal.[121] Accordingly, the act does not involve an original exercise of jurisdiction, because an enforcing court merely renders an award judgment which 'claims to have no effect outside the territorial jurisdiction of the court'.[122]

Therefore, accordingly,[123] 'a court may lend its power to an arbitral tribunal or to its award, but in doing so it exercises an auxiliary, not an original, jurisdiction'.[124] Thus, as long as a Member State court acts in this 'auxiliary' capacity, whether to

[117] Briggs (n 7).
[118] ibid 285–88.
[119] Hartley (n 9) 973-75. cf Dermikol (n 65) 396–97, 400–01.
[120] Briggs (n 7).
[121] ibid 285–288.
[122] ibid 287.
[123] ibid.
[124] ibid 285.

make ancillary orders such as the appointment of an arbitrator, or orders which 'give additional force to an arbitral award' as in *Gazprom*, the court 'acts in a matter of arbitration which has no effect on any other court' and thus enjoys the same exception as applies to the arbitral tribunal which it is aiding.[125] Whereas, when a court directly issues an AAEI, it is not acting in that 'auxiliary' capacity because it neither 'exercis[es] its jurisdiction to give power to the award of a tribunal' nor 'assist[s] the mechanics of the process before the tribunal', but exercises an independent, 'original' jurisdiction instead.[126] Briggs also identifies some determinants of whether other judicial acts are 'auxiliary', such as whether the act claims to have extra-territorial effect or if the act 'is intended to have effects on the courts of another Member State'.[127] According to Briggs, all of this 'unremarkably' and 'perfectly comprehensib[ly]' resolves what some might have perceived as 'initially perplexing' about *West Tankers*.[128]

Briggs' account is an incisive attempt at lending some rational rigour to the *Gazprom* Court's reasoning. *Prima facie*, there also exists an intuitive appeal in seeking to explain *Gazprom's* 'carve-out' by invoking the exceptional character of award judgments rendered by courts enforcing awards.[129] Nevertheless, Briggs' explanation is still unsatisfactory because of four reasons: (1) judgments enforcing arbitral AAEIs are still independent exercises of curial jurisdiction; (2) the *West Tankers* prohibition arguably does not respond to technicalities relating to the nature of judgments; (3) Briggs' thesis omits to explain why 'Effects' analysis becomes inapplicable; and (4) the purposes accompanying an award judgment enforcing an arbitral AAEI are irrelevant for *West Tankers*' 'Effects' analysis.

(a) Judgments enforcing arbitral AAEIs are still independent exercises of curial jurisdiction

First, it is juridically unclear how the fact that a court is exercising an 'auxiliary' jurisdiction in enforcing an award makes it *any less an exercise of its own jurisdiction*, or how one can attribute those acts to the tribunal to the elimination of the court's role in that process.[130] Just why is the rendering of what Scherer has termed an 'ancillary judgment' not an independent exercise of curial jurisdiction capable of

[125] ibid.
[126] ibid 286.
[127] ibid 286–87.
[128] ibid 288.
[129] See further Scherer (n 75) *passim*.
[130] cf Scherer, ibid 610ff.

being identified discretely from the award?[131]

Indeed, first principles suggest otherwise. The jurisdiction of a court to recognise and enforce an arbitral award is a public law construct, typically a creature of national legislation.[132] Quite differently, an arbitral tribunal's jurisdiction is constituted by the parties' agreement.[133] Being so, one cannot reckon both jurisdictions as a composite unit even where the exercising of the one seeks practically to effectuate the product of the other.

Furthermore, for a jurisdiction—like England and Wales—that espouses the 'parallel entitlement' theory of award judgments, the discrete existence of the award judgment from the award it enforces is conceptually presupposed.[134] Briggs' analysis, if true, would sit very uneasily with a jurisdiction's acceptance of the 'parallel entitlement' theory of award judgments.

For all these reasons, we see that Briggs' thesis affords no additional basis for conceiving of the judicial act as losing its individual existence or otherwise being a mere extension of that which it enforces.

(b) The *West Tankers* prohibition arguably does not respond to technicalities relating to the nature of judgments

While it is arguably true that award judgments differ in character from other judgments, the proposition that they claim to have no extra-territorial effect, apart from being itself controversial,[135] is arguably irrelevant to the *West Tankers* analysis for two reasons.

First, much controversy looms over whether a judgment by a court confirming or enforcing an award bears the same 'extra-territorial imprint' as other judgments do.[136] Indeed, Scherer accurately describes the issue as essentially one of policy, and not answerable *a priori* as a conceptual question, suggesting that there exists no settled answer in most jurisdictions.[137]

Second, it remains unclear how the *West Tankers* prohibition, as originally understood, might be at all sensitive to the distinction Briggs wishes to invoke. Instead, the notion of a court playing 'auxiliary' to an arbitral tribunal seems

[131] ibid 606–07.

[132] Eg *Mutual Shipping Corpn v Bayshore Shipping* [1985] 1 Lloyd's Rep 189; *Guangzhou Dockyards Co v ENE Aegiali* [2010] EWHC 2826.

[133] Born (n 10) 215–216.

[134] ibid 600-01. On what 'award judgments' are, see the text accompanying (n 76).

[135] See eg Scherer (n 75) 608–612.

[136] See Scherer, ibid 587–88, 608–611.

[137] ibid 609–11.

the very sort of analytical nicety an 'Effects' analysis would ignore. Imagine, for example, if the injunction applicant in *West Tankers* had obtained an award by the London arbitrators in the form of an enjoining order and appeared again before Colman J, who proceeded to enforce that award against the insurers. [138] If Briggs' thesis were correct, then, conceptually, that award judgment would not fall afoul of *West Tankers*. Yet, as discussed above, it is highly unlikely that the *West Tankers* Court would have agreed, or even that the *ratio* of *Gazprom* extends that far.[139]

(c) Briggs' thesis does not explain why *West Tankers*' 'Effects' analysis becomes inapplicable

Relatedly, a key predicate of Briggs' thesis is the premise that, because a judicial order enforcing an award is *not a judgment for Brussels I purposes*, '... it acts in a matter of arbitration which has no effect on any other Court' and accordingly 'lies outside the domain of the Brussels I Regulation'.[140] But that argument is arguably made irrelevant by the original 'Effects' principle of *West Tankers*. The exact same could have been said about judicial AAEIs like that issued by Colman J, which, similarly, were not judgments governed by Brussels. Indeed, the Court conceded as much.[141] But that, however, did not preclude them from being nevertheless 'incompatible' with the Regulation by virtue of their disruptive impact on another court's Brussels-conferred jurisdiction. *Mutatis mutandis*, it would be irrelevant whether or not an award judgment is a judgment for Brussels purposes.[142]

(d) The purposes accompanying an award judgment enforcing an arbitral AAEI are irrelevant for 'Effects' analysis

Finally, Briggs' method of distinguishing between 'auxiliary' and 'non-auxiliary' judicial acts in terms of their accompanying purpose is also questionable. One could accept that an award judgment is not 'designed to have an impact on the courts of another Member State' nor 'reac[h] into the legal order of another Member State'.[143] But, again, the very logic of *West Tankers*' 'effectiveness' imperative arguably makes it that the designs of the issuing court arguably do not

[138] cf Hartley (n 9) 975n44.
[139] See G*azprom* (n 4) [40]. cf Briggs's response in (n 7) 288.
[140] ibid 285–86.
[141] *Allianz* (n 3) [22]–[23].
[142] cf Hartley (n 9) 969.
[143] ibid 286.

matter.[144] As Briggs himself argues elsewhere, the AAEI is not purposed as such to influence the courts of another Member State or to thwart their jurisdiction.[145] Rather, it seeks to compel the enjoined entity not to breach its contract. But all of that was ostensibly irrelevant for both AG and Court, who focused on how potentially disruptive the injunction was *in fact,* not in design.[146]

For the foregoing reasons, Briggs' attempt to prove the existence of a coherent nexus of principle between *West Tankers* and *Gazprom* is unsatisfactory. One remains perplexed by *Gazprom*'s failing to explain why (and when) judicial acts of award enforcement can inherit the 'exceptionality' of arbitral awards if other judicial acts are assessed purely in terms of their effects.

(ii) Explanation 2: Hartley's 'Mutual Trust' Thesis

A second and less analytically ambitious explanation might be put forth as being more accurately descriptive of the *Gazprom*'s reasoning. This thesis, advocated by Professor Hartley,[147] holds that:

1. The principle of Mutual Trust *simpliciter* now constitutes the underlying basis for the prohibition in *West Tankers.*[148]
2. Judicial acts enforcing arbitral awards *just are* not contrary to the general principle of Mutual Trust.[149]
3. Conversely, other judicial acts like the issuing of anti-suit injunctions, while themselves falling within the 'arbitration exception' in Article 1(2)(d), are still prohibited for being contrary to Mutual Trust. Thus, in Hartley's words: *'[Gazprom] changes the basis of the [West Tankers] prohibition: it is no longer based solely on the Brussels Regulation, but is now contrary to a general principle which emerges from the case law of the CJEU.'*[150]

Hartley's thesis is, at least, descriptively persuasive. Closer analysis shows that the *Gazprom* Court did place newfound emphasis on the principle of Mutual Trust in apparent displacement of *West Tankers'* original rationale. In *West Tankers*, as Hess observes, 'Mutual Trust [was] only used as an additional argument [and] much

[144] ibid 286.
[145] Briggs (n 14) 544–45.
[146] See ibid 566–68; *West Tankers* (n 20) [26]-[31]. cf Ortolani (n 47) 13–15.
[147] Hartley (n 9) 973–74.
[148] ibid, 973–74; cf Hartley (n 80) 852n46.
[149] ibid 974–75, reading *Gazprom* (n 4) [35] and [39] to imply this.
[150] ibid 973; see also 974n43 and 975n44.

later'.[151] The rationale for its prohibition was instead presented as the securing of the 'proper operation of the Regulation' and 'the priority of Community law',[152] leading commentators like Briggs to surmise that *'...[a]s long as a matter can be said to have some sort of connection to the Regulation ... anything which "undermines its effectiveness" is prohibited'*.[153] Conversely, in *Gazprom*, Mutual Trust took centre-stage, occupying four paragraphs in the Court's reasoning when it was only mentioned supplementally once in *West Tankers*.[154] *Effet utile* was not once invoked by the *Gazprom* court,[155] which conducted its inquiry in terms of whether arbitral acts were incapable of violating Mutual Trust and therewith extrapolated that judicial acts enforcing them followed suit.[156] Practically, then, the 'Effects' principle which then drove *West Tankers* was relegated to the backseat in *Gazprom*. Mutual Trust was identified not only as having explanatory priority over the Regulation's *effet utile*, but was visibly reinstituted as the basis of *West Tanker*s' prohibition.[157]

(iii) Hartley's account is descriptively accurate, but presents an analytically unsatisfactory picture

Thus, Hartley's explanation succeeds where Briggs' 'auxiliary judgment' thesis falters. It accurately accounts for what the *Gazprom* Court basically did—shelving the three discrete bases given in *West Tankers* as to why a judicial AAEI was 'incompatible' with the Regulation into a single conceptual repository: Mutual Trust.

That Hartley's thesis should be descriptively preferable, however, does not bode favorably for an attempt at rationalising *Gazprom*. While descriptively accurate, Hartley casts the Court as perpetrating conceptual say-so: judicial acts enforcing arbitral awards were exempt *just because* the court defined Mutual Trust not to begrudge them.

That must worry us. If the overarching rationale underlying the *West Tankers* prohibition post-*Gazprom* is now reducible to the Principle of Mutual Trust instead being based on the *effet utile* of the Regulation, one needs to be able to discern what Mutual Trust means in order to identify what else might or might not be caught. No longer can one be sceptical about its provenance,[158] or treat it as a side-wind

[151] Hess (n 41).
[152] ibid.
[153] See further Briggs, (n 42) 166; Ortolani (n 47) 13-15.
[154] Compare *Gazprom* (n 4) [34], [37]–[39] with *Allianz* (n 3) [30].
[155] Hartley (n 9) 973–75.
[156] *Gazprom* (n 4) [37]–[40].
[157] *Accord* Hartley (n 9) 973–75.
[158] Briggs (n 42) 164–65 and 165n26.

to the Regulation's *effet utile*.[159] But that, unhappily, is easier professed than done. Because the principle of Mutual Trust has not been clearly defined, one cannot predictably tell what it requires or exempts beyond what *West Tankers* and *Gazprom* demonstrates by example.

(a) 'Mutual Trust' is unintelligible content-wise and cannot afford much practical guidance

The general principle of Mutual Trust has been regarded to be the "essential basis" of the Brussels Regulation.[160] It is mentioned in the recitals of both Regulations.[161] Further afield, the principle also finds application in the context of the European Arrest Warrant cases,[162] in insolvency,[163] and in family law.[164] Much ink has also been spilt on its wider jurisprudential aspects.[165] Even so, one could well question what the principle practically requires where it specifically comes to the work of courts in support of arbitration, apart from the fact that it abhors judicial AAEIs. True, both the Court and commentators have expounded that 'Mutual Trust' basically means that Brussels' jurisdictional rules are to be regarded as *common* and *compulsory*,[166] entailing that 'courts of one Member State [must] respect the right of the court of another Member State to determine its own jurisdiction.'[167] But, where AAEIs are specifically concerned, one could still question if the principle has any independent parameters existing apart from the bare proposition that judicial AAEIs are forbidden but (at least some) acts enforcing arbitral AAEIs are not.

The answer must be negative. It is difficult to see how, but for the Court's judgment in *West Tankers*, one would have deduced from Mutual Trust alone that a judicial AAEI issued in proceedings which were not themselves governed by Brussels would flout Mutual Trust.[168] Likewise, if not for *Gazprom*, it would be hard

[159] Hess (n 41).

[160] See Andrew Dickinson in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (OUP 2015) para 1.67; cf Thomas Wischmayer, 'Generating Trust Through Law? – Judicial Cooperation in the European Union and the 'Principle of Mutual Trust' (2016) 17 German LJ 339, 358-59; *Turner* (n 2) [24].

[161] Recitals (3) and (16) in Brussels I (n 1); Recital (26) in Recast (n 1).

[162] Case C-436/04 *Van Esbroeck* [2006] ECR I–0233, [30].

[163] Case C-533/08 *TNT Express Nederland* [2010] ECR I-4107, [54]–[56].

[164] Case C-195/08 *Rinau*, EU:C:2008:406, [50].

[165] See eg Wischmayer (n 160); Felix Blobel and Patrick Späth, 'The Tale of Multilateral Trust and the European Law of Civil Procedure' (2005) 30(4) ELR 528.

[166] *Turner* (n 2) [24]–[25].

[167] See Neil Dowers and Zheng Sophia Tang, 'Arbitration in EU Jurisdiction Regime: the Recast Regulation and a New Proposal' (2015) 3(1) Groningen JIL 125, 143.

[168] Wischmeyer (n 160) 342.

to augur, by *West Tankers'* lights alone, that Mutual Trust was not violated by (at least some) award judgments enforcing arbitral AAEIs.[169] In truth, the case law—from *Gasser* to *Gazprom*—does not provide much more practical guidance than their respective conclusions on what the principle did prohibit.[170] One is not even told if Mutual Trust operates independently of Brussels's material scope,[171] and so if whether, as Hartley hypothesizes, '*the prohibition applies to protect proceedings in the courts of Member States even if they are outside the subject-matter scope of the Brussels Regulation.*'[172]

To wit, there are four standing uncertainties relating to a 'Mutual Trust'-based prohibition of the sort *Gazprom* appears to have instituted.

First, Mutual Trust tells us little further about the precise parameters of *Gazprom*'s 'carve-out', and therefore gives little guidance on what Mutual Trust requires in respect of the mooted variations on *Gazprom*'s facts discussed above. For one, the Court suggested at ¶38 that the 'contestability' of the award mattered.[173] So, would it flout Mutual Trust for a French court to enforce an arbitral AAEI—since French law mandates the recognition and enforcement of awards save where 'manifestly contrary to international public policy'?[174] And even where a Member State simply employs Art V NYC grounds, it is unclear how arbitral AAEI awards might be more 'contestable' relative to ordinary court-issued injunctions. Judicial AAEIs, as aforesaid, can be ignored *in foro* or be opposed at its origin upon much broader bases than Art V permits in respect of arbitral awards. Because Mutual Trust lacks a proper juridical grammar, there is frighteningly little the analyst can do to affirm or falsify these possibilities, apart from drawing hopeful analogies with what passed bar in *Gazprom*.

Second, it is difficult to discern just what legal incidents accompany the intercurial obligation of Mutual Trust. A crucial question, left unanswered by *Gazprom*, is whether a violation of 'Mutual Trust' constitutes a violation of EU public policy, as then affords a V(1)(b) basis for refusal of an arbitral AAEI's recognition and enforcement.[175] Furthermore, *Gazprom* also suggests that Mutual Trust requires a claimant to have "access to the court before which [she] ... brought proceedings",[176] but offers little further guidance on what other possible legal incidents that 'right' might entail or be based upon. Might it, for example, be that a court before which parallel proceedings are brought, *qua* beneficiary of Mutual Trust, might

[169] cf *Allianz (EWHC)* (n 3) [51]–[68].
[170] Van Calster (n 47) 50–57.
[171] Hartley (n 9) 973–75.
[172] ibid 973.
[173] *Gazprom* (n 4) [39].
[174] Art 1514, NCPC; cf *Beverage Intl c. Zone Brands Europe* (Cass Civ 1re, 08-16.369, 14 Oct 2009).
[175] cf Opinion of AG Wathelet, (n 6) [161]–[188].
[176] See *Gazprom* (n 4) [34], [37]–[39].

reciprocally have a duty to respond in kind by properly handling the parallel claim? And it is even intelligible for one to argue that the right enjoyed by a parallel claimant should be defeasible on a showing of complicit fault or bad faith by a third forum's courts?[177] Or do these commonsense arguments defy what 'Mutual Trust' *conceptually* means? Again, because the concept lacks a juridical grammar, one is left to guess.

Third, there remains the question of whether the judicial enforcement of an award of damages for the breach of an arbitration agreement by commencing a parallel suit would be compatible with Mutual Trust,[178] as Flaux J had suggested in an English decision.[179] *Prima facie* it might seem intuitive that, if the enforcement of an award having the effect of an AAEI has been found compatible, then the enforcing of an award of damages for the breach of the same obligation should be similarly exempt.[180] But the amorphousness of Mutual Trust does not allow us to conclude so with confidence. Recall that the *Gazprom* Court had emphasised at paragraph 40, apparently as a datum of Mutual Trust compliance, the absence of penalties being imposed on an individual for non-compliance with an arbitral AAEI.[181] It eludes comprehension why the exaction of a penalty by an arbitral tribunal itself is apparently objectionable, when penalties already exist for non-compliance with *the award judgment* enforcing the arbitral AAEI.[182] But accepting the Court's logic (as we must), an award of damages might be argued to resemble more closely a sanction than the Stockholm tribunal's AAEI sans damages, and thus be prohibited.[183] Again, lacking a proper analytical explanation as to what animates Mutual Trust, all that succeeds is success.

Finally, the amorphousness of Mutual Trust also thwarts identification of whether *judicially-awarded* damages in lieu of an AAEI, as in the *Starlight* cases,[184] would be similarly caught. Were the *effet utile* of the Regulation still an uncompromising quantity, then the answer, as Dickinson cogently prognosticates, would likely be 'yes'.[185] Inasfar as an award of damages could be disruptive of

[177] Carducci (n 46) 178, argues so, but cf *Turner* (n 2) [12].
[178] Hartley (n 9) 862–64; Martin Illmer, 'Scope and Definitions' in (n 160) 86–87.
[179] *Allianz (EWHC)* (n 3) [51]–[68]. See further Illmer, ibid 86–87.
[180] Tan (n 109), 597–611.
[181] *Gazprom* (n 4) [40]. The SCC did not award damages for breach: (n 49) [269]–[277].
[182] cf *Cruz City* (n 82).
[183] cf Hartley (n 9) 862-84; Ortolani (n 47) 12–15.
[184] See Dickinson (n 105) for a summary account. The *Starlight* cases involved the English courts holding that judicially-awarded damages in lieu of an AAEI were not prohibited under EU law.
[185] ibid 190–93.

another court's jurisdiction, it would be incompatible with Brussels.[186] In light of *Gazprom*'s apparent re-orientation of the rationale underlying *West Tankers*, however, all is muddied. For instance, if Mutual Trust did not resent judicial acts purposed to *compensate* the innocent party instead of imposing a penalty, perhaps it might pass. Conversely, if damages were seen as more analogous to the 'penalties' contemplated by paragraph 40, then the reverse might hold. Withal, it is wholly unclear just how sensitive Mutual Trust would be to the differences obtaining between judicial AAEIs and damages in lieu. On one hand, as Carducci points out, pecuniary damages do not coerce or compel, and '[do] not [directly] conflict with ... the right to file claims before courts'.[187] But, as Dickinson correctly observes, the prospect of damages could still very well have the *effect* of deterring a claimant from filing suit,[188] which would clearly be relevant had the original *West Tankers* prohibition been the only rule. The problem, again, is that one cannot tell how far Mutual Trust imports *West Tankers*' 'effectiveness' ethos.

E. Ultimately, *Gazprom's* 'carve-out' from the *West Tankers*' prohibition is analytically inexplicable

So the spectacle emerging is troubling. While it is true that, in a post-*Gazprom* world the *West Tankers* prohibition may no longer be potentially limitless, it has been confounded beyond ready explication. Simultaneously, its apparent conceptual basis has been both simplified in the abstract ('All is Mutual Trust') and yet further complicated when sought to be practically applied ('What does Mutual Trust Require?'). Therefore, *Gazprom*, in the final analysis, cannot be analytically reconciled with the logic and ethos of *West Tankers*, and must be reckoned a conceptually inexplicable backtracking fuelled by a preference for good policy over coherence of doctrine. Still better analytically unintelligible than absolute, some might argue, and so *Gazprom*'s opacity was necessary. However, at least from a systemic perspective, the uncertainty that *Gazprom* brings is inconsistent with the Rule of Law.[189] This is not to conclude that *Gazprom*'s result was not worth its price in coherence. But one cannot deny that *Gazprom*, in effecting an inexplicable carve-

[186] ibid 190. cf Ahmed (n 71) 169–174.

[187] Guido Carducci, 'The New EU Regulation 1215/2012 of 12 December 2012 on Jurisdiction and International Arbitration' (2013) Arb Intl 467, 489. See further Opinion of AG Wathelet (n 6) fn 87; *Marzillier v AMT Futures Ltd* [2015] EWCA Civ 143, [61]–[62].

[188] Dickinson (n 105) 190–93.

[189] In the Razian sense: Joseph Raz, 'The Rule of Law and its Virtue' (1997) 93 LQR 195.

out from the *West Tankers* prohibition, comes at considerable analytical cost.

V. The Recast Does Not Resolve the Analytical Deficiencies Gazprom Brings

With *Gazprom* having both expressly affirmed the continuing existence of the *West Tankers* prohibition whilst muddying its juridical basis and scope, one might question whether the Recast has improved or clarified anything. We argue that the answer is negative.[190] Recital (12) of the Recast serves as an interpretative guide for the Article 1(2)(d) 'arbitration' exception. Even assuming that a recital in a Regulation has independent legal effect and can therefore displace a Grand Chamber decision (an unsettled question),[191] it shall be seen that the *West Tankers* prohibition continues to exist, in an analytically deficient state, as it had post-*Gazpro*m.

A. Discerning the impact of Recital (12) Post-*Gazprom*

(i) Pace AG Wathelet, Recital (12) does not modify the West Tankers prohibition

Any discussion of the effect of Recital (12) on *West Tankers* must start with AG Wathelet's opinion in *Gazprom*. As is widely known,[192] AG Wathelet had controversially argued, at length, that Recital (12) had the effect of displacing the prohibition in *West Tankers* for all manner of AAEIs.[193] Two of his arguments, that paragraphs 2 and 4 of the Recital (12), respectively, had reversed the *West Tankers* prohibition, are key, and will be scrutinised. The following analysis shall demonstrate that the Advocate-General erred on both counts, and that Recital (12) has had neither modificative nor clarificatory effect on the state of things post-*Gazprom*.

(a) The AG's argument from paragraph 2 of Recital (12) is problematic

As his first argument, AG Wathelet contended that paragraph 2 of Recital (12)

[190] Most commentators similarly conclude: see Bermann (n 8) 274–80, 280; Briggs (n 7) 287; Briggs (n 14) 792–794, 794n137; Hartley (n 9) 974–75; Dermikol (n 65) 397-404; Kajkowska (n 7) 415; Illmer, (n 178) 78, para 2.52; Simon Camilleri, 'Recital 12 of the Recast Regulation: A New Hope?' (2013) 62 ICLQ 899, 903ff. *Contra*: Joseph (n 48) paras 12.61–12.78; Richard Fentiman, *International Commercial Litigation* (2nd edn, OUP 2015) 534–38.

[191] cf Bermann (n 8) 899–901; Moses (n 66) 18n87; Dickinson (n 178) 20; Carducci (n 187) 470.

[192] Briggs (n 7) 287; Bermann (n 8) 898–901; Illmer (n 178) 78.

[193] Opinion of AG Wathelet (n 6) [91]–[157].

was intended to be a legislative reversal of *West Tankers*.[194] Paragraph 2 states that a ruling by a Member State court as to the validity of an arbitration agreement is not subject to the 'rules of recognition and enforcement' of the Regulation, 'regardless of whether the court decided on [that] as a principal issue or as an incidental question'.[195]

The AG tendered a two-step argument. First, he argued that paragraph 2 of Recital (12) operated to exclude any court proceedings, relating to whether an arbitration agreement was valid and enforceable, from the material scope of Recast.[196] Paragraph 2 had, in Illmer's words,[197] the effect of '*splitting*' any determinations on an arbitration agreement's validity—for the purposes of determining their 'subject matter'—from the rest of the proceedings following that determination, thereby reversing the *West Tankers* paragraph 26 principle that the 'subject matter' of proceedings relating to an arbitration agreement replicated that of the main proceedings.[198] Second, being so, an AAEI would, accordingly, only be interfering with a jurisdiction which was not conferred by the Regulation, and thus cannot be 'incompatible' therewith.[199]

The AG's thesis, however, is problematic on at least four counts.

First, putting that point about the exact legal status of Recital (12) aside, it is a better construction of paragraph 2 that it *merely* stipulates that rulings on an arbitration agreement's enforceability 'should not be subject to the *rules of recognition and enforcement*' of Recast. Paragraph 2 does not state that such rulings should *also fall outwith* the scope of Recast, and so might be read as excluding that possibility.[200] The AG's argument would be plausible only if we categorically assume that what paragraph 2 meant by not 'subjecting' a ruling on the validity of arbitration agreements 'to the [Regulation's] rules of recognition and enforcement' was that a court's jurisdiction to do so was not governed, and thereby not *protected*, by the Regulation. Only then *might* it follow that anything interfering with *only* that sliver of jurisdiction was not 'incompatible' therewith.[201] But that assumption is multiply dubious. An exemption from the 'rules of recognition and enforcement' connotes perfectly autonomously that a ruling is not to be treated as a judgment under

[194] ibid [125]–[135].
[195] See further Moses (n 66) 20–21; Carducci (n 187) 472–75.
[196] Opinion of AG Wathelet (n 6) [125] – [135] and nn 73–74.
[197] Illmer (n 178) 78–79. See also Carducci (n 187) 473.
[198] *Gazprom*, Opinion of AG Wathelet (n 6) [133]–[135] and n 74.
[199] ibid.
[200] cf Hartley (n 9) 971–72, making a similar point.
[201] See also Fentiman (n 190) 534–38. cf Dermikol (n 65) 400–02.

Recast. So why might it do more?

Second, one might object to AG Wathelet's apparent assumption that a *'ruling'* necessarily implicates a court's *jurisdiction*.[202] Paragraph 2 ostensibly exempts the 'ruling' by a court from the material scope of Brussels, but this need not imply that the *jurisdiction* of a court to make that ruling is similarly exempt. True, one could infer that, if a ruling on the arbitration agreement's validity falls outwith Brussels, so would a court's jurisdiction to make it. But the fact remains that paragraph 2 could have stated 'jurisdiction' if it was intended that 'ruling' should comprise the same.[203]

Third, even if one assumes that the jurisdiction to rule on an arbitration agreement's validity are exempt from the Recast, that does not alter the fact that a judicially-issued AAEI could still have the *effect* of interfering with a court's prospects of considering the merits, or of deterring a claimant from commencing suit elsewhere and so to forgo her supposed 'right of judicial protection'.[204] Indeed, that very thought centrally permeates the original *West Tankers* ruling.[205] Therein, the argument that an AAEI merely targeted a claimant *in personam* did not persuade the Court.[206] *Mutatis mutandis*, the argument that an AAEI would target *only* a court's jurisdiction to address the preliminary issue might find comparable dyspathy. Under *West Tankers*, it would not matter if an AAEI more immediately interfered with the jurisdiction of another state's court to address the 'gateway' issue of an arbitration agreement's validity, for it would still disrupt that court's ability to consider the case's merits *eventually*.[207] Even with *Gazprom*, the conclusion would remain so if Mutual Trust should still involve any kind of an 'Effects' analysis.

Fourth, and perhaps most fatally, the legislative history behind the Recast militates very strongly against there being an outright reversal of *West Tankers* intended by virtue of any combination of the paragraphs in Recital (12).[208]

The fact remains that apart from the recitals, the text of Brussels remained the same. And the reason for this is intelligibly accounted for by the Recast's history. In Illmer's vivid language, the final Recast was a 'surrender rather than a well-founded solution' borne out of legislative deadlock.[209] Summarily recounted, in the wake of

[202] See Hartley (n 9) 971–72.
[203] ibid 971–72.
[204] *Allianz* (n 3) [31]; *Gazprom* (n 4), [34], [38].
[205] *Allianz*, ibid [24]ff. cf Sattler (n 63) 345.
[206] cf Briggs, (n 42) 163–166.
[207] For a variant argument, see Dermikol (n 65) 399–401; cf Briggs (n 17) 999–1002.
[208] cf Bermann (n 8) 899, Hartley (n 9) 972; Ojiegbe (n 9) 283–284.
[209] Illmer (n 178) 60.

the Heidelberg Report,[210] the Commission had proposed a partial abrogation of the Article 1(2)(d) exception and a *lis alibi pendens* regime under which Seat courts would enjoy priority to decide whether arbitration agreements were valid.[211] The Council and Parliament, however, rejected that.[212] Thereafter there came another proposal by the Committee on Legal Affairs proposing the total exclusion of '... any dispute, litigation, or application which the parties have subjected to an arbitration agreement' from Brussels' scope.[213] This too failed to pass, *inter alia*, because it enabled litigants seeking to obviate Brussels to plead fictitious arbitration agreements.[214] Thus, in the end, the institutions 'simply asserted that the problem [of parallel actions] did not exist' and left the text of Brussels I mainly intact with merely minor clarifications.[215] Amidst that backdrop, it is difficult to see how a decision of the Grand Chamber might be reversed by a legislative attempt which contemplated the prospect but could not consummate it in the end.[216]

Indeed, as commentators have consistently noted,[217] paragraph 2, when read with Article 73(2),[218] seems much more purposed to solve the problem which arose in *The Wadi Sudr,*[219] whereby a judgment made by a court on an arbitration agreement's validity was reckoned to be a judgment enforced under the Regulation. The mischief of the *Wadi Sudr* phenomenon was acute, since it could make the Regulation preclusive of a seat court's ability to rule on the validity of an arbitration agreement where another court beat it to the ruling.[220] This had various other ramifications, such as the potential non-confirmation of an arbitral award if that other court's contrary ruling had to be treated *res judicata* by the seat's courts.[221] Moore-Bick LJ even mooted, controversially, that a court's judgment so treated could foreclose arbitral decision were the arbitration procedurally governed by the seat's law.[222] All this made a 'Torpedo' action considerably more threatening. It is

[210] Burkhard Hess et al, *Report on the Application of Regulation Brussels I in the Member States* (Study JLS/C4/2005/03, RKU Heidelberg 2007) [106]ff. cf Illmer, ibid 56.

[211] European Commission, *Proposal* (COM(2010) 748 final, 14 Dec 2010).

[212] See Moses (n 66) 15–17, citing Luca Radicati di Brozolo, 'Arbitration and the Draft Revised Brussels I Regulation' (2011) 7(3) JPIL 432.

[213] European Parliament Committee on Legal Affairs, *Draft Report* (C7-0433/2010–2010/0383(COD), 28 June 2011).

[214] Illmer (n 178) 59–60.

[215] ibid 60-61; Carducci (n 187) 484, 489ff; Moses (n 66) 18.

[216] See Bermann (n 8) 900–02.

[217] Moses (n 66) 19–20; Bermann, ibid 899-900; Illmer (n 178) 78–79.

[218] Art 73(2), Recast (n 5).

[219] [2009] EWCA Civ 1397.

[220] cf Arts 34 and 35, Brussels I (n 1); Illmer (n 21) 652–55; Camillieri (n 190) 904–16.

[221] Ilmer (n 21) 652–55; Moses (n 66) 20–21.

[222] *The Wadi Sudr* (n 219) [118]–[119]. See Moses (n 66) 20n96; Camilleri (n 190) 908–09.

therefore far more likely that paragraph 2 was targeted at reversing that specific mischief inasfar that other court's ruling should no longer be treated as a judgment under Brussels.[223]

Ultimately, therefore, the success of AG Wathelet's paragraph 2 argument turns on two doubtful premises: (1) that its language implies that *a court's jurisdiction* to make such a ruling falls outwith Recast's scope; and, (2) that an act impeding that jurisdiction does not spill over to impede its Brussels-given 'merits' jurisdiction in a way that offends Mutual Trust (or whatever remains of 'Effects' analysis). These premises are highly questionable.

(b) The AG's argument from paragraph 4 of Recital (12) is also problematic

The AG's argument that paragraph 4 of Recital (12) encompasses, and so exempts, judicial AAEI is even more doubtful.[224] To wit, AG Wathelet had contended that the phrase 'ancillary proceedings' in paragraph 4 covered judicial anti-suit injunctions, since, accordingly, '*an anti-suit injunction [was] among the measures which the court of the seat of the arbitral tribunal may order in support of the arbitration with the aim of ensuring the proper conduct of the arbitral proceedings*'.[225]

With respect, the AG's construction is analytically doubtful. In the first place, 'ancillary proceedings' was a term that was contemplated by all three official reports on the Brussels Convention to mean things *ejusdem generis* the appointment of arbitrators, determination of the seat of the arbitration, and extension of time limits.[226] Thereafter the Court, in its cases, conceived of an 'ancillary' proceeding as 'the process of setting arbitration proceedings in motion'.[227] Thus understood, an AAEI cannot congruently be deemed an 'ancillary proceeding' for several reasons. First, an AAEI does not directly or affirmatively facilitate the arbitral proceedings. Rather, it involves the enforcing of the *negative* contractual obligation *not* to sue elsewhere. Furthermore, an AAEI is a substantive contractual remedy enforcing the negative obligational aspect of an arbitration agreement, not an act of procedural administration like the appointing of an arbitrator.[228] While it is true that, as the AG observes, an injunction might be most needed when the arbitral

[223] cf Bermann (n 8) 899–900.

[224] The weight of commentary disfavours AG Wathelet: eg Bermann (n 8) 900-01, Dowers and Tang (n 167) 140; Camilleri (n 190) 904–08; Moses (n 66) 23–25; Carducci (n 187) 488–90; Dermikol (n 65) 402; Briggs (n 17) 1002–03; Ilmer, (n 178) 78.

[225] *Gazprom*, Opinion of AG Wathelet (n 6), ibid [138]–[140].

[226] Peter Schlosser, *Report* [1979] OJ C59/71, [64]ff; Dimitri Evrigenis and Konstantinos Kerameus, Report [1986] OJ C298/01, [35]; Paul Jenard, (1979) 22 OJ C59 1; See further Illmer (n 178) 75, para 2.46.

[227] *Marc Rich* (n 24) [21]; *Van Uden* (n 24) [31]–[34].

[228] eg Born (n 10) 2190ff.

proceedings are not yet set in motion,[229] it is precarious to base the analytically problematic interpretation contended for on that pragmatic need alone.

Even if one surmounts the foregoing objections, there remains a final obstacle. *Even if* judicial AAEIs were contemplated to fall within the term 'ancillary proceedings', *that might just not matter*. The fact (assuming *arguendo*) that AAEIs were now by grace of paragraph 4 not governed by the Recast does not then entail that they would not still be prohibited by a *wider, free-standing basis* of prohibition. Such remains a standing possibility because, to recap, the *Gazprom* Court had seemingly rationalised the *West Tankers* prohibition as now being predicated wholly upon the 'general principle' of Mutual Trust. As Hartley suggests, that move made by the *Gazprom* court possibly means that the prohibition remains capable of catching acts (apart from *Gazprom*'s uncertain 'carve-out') which impede the jurisdiction of other courts, even if they should be themselves expressly exempted from Brussels' scope of application.[230]

(ii) Therefore, Recital (12) does not resolve the analytical deficiencies post-Gazprom

Thus, the foregoing analysis evinces that the Recast does not change in the main what *West Tankers* instituted and what *Gazprom* has affirmed but complicated. Consequently, it does little to resolve the analytical complications plaguing the present doctrinal configuration.

VI. Conclusion

Finally reckoned, our picture is this. The *West Tankers* decision did not merely propound a rule that prohibited judicial AAEIs, but founded that prohibition on what appeared to be an uncompromising 'Effects' analysis. The same Court later endeavoured in *Gazprom* to exempt (some) judicial acts of enforcing arbitral AAEIs from its seemingly relentless logic. But to do so, the Court had to reconceptualise the prohibition by replacing its 'Effects' ethos for that of Mutual Trust. Therewith emerged many other uncertainties concerning the nature and parameters of this 'carve-out', which continue to defy proper explication. We know not if *all* judicial acts of arbitral award enforcement are categorically exempt. We know not what remains of the 'Effects' analysis if Mutual Trust now drives the prohibition. And, while the EU institutions had attempted to devise a legislative solution, it was never consummated. The Recast simply does not alleviate these troubles.

In the end, the doctrinal configuration emerging post-Recast is uncertain and analytically incomprehensible. Regardless of whether *West Tankers* or *Gazprom*

[229] *Gazprom*, Opinion of AG Wathelet (n 6) [155]–[156].
[230] Hartley (n 9) 973–975.

reached the right outcomes, they have exacted a non-negligible toll on doctrinal integrity. Some might think it for the better that *Gazprom* secured the exemption of (at least some) judgments enforcing arbitral awards. Or, perhaps, it could be objected that the Court should have fully backtracked instead of producing an unprincipled compromise. Minds will perennially differ, but all concerned should not neglect the analytical costs that *Gazprom* brings.