



Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 4 December 2014¹

Case C-536/13

‘Gazprom’ OAO (Request for a preliminary ruling)

from the Lietuvos Aukščiausiasis Teismas (Lithuania))

(Area of freedom, security and justice — Judicial cooperation in civil matters — Regulation (EC) No 44/2001 — Anti-suit injunction issued by an arbitral tribunal situated in a Member State — Prohibition on initiating proceedings before a court of another Member State — Injunction to limit the claims made in judicial proceedings — Right of a court of the second Member State to refuse to recognise the arbitral award — Independent judgment of a court on its jurisdiction over a dispute falling within the scope of Regulation No 44/2001 — Safeguard of the primacy of EU law and of the effectiveness of Regulation No 44/2001)

I – Introduction

1. The present request for a preliminary ruling concerns the status of arbitration and anti-suit injunctions in the light of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters² (‘the Brussels I Regulation’, which from 10 January 2015³ will be replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁴ (‘the Brussels I Regulation (recast)’).

2. Although there has been abundant case-law on these matters and abundant comment in the literature, the Court decided, on the basis of certain elements of fact or of law that distinguish the present case, to entrust it to the Grand Chamber. This should enable the Court to define and clarify the relationship between EU law and international arbitration, whose ‘fundamental importance ... within the “international business community” — having ‘become the “most frequently used method of resolving disputes in international trade” — had already been recognised by Advocate General Darmon.⁵

1 — Original language: French.

2 — OJ 2001 L 12, p. 1.

3 — Apart from Articles 75 and 76, which have already been applicable since 10 January 2014.

4 — OJ 2012 L 351, p. 1.

5 — Opinion of Advocate General Darmon in *Rich* (C-190/89, EU:C:1991:58, point 3).

II – Legal framework

A – *EU law*

1. The Brussels I Regulation

3. In Chapter I of the Brussels I Regulation, entitled ‘Scope’, Article 1 is worded as follows:

‘1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. This Regulation shall not apply to:

...

(d) arbitration.

...’

4. In Chapter II of that regulation, entitled ‘Jurisdiction’, Article 2(1) states:

‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

5. As provided in Article 4(1) of the Brussels I Regulation:

‘If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.’

6. In Chapter III of that regulation, entitled ‘Recognition and enforcement’, Article 32 provides:

‘For the purposes of this Regulation, “judgment” means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called ...’

7. Article 33(1) in Chapter III provides:

‘A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.’

8. According to Article 34 of that chapter:

‘A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

...’

2. The Brussels I Regulation (recast)

9. For the subject to which the present case relates, namely the relationship between arbitration and the Brussels I Regulation, two elements of the new regulation should be mentioned: recital 12 in its preamble and Article 73.

10. Recital 12 reads as follows:

‘This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

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

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

11. In Chapter VII of that regulation, entitled ‘Relationship with other instruments’, Article 73(2) provides:

‘This Regulation shall not affect the application of the 1958 New York Convention.’

B – *The 1958 New York Convention*

12. Article I(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in New York on 10 June 1958 (‘the 1958 New York Convention’), provides:

‘This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.’

13. Article II(3) of that convention provides:

‘The court of a Contracting State, when seised of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.’

14. As provided in Article III of that convention:

‘Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. ...’

15. Article V of that convention sets out the conditions under which recognition and enforcement of an arbitral award may be refused:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - (a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions or matters submitted to arbitration may be recognised and enforced; or
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
 - (a) The subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or
 - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.’

16. Lithuania ratified the 1958 New York Convention by the adoption of Resolution (nutarimas) No I-760 of the Lithuanian Parliament (Seimas) of 17 January 1995.

C – Lithuanian law

17. Chapter X of Book Two of the Lithuanian Civil Code is entitled ‘Investigation of the activities of a legal person’ and consists of Articles 2.124 to 2.131.

18. Article 2.124 of that code, entitled ‘Content of the investigation of the activities of a legal person’, provides:

‘Persons listed in Article 2.125 ... shall have the right to request the court to appoint experts who shall investigate whether a legal person or a legal person’s management organs or their members acted in a proper way and, if improper actions are established, to apply measures specified in Article 2.131 ...’

19. Under Article 2.125(1)(1) of that code, one or more shareholders holding at least 1/10th of the shares of the legal person may bring such an action.

20. The measures provided for in Article 2.131 of that code include annulment of decisions taken by the management organs of the legal person, exclusion, or temporary suspension of the powers, of the members of its organs, and the possibility of requiring the legal person to take or not to take certain actions.

III – The main proceedings and the questions referred for a preliminary ruling

21. Lietuvos dujos AB (‘Lietuvos dujos’) is a company formed under Lithuanian law whose business consists in buying gas from Gazprom OAO (‘Gazprom’) (Russian Federation), conveying it and distributing it in Lithuania, and also in managing the gas pipelines and transporting gas to the Region of Kaliningrad of the Russian Federation. It is not involved in gas exploration or production.

22. At the time of the facts of the present case, the largest shareholders in Lietuvos dujos were the German company E.ON Ruhrgas International GmbH (38.91%), the Russian public undertaking Gazprom (37.1%) and the Republic of Lithuania (17.7%).

23. Gazprom is vertically integrated and has a dominant position in the gas sector. It acquired its shareholding in Lietuvos dujos by the agreement for the sale and purchase of shares of 24 January 2004.⁶ Article 7.4.1 of that agreement provides:

‘[Gazprom] shall supply natural gas to consumers in the Republic of Lithuania for a period of 10 years in such quantity as shall meet the demand of at least 90% of all consumers in the Republic of Lithuania. The supply of natural gas to the Republic of Lithuania must be based on fair prices that take the market conditions of energy suppliers in the Republic of Lithuania into account.’

24. Article 7.4.2.3 of that agreement provides:

‘The price of natural gas shall be fixed according to the formula supplied in the valid agreement on the supply of gas concluded between [Gazprom] and [Lietuvos dujos]. This formula may change according to movements in the prices of alternative fuels in the Republic of Lithuania.’

25. I shall refer hereinafter to the agreement referred to in Article 7.4.2.3 as ‘the long-term gas agreement’.

⁶ — A copy of this agreement in Lithuanian is available on the website of the Minister of Energy of the Republic of Lithuania at the following address: <http://www.enmin.lt/lt/news/gazprom.pdf>.

26. This long-term gas agreement, which was concluded in 1999, before Gazprom became a shareholder of Lietuvos dujos, applied to the period from 2000 until 2015 and has been amended on a number of occasions in the context of negotiations between Gazprom and Lietuvos dujos.

27. On 24 March 2004, Gazprom also concluded a ‘shareholders’ agreement’ with E.ON Ruhrgas International GmbH and the State Property Fund acting on behalf of the Republic of Lithuania, which was subsequently replaced by the Ministry of Energy of the Republic of Lithuania.

28. Article 6.1(1.9) of that agreement provides that the shareholders ‘... shall seek to ensure ... safeguarding of, on terms and conditions mutually acceptable and beneficial for [Lietuvos dujos] and the [shareholders] and on the basis of contractual obligations between [Lietuvos dujos] and [Gazprom]: (i) the long-term gas transit to the Kaliningrad oblast of the Russian Federation, ... (iii) the long-term gas supply to [Lietuvos dujos]’.

29. The shareholders’ agreement is subject to Lithuanian law. Section 7.14 of that agreement contains an arbitration agreement, according to which ‘[a]ny claim, dispute or contravention in connection with this Agreement or its breach, validity, effect or termination, shall be finally settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The place of arbitration shall be Stockholm, Sweden, the number of arbitrators shall be three (all to be appointed by the Arbitration Institute) and the language of arbitration shall be English’.⁷

30. On 8 February 2011, the Ministry of Energy wrote to the general manager of Lietuvos dujos, Mr Valentukevičius, and to two members of the board of directors of that company, both appointed by Gazprom, Mr Golubev and Mr Seleznev, alleging that they had not acted in the interest of Lietuvos dujos when the formula for the calculation of the gas price contained in the long-term gas contract was amended.

31. On 25 March 2011, the Ministry of Energy brought an action against Lietuvos dujos and Mr Valentukevičius, Mr Golubev and Mr Seleznev before the Vilniaus apygardos teismas (Regional Court, Vilnius), in order to secure an investigation of the activities of Lietuvos dujos (Article 2.124 et seq. of the Lithuanian Civil Code).

32. By that action, the Ministry of Energy claimed that the interests of the Republic of Lithuania, as a shareholder of Lietuvos dujos, had been damaged, and Gazprom’s interests unduly favoured, by the amendments to the long-term gas contract in that the price at which Lietuvos dujos bought gas from Gazprom was not fair. Among other requests, the Ministry of Energy asked the Lithuanian court to remove Mr Valentukevičius, Mr Golubev and Mr Seleznev from their posts and to require Lietuvos dujos to enter into negotiations with Gazprom in order to fix a fair and correct price for the purchase of gas.

33. Being of the view that that action breached the arbitration agreement contained in Section 7.14 of the shareholders’ agreement, Gazprom filed a request for arbitration against the Ministry of Energy at the Arbitration Institute of the Stockholm Chamber of Commerce on 29 August 2011, asking the arbitral tribunal to order the Ministry of Energy to withdraw the action which it had brought before the Lithuanian courts. The Institute of Arbitration of the Stockholm Chamber of Commerce registered that arbitration request as Arbitration No V (125/2011).

34. On 9 December 2011 the Ministry of Energy amended its action. By its amended action, it, inter alia, dropped its request for the removal of Mr Valentukevičius, Mr Golubev and Mr Seleznev from their posts, but maintained its request that Lietuvos dujos should be required to enter into negotiations with Gazprom in order to fix a fair and correct price for the purchase of gas.

⁷ — Footnote not relevant to the English translation.

35. The dispute between Gazprom and the Republic of Lithuania was extended in March 2012 by further international arbitration proceedings initiated by Gazprom before the Permanent Court of Arbitration in The Hague. By those proceedings, Gazprom disputed the Lithuanian Government's decision to proceed in accordance with Article 9 of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC,⁸ and to unbundle within Lietuvos dujos the gas pipeline network management business from the gas production and supply business, which meant that Gazprom could no longer be a shareholder of Lietuvos dujos.

36. In these further international arbitration proceedings, Gazprom claims that in transposing and implementing that directive the Republic of Lithuania breached its obligations under the Treaty of 29 June 1999 between the Government of the Russian Federation and the Government of the Republic of Lithuania on the encouragement and mutual protection of investments.⁹

37. On 31 July 2012, the Arbitral Tribunal established in Arbitration No V (125/2011) made a final award ('the arbitral award') in which it granted Gazprom's request in part.¹⁰ According to the Arbitral Tribunal, the proceedings initiated by the Ministry of Energy before the Vilniaus apygardos teismas breached in part the arbitration agreement contained in the shareholders' agreement. It therefore ordered the Ministry of Energy to withdraw some of the requests submitted before the Vilniaus apygardos teismas (in particular the request requiring Lietuvos dujos to enter into negotiations with Gazprom in order to set a fair and correct price for the purchase of gas) and to reformulate one of those requests in such a way as to comply with the undertaking given by the Ministry of Energy to submit to arbitration any disputes coming within the scope of the shareholders' agreement.

38. On 3 September 2012, the Vilniaus apygardos teismas upheld the action brought by the Ministry of Energy and decided to appoint experts to conduct an investigation of the activities of Lietuvos dujos. It also found that that action fell within its jurisdiction and could not be the subject of arbitration under Lithuanian law.

39. Lietuvos dujos and Mr Valentukevičius, Mr Golubev and Mr Seleznev brought an appeal against that decision before the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania). Gazprom brought an action before that court, asking it to recognise and enforce the arbitral award in application of the 1958 New York Convention.

40. In October 2012, the Republic of Lithuania initiated arbitration proceedings against Gazprom before the Arbitration Institute of the Stockholm Chamber of Commerce, claiming that the amendments to the long-term gas contract between 2004 and 2012 were contrary to the terms of the agreement for the sale and purchase of shares of 24 January 2004, and sought damages amounting to USD (United States Dollars) 1.9 billion.¹¹

41. By order of 17 December 2012, the Lietuvos apeliacinis teismas, relying on Article V(2)(a) and (b) of the 1958 New York Convention, decided not to grant Gazprom's application.

8 — OJ 2009 L 211, p. 94.

9 — See the press article by Alyx Barker entitled 'Gazprom v Lithuania: cast list out', published on 31 July 2012 on the website of the Global Arbitration Review (<http://globalarbitrationreview.com/news/article/30730/gazprom-v-lithuania-cast-list-out/>), and the item entitled 'OAO Gazprom v. The Republic of Lithuania', published on the website of the Permanent Court of Arbitration (http://www.pca-cpa.org/showpage.asp?pag_id=1470).

10 — The final award of 31 July 2012 in Case No V (125/2011) is available on the website of the Global Arbitration Review (http://www.globalarbitrationreview.com/cdn/files/gar/articles/Gazprom_v_Lithuania_Final_Award.pdf).

11 — See the press article by Kyriaki Karadelis entitled 'Lithuania gas price arbitration takes off', published on 5 October 2012 on the website of the Global Arbitration Review (<http://globalarbitrationreview.com/news/article/30876/lithuania-gas-price-arbitration-takes-off/>).

42. More specifically, the Lietuvos apeliacinis teismas held that the Arbitral Tribunal had no authority to determine a question already raised before and examined by the Vilniaus apygardos teismas, which by its order of 3 September 2012 had held that the disputes referred to in Article 2.134 of the Civil Code could not be settled by arbitration. The Lietuvos apeliacinis teismas was therefore entitled to refuse to recognise and enforce the arbitral award on the basis of Article V(2)(a) of the 1958 New York Convention.

43. The Lietuvos apeliacinis teismas also considered that, by limiting the Lithuanian State's capacity to bring proceedings before a Lithuanian court and denying the jurisdiction of the Lithuanian courts to rule on their own jurisdiction, the arbitral award breached the principle of the independence of the judicial authorities enshrined in Article 109(2) of the Lithuanian Constitution. The Lietuvos apeliacinis teismas therefore concluded that the arbitral award breached Lithuanian public policy and refused to recognise and enforce it, this time on the basis of Article V(2)(b) of the 1958 New York Convention.

44. By order of 21 February 2013, the Lietuvos apeliacinis teismas dismissed the appeal brought by Lietuvos dujos and Mr Valentukevičius, Mr Golubev and Mr Seleznev against the decision of the Vilniaus apygardos teismas to initiate an investigation of the activities of Lietuvos dujos.

45. Both of those orders of the Lietuvos apeliacinis teismas have been the subject of appeals in cassation to the referring court, which, by order of 21 November 2013, decided to stay examination of the appeal in cassation against the decision of the Lietuvos apeliacinis teismas concerning the investigation of the activities of Lietuvos dujos until it had decided the appeal concerning the recognition and enforcement of the arbitral award.

46. In the context of the latter appeal, Gazprom claimed that the order of 17 December 2012 of the Lietuvos apeliacinis teismas should be quashed and a new order made upholding its request for recognition and enforcement of the arbitral award. The Ministry of Energy claimed that the appeal should be dismissed on the basis of Article V(2)(b) of the 1958 New York Convention, claiming that the arbitral award constituted an anti-suit injunction and that its recognition and enforcement would be contrary to the Brussels I Regulation as interpreted by the Court in *Allianz and Generali Assicurazioni Generali* (C-185/07, EU:C:2009:69).

47. In those circumstances, the Lietuvos Aukščiausiasis Teismas decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

- '(1) Where an arbitral tribunal issues an anti-suit injunction and thereby prohibits a party from bringing certain claims before a court of a Member State, which under the rules on jurisdiction in the Brussels I Regulation has jurisdiction to hear the civil case as to the substance, does the court of a Member State have the right to refuse to recognise such an award of the arbitral tribunal because it restricts the court's right to determine itself whether it has jurisdiction to hear the case under the rules on jurisdiction in the Brussels I Regulation?
- (2) Should the first question be answered in the affirmative, does the same also apply where the anti-suit injunction issued by the arbitral tribunal orders a party to the proceedings to limit his claims in a case which is being heard in another Member State and the court of that Member State has jurisdiction to hear that case under the rules on jurisdiction in the Brussels I Regulation?
- (3) Can a national court, seeking to safeguard the primacy of EU law and the full effectiveness of the Brussels I Regulation, refuse to recognise an award of an arbitral tribunal if such an award restricts the right of the national court to decide on its own jurisdiction and powers in a case which falls within the jurisdiction of the Brussels I Regulation?'

48. On 10 June 2014, the Competition Council of the Republic of Lithuania announced that it had imposed on Gazprom a fine of LTL (Lithuanian litas) 123 096 700 (around EUR 35.6 million) for breach of the conditions imposed on it when it acquired its shareholding in Lietuvos dujos.¹²

49. On 12 June 2014, Gazprom announced that it had decided to sell that shareholding.¹³

IV – Procedure before the Court

50. The request for a preliminary ruling was lodged at the Court Registry on 15 October 2013. Written observations were submitted by Gazprom, the Lithuanian, German, Spanish, French, Austrian and United Kingdom Governments, the Swiss Confederation and the European Commission.

51. In accordance with Article 61(1) of its Rules of Procedure, on 4 July 2014 the Court sent the parties two questions to be answered in writing before the hearing and no later than 31 July 2014. Gazprom, the Lithuanian, German, Spanish, French and United Kingdom Governments, the Swiss Confederation and the Commission lodged their answers within the prescribed period.

52. A hearing took place on 30 September 2014, at which Gazprom, the Lithuanian, German, Spanish, French and United Kingdom Governments, the Swiss Confederation and the Commission made oral submissions.

V – Analysis

A – Preliminary observations

1. The Court's jurisdiction

53. At page 10 of its request for a preliminary ruling, the referring court considers that the action of the Ministry of Energy against Lietuvos dujos and Mr Valentukevičius, Mr Golubev and Mr Seleznev was brought before the Vilniaus apygardos teismas¹⁴ on the basis of an application by analogy (*mutatis mutandis*) of Article 6(2) of the Brussels I Regulation.

54. Article 6(2) of that regulation states that a person domiciled in a Contracting State may also be sued, 'as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case'.

55. To my mind that provision is manifestly inapplicable in the present case, as the action at issue is not an action on a warranty or guarantee or any other type of third-party proceedings.

12 — See Decision No 2S-3/2014 of 10 June 2014 (available on the website of the Competition Council of the Republic of Lithuania at the following address: http://kt.gov.lt/index.php?show=nut_view&nut_id=1541).

13 — See Sytas, A., 'Gazprom sells Lithuania assets after antitrust fine', published on 12 June 2014 on the Reuters Agency website at the following address: <http://uk.reuters.com/article/2014/06/12/uk-lithuania-gazprom-idUKKBN0EN1IF20140612>.

14 — See points 31 and 32 of this Opinion.

56. At the hearing, the Lithuanian Government suggested that there had been a typographical error on the part of the referring court, as its intention was to rely on Article 6(1) of that regulation,¹⁵ which seems scarcely more applicable since it allows a person domiciled in one Member State to be sued before the courts of *another Member State* where one of his co-defendants is domiciled. In this instance, with the exception of Mr Golubev and Mr Seleznev, who are domiciled in a third State, the defendants are domiciled in Lithuania.

57. The Court could indeed refuse to answer the present questions referred to it for a preliminary ruling on the ground that the Lithuanian courts had no jurisdiction correctly based on the Brussels I Regulation. It could state, however, that it was possible for the Vilniaus apygardos teismas to establish its jurisdiction with respect to Lietuvos dujos and its general manager Mr Valentukevičius on Article 2(1) of that regulation,¹⁶ the necessary element of extraneousness for the applicability of that article (and of the regulation) resulting from the fact that two of the co-defendants (Mr Golubev and Mr Seleznev) are domiciled in the Russian Federation,¹⁷ in which case it would have jurisdiction to answer the questions submitted by the referring court.

2. The admissibility of the questions

58. According to settled case-law, ‘questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it’.¹⁸

59. In this instance, the referring court states at page 9 of its request for a preliminary ruling that ‘the question of initiation of investigation of a legal person cannot be subject to arbitration’.

60. As the French Government and the Commission observe, there is thus a legal basis, namely Article V(2)(a) of the 1958 New York Convention,¹⁹ on which the referring court may refuse to recognise and enforce an arbitral award, as, moreover, the Lietuvos apeliacinis teismas has already done.²⁰

61. It is therefore in my view conceivable that the questions submitted to the Court are not relevant to the dispute in the main proceedings, since the referring court is perfectly capable of doing without the answers to those questions in order to settle the dispute before it. The present Opinion clearly proceeds on the assumption that the Court considers that the questions submitted to it are admissible.

15 — ‘A person domiciled in a Member State may also be sued: 1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings; ...’

16 — ‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

17 — See judgment in *Owusu* (C-281/02, EU:C:2005:120, paragraphs 24 to 26 and 35).

18 — Judgment in *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 27). See also, to that effect, judgments in *Régie Networks* (C-333/07, EU:C:2008:764, paragraph 46); *Budějovický Budvar* (C-478/07, EU:C:2009:521, paragraph 63); *Zanotti* (C-56/09, EU:C:2010:288, paragraph 15); and *Radu* (C-396/11, EU:C:2013:39, paragraph 22).

19 — ‘Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject-matter of the difference is not capable of settlement by arbitration under the law of that country; ...’

20 — See points 41 and 42 of this Opinion.

3. Is an anti-suit injunction actually at issue?

62. In its request for a preliminary ruling, the referring court characterises the arbitral award as an anti-suit injunction since it orders the Ministry of Energy to withdraw certain of the requests which it had submitted before the Lithuanian courts.

63. In that sense, the arbitral award closely resembles the English-law anti-suit injunctions which formed the subject-matter of the judgments in *Turner* (C-159/02, EU:C:2004:228) and *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69). In English law an anti-suit injunction is an order made by an English court requiring a party subject *in personam* to the jurisdiction of the English courts²¹ not to bring or advance particular claims, to withdraw such claims or to take the necessary steps to terminate or suspend proceedings pending before a national court or tribunal, or arbitral tribunal, established in a foreign country.²²

64. An anti-suit injunction is not directed against the foreign court and is addressed only to a party who is being sued before an English court.²³

65. A party to whom an anti-suit injunction is addressed and who does not comply with it exposes himself to proceedings for contempt of court, which may entail criminal sanctions and the confiscation of assets in the United Kingdom.²⁴ It is clearly possible that the anti-suit injunction will have no effect if the party to whom it is addressed is not present in the United Kingdom or has no assets there, but any judgment obtained in breach of an anti-suit injunction will be neither recognised nor enforced in the United Kingdom.²⁵

66. As the French Government states in its written answer to the questions put by the Court, no injunction of that type has been issued in the dispute in the main proceedings. Unlike the anti-suit injunctions forming the subject-matter of the judgments in *Turner* (EU:C:2004:228) and *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69), the Ministry of Energy's failure to comply with the arbitral award does not entail any sanction for that ministry.²⁶

67. That having been said, the arbitral award and the injunction therein are binding on the person addressed by ordering it to withdraw a part of its action before the Lithuanian courts in so far as, according to the Arbitral Tribunal, that action comes partly within the scope of the arbitration agreement. It is in that sense that, just like the anti-suit injunctions forming the subject-matter of the judgments in *Turner* (EU:C:2004:228) and *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69), the arbitral award is capable, according to the referring court, of undermining the practical effect of the Brussels I Regulation. My reasoning is based on that assumption.

B – First question

68. By its first question, the referring court asks the Court whether it may refuse to recognise an arbitral anti-suit injunction on the ground that it would restrict its 'right to determine itself whether it has jurisdiction to hear the case under the rules on jurisdiction in the Brussels I Regulation'.

21 — A person may be subject *in personam* to the jurisdiction of the English courts by virtue of being present in England and Wales or by virtue of having agreed to a clause conferring jurisdiction on the English courts.

22 — See, Raphael, T., *The Anti-Suit Injunction*, Oxford University Press, Oxford, 2008, paragraph 1.05.

23 — See *Turner v Grovit and Others* [2001] UKHL 65, paragraph 23, and *Société Nationale Industrielle Aerospatiale v Lee Kui Jak and Another* [1987] 1 AC 871 (PC), paragraph 892.

24 — See Briggs, A., and Rees, P., *Civil Jurisdiction and Judgments*, 5th ed., Informa, London, 2009, paragraph 5.55.

25 — Ibid.

26 — It would be possible for an arbitral tribunal to punish a party who has not complied with an anti-suit injunction by taking that conduct into account when calculating the costs of the arbitration, but not in a case such as that in the main proceedings, because the sole purpose of the arbitration was the anti-suit injunction. The arbitral tribunal's task was completed when it made the arbitral award (*functus officio*) and that tribunal can therefore no longer impose a penalty on a party for breach of its anti-suit injunction.

69. It is therefore necessary to ascertain whether the Brussels I Regulation is indeed applicable in the present instance or whether only the 1958 New York Convention applies to the dispute in the main proceedings.

1. Is the Brussels I Regulation applicable pursuant to the second subparagraph of Article 71(2) thereof?

70. In order to place itself within the scope of the Brussels I Regulation, the referring court relies on the second subparagraph of Article 71(2) of that regulation, which provides that '[w]here a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition and enforcement of judgments, those conditions shall apply. In any event, the provisions of this Regulation which concern the procedure for recognition and enforcement of judgments may be applied'.²⁷

71. In my view, and as the German Government and the Swiss Confederation maintain, that provision is not applicable in this instance, since its scope is limited to conventions between Member States which determine 'conditions for the recognition and enforcement of judgments'. The word 'judgment' is defined in Article 32 of that regulation as 'any judgment given by *a court or tribunal of a Member State*, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court'.²⁸ It is clear that an arbitral tribunal established on the basis of an arbitration agreement freely entered into by two parties (such as the tribunal that made the arbitral award at issue in the main proceedings) is not a court or tribunal of a Member State.²⁹

72. Furthermore, Article 1(2)(d) of the Brussels I Regulation excludes arbitration from the scope of that regulation. This means that, as Gazprom, the German, French and United Kingdom Governments, the Commission and the Swiss Confederation indeed maintain, the recognition and enforcement of arbitral awards, such as the award at issue in the main proceedings, should be subject only to the 1958 New York Convention.

73. In this instance, according to those parties, since the referring court itself was seised in the context of a recognition and enforcement procedure in application of that convention, the recognition and enforcement of the arbitral award at issue are exclusively a matter for that convention.³⁰ Consequently, there should be no question of EU law that the Court would have jurisdiction to answer on the basis of Article 267 TFEU.

2. Would the Brussels I Regulation be applicable by virtue of the judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69)?

74. As the French Government states in its answer to the questions put by the Court, 'the judgment in *Allianz and Generali Assicurazioni Generali* [(EU:C:2009:69)] has raised doubts as to the extent to which arbitration is excluded from the scope of [the Brussels I Regulation]'.³¹

²⁷ — See p. 6 of the request for a preliminary ruling.

²⁸ — Emphasis added.

²⁹ — See, to that effect, judgment in *Ascendi* (C-377/13, EU:C:2014:1754, paragraph 29).

³⁰ — See, to that effect, the final paragraph of recital 12 in the preamble to the Brussels I Regulation (recast), which states that '[t]his Regulation should not apply to ... the ... recognition or enforcement of an arbitral award'. That, moreover, was the position taken in the Report of P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 1, 13).

75. In August 2000 the *Front Comor*, a vessel owned by West Tankers Inc. ('West Tankers') and chartered by Erg Petroli SpA ('Erg Petroli'), caused damage to a jetty in Syracuse owned by Erg Petroli. The charterparty was governed by English law and contained a clause providing for arbitration in London.

76. Erg Petroli claimed compensation from its insurers Allianz SpA ('Allianz') and Generali Assicurazioni Generali Spa ('Generali') up to the limit of its insurance cover and commenced arbitration proceedings in London against West Tankers for the excess. Having paid Erg Petroli compensation under the insurance policies for the loss it had suffered, the insurers, exercising their right of subrogation, brought proceedings against West Tankers before the Tribunale di Siracusa (Italy) for recovery of the sums paid to Erg Petroli. West Tankers raised an objection of lack of jurisdiction on the basis of the existence of the arbitration agreement.

77. Since the seat of the arbitration was in London, West Tankers brought proceedings before the English courts in order to obtain an anti-suit injunction restraining Allianz and Generali from pursuing any proceedings other than the arbitration and from continuing the proceedings commenced before the Tribunale di Siracusa.

78. The English courts upheld that claim but the House of Lords asked the Court whether, in view of the difference between the circumstances of the case before it and the circumstances in *Turner* (EU:C:2004:228),³¹ it had the power to issue an anti-suit injunction that would be compatible with the Brussels I Regulation, because Article 1(2)(d) of that regulation excludes arbitration from the scope of the regulation.

79. The Court began its analysis by accepting that, as national proceedings but in support of an arbitration, '[p]roceedings, such as those in the main proceedings, which lead to the making of an anti-suit injunction, cannot, therefore, come within the scope of [the Brussels I Regulation]'.³²

80. The Court then held that, '[h]owever, even though proceedings do not come within the scope of [the Brussels I Regulation], they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. *This is so, inter alia, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by [the Brussels I Regulation]*'.³³

81. The Court therefore considered that 'a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within [the] scope of application [of the Brussels I Regulation]'.³⁴

82. On that basis, the Court answered the question submitted by the House of Lords in the negative, ruling that the proceedings brought by Allianz and Generali against West Tankers before the Tribunale di Siracusa themselves came within the scope of the Brussels I Regulation,³⁵ in spite of the arbitration agreement between the parties. The Court added that the anti-suit injunction at issue did

31 — That case, which was wholly unconnected with arbitration, concerned an anti-suit injunction issued by English courts and related to proceedings initiated in Spain. The Court held that such anti-suit injunctions were incompatible with the Brussels I Regulation.

32 — Judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69, paragraph 23).

33 — Ibid. (paragraph 24). Emphasis added.

34 — Ibid. (paragraph 26).

35 — Ibid. (paragraphs 26 and 27).

not respect the Italian court's right to determine itself whether it had jurisdiction to settle the dispute before it,³⁶ that it was therefore contrary to the principle of mutual trust between the courts of the Member States and that it prevented access to the national judicial order by an applicant who considered that the arbitration agreement was void, inoperative or incapable of being performed.³⁷

83. In conclusion, the Court ruled that the anti-suit injunction at issue in that case was incompatible with the Brussels I Regulation.

84. On that basis, the referring court considers that, like an anti-suit injunction issued by a national court, an anti-suit injunction issued by an arbitral tribunal undermines the effectiveness of the Brussels I Regulation.

85. That view is conceivable in so far as, in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69), the House of Lords, like the referring court, was seised of proceedings which, as the Court held, fell outside the scope of the Brussels I Regulation,³⁸ namely an application for an anti-suit injunction against a party which had brought proceedings in Italy in breach of an arbitration agreement under which any dispute was to be submitted to arbitration in London.³⁹ The application for recognition and enforcement of the arbitral award at issue in the main proceedings also falls outside the scope of that regulation.

86. The Brussels I Regulation was held to be applicable in that case on the basis of other proceedings, namely the proceedings before the Italian court, the substance of which, like the substance of the action seeking to initiate an investigation of the activities of Lietuvos dujos,⁴⁰ came within the scope of that regulation, and in particular Article 5(3). In the present case, the substance of the action brought by the Ministry of Energy seeking to initiate an investigation of the activities of Lietuvos dujos also come within the scope of the Brussels I Regulation, and more specifically Article 2.⁴¹

87. In that regard, the German, French and United Kingdom Governments, the Swiss Confederation and the Commission maintain that the Brussels I Regulation is not applicable in the main proceedings, since arbitration is excluded from its scope. If it were so simple, however, the Court would not have declared the anti-suit injunction forming the subject-matter of its judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69) incompatible with the Brussels I Regulation.⁴²

88. In that sense, the situation of the House of Lords, which was seised of a matter outside the scope of the Brussels I Regulation, is comparable to the situation of the referring court, which is also seised of an application for recognition and enforcement of an arbitral award, an application that is likewise excluded from the scope of that regulation. Furthermore, since the referring court is at the same time

36 — Ibid. (paragraph 30).

37 — Ibid. (paragraph 31).

38 — Ibid. (paragraph 23).

39 — See point 75 of this Opinion.

40 — Namely the action brought by the Ministry of Energy on 25 March 2011 before the Vilniaus apygardos teismas against Lietuvos dujos, its general manager, Mr Valentukevičius, and two members of its board of directors, Mr Golubev and Mr Seleznev, seeking initiation of an investigation of the activities of Lietuvos dujos (Article 2.124 et seq. of the Lithuanian Civil Code). That court held that the matter could not be settled by arbitration. See points 31, 32 and 38 of this Opinion.

41 — See point 57 of this Opinion.

42 — In this connection, I do not agree with the position which the United Kingdom Government expressed at the hearing that the Court held that it had jurisdiction to rule on the anti-suit injunction forming the subject-matter of the judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69) because that injunction, when recognised in Italy, would prevent the Italian court from deciding on its own jurisdiction under the Brussels I Regulation. The anti-suit injunction and the consequences in the United Kingdom of failure to comply with it were sufficiently serious factors to deter Allianz and Generali Assicurazioni Generali from continuing the Italian proceedings. In reality, West Tankers did not need to have the anti-suit injunction recognised and enforced in Italy. As is clear from paragraphs 29 to 31 of that judgment, the deterrent effects to which the anti-suit injunction gave rise in the United Kingdom were alone sufficient to require Allianz and Generali Assicurazioni Generali to withdraw the action pending before the Tribunale di Siracusa. That impact that the anti-suit injunction could have on the Italian court's power to decide on its own jurisdiction and on the applicability of the Brussels I Regulation led the Court to rule that the anti-suit injunction came within the scope of the regulation.

seised of an action that does fall within the scope of that regulation, namely the application to initiate an investigation of the activities of Lietuvos dujos, its position is the same as that of the Tribunale di Siracusa in the judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69). In that judgment, the Court ruled that the anti-suit injunction was incompatible with the Brussels I Regulation, a conclusion which the referring court considers to be applicable to the dispute in the main proceedings. I do not share that view, for the reasons which I shall develop.

3. Answer to the question for a preliminary ruling

89. Two factors lead me to propose that the Court should answer this question in the negative.

a) The exclusion of arbitration from the scope of the Brussels I Regulation (recast)

90. The Spanish Government is of the view that, for temporal reasons, the Court should not take the Brussels I Regulation (recast) into account in its answer to the present request for a preliminary ruling.

91. Admittedly, that regulation will be applicable only from 10 January 2015, but, like Gazprom, the Lithuanian, German and French Governments, the Commission and the Swiss Confederation, I think that the Court should take it into account in the present case, since the main novelty of that regulation, which continues to exclude arbitration from its scope, lies not so much in its actual provisions but rather in recital 12 in its preamble, which in reality, somewhat in the manner of a retroactive interpretative law, explains how that exclusion must be and always should have been interpreted.

92. Before I embark on a more thorough appraisal of the scope of recital 12, it will be useful to consider its legislative history.

93. Article 73 of the Brussels I Regulation establishes a procedure for the reform of that regulation, namely that, no later than 1 March 2007, the Commission was to present to the European Parliament, the Council of the European Union and the Economic and Social Committee a report on its application, together with proposals for its adaptation.

94. In the context of that procedure, the Commission instructed Professor Hess, Professor Pfeiffer and Professor Schlosser to prepare a report ('the Heidelberg Report') on the application of the Brussels I Regulation.⁴³ That report was published in 2007, before the judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69) was delivered.

95. While acknowledging that the Brussels I Regulation should not deal with matters governed by the 1958 New York Convention, the authors of the Heidelberg Report proposed a series of new provisions that would have allowed that regulation to intervene in the sphere of arbitration in order to deal with questions of the interface between those two instruments, such as, for example, the question of the bringing of proceedings before a national court which has declared an arbitration agreement invalid or the bringing of proceedings before a national court in its capacity as the court acting in support of the arbitration.

43 — See Hess, B., Pfeiffer, T., and Schlosser, P., 'Report on the Application of Regulation Brussels I in the Member States' (available on the following website: http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf).

96. The Heidelberg Report was followed by delivery of the Opinion of Advocate General Kokott in *Allianz and Generali Assicurazioni Generali* (EU:C:2008:466, points 71 and 73), where she noted that there was no ‘mechanism to coordinate [the jurisdiction of arbitral tribunals] with the jurisdiction of the national courts’ and proposed that ‘only the inclusion of arbitration in the scheme of [the Brussels I Regulation] could remedy the situation’.

97. The Court agreed with Advocate General Kokott’s analysis and cited her Opinion several times (judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69, paragraphs 20, 26 and 29)).

98. Comments criticising that judgment came essentially from the world of private international law and arbitration, the essential part of the criticism being that in reality it had extended the scope of the Brussels I Regulation to arbitration in a way that could undermine its effectiveness.⁴⁴

99. To that criticism, I would also add that the judgment contrasted sharply with three earlier judgments of the Court, namely the judgments in *Hoffmann* (145/86, EU:C:1988:61), *Rich* (C-190/89, EU:C:1991:319) and *Van Uden* (C-391/95, EU:C:1998:543).

100. The judgment in *Hoffmann* (EU:C:1988:61) concerned the enforcement in the Netherlands of a German judgment ordering a husband to make maintenance payments to his wife by virtue of his obligations, arising out of the marriage, to support her. Such a judgment necessarily presupposed the existence of the matrimonial relationship. The Hoge Raad der Nederlanden (Netherlands) asked whether the dissolution of that matrimonial relationship by a decree of divorce granted by a Netherlands court could terminate the enforcement of the German judgment, even where that judgment remained enforceable in Germany, as the divorce decree was not recognised there.

101. Like arbitration, the status of natural persons, of which marriage and divorce form part, was excluded from the scope of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36; ‘the Brussels Convention’). On the other hand, the payment of maintenance, which is not a question of status, was covered by the Brussels Convention, which meant that the Netherlands courts were required *prima facie* by the convention to recognise and enforce the German judgment, which would have been irreconcilable with the Netherlands decree of divorce.

102. The Court held that ‘the [Brussels] Convention does not preclude the court of the State in which enforcement is sought from drawing the necessary inferences from a national decree of divorce when considering the enforcement of the foreign maintenance order’,⁴⁵ and this meant that the Hoge Raad der Nederlanden was not required to recognise and enforce the German judgment, which none the less came within the scope of the Brussels Convention.

103. In the judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69), although arbitration, like the status of natural persons, was excluded from the scope of the Brussels I Regulation, the Court held that the English courts could not apply their national law to its full extent and issue anti-suit injunctions in support of an arbitration. In doing so, the Court restricted the extent to which arbitration is excluded from the scope of that regulation.⁴⁶

44 — See, in particular, Briggs, A., *Civil Jurisdiction and Judgments*, 5th ed., Informa, London, 2009, paragraph 2.40; Peel, E., ‘Arbitration and Anti-Suit Injunctions in the European Union’, 2009, vol. 125, *Law Quarterly Review*, p. 365; Dal, G.A., ‘L’arrêt “West Tankers” et l’effet négatif du principe de compétence-compétence’, 2010, *Revue pratique des sociétés*, p. 22; Kessedjian, C., ‘Arbitrage et droit européen: une désunion irrémédiable?’, 2009, *Recueil Dalloz*, p. 981; Muir Watt, H., ‘Cour de justice des Communautés européennes (grande chambre) — 10 février 2009 — Aff. C-185/07’, 2009, vol. 98, *Revue critique de droit international privé*, p. 373; Audit, B., ‘Arrêt Allianz and Generali Assicurazioni Generali, EU:C:2009:69’, 2009, *Journal du Droit International*, p. 1283; Bollée, S., ‘Allianz SpA et autre c/ West Tankers Inc’, 2009, *Revue de l’arbitrage*, p. 413.

45 — Judgment in *Hoffmann* (EU:C:1988:61, paragraph 17).

46 — See Briggs, A., and Rees, P., *Civil Jurisdiction and Judgments*, 5th ed., Informa, London, 2009, paragraph 2.40.

104. *Rich* (EU:C:1991:319) concerned a contract for the purchase of crude oil between a Swiss company and an Italian company. The contract was subject to English law and contained an arbitration agreement. When the purchaser (the Swiss company) claimed that the cargo had seriously deteriorated, the seller (the Italian company) brought an action before the Tribunale di Genova (Italy), seeking a declaration that it was not liable to the purchaser.

105. As agreed in the contract, the Swiss company initiated arbitration proceedings in London, in which the Italian company refused to participate or to appoint the arbitrator, which prevented the proceedings from continuing. The Swiss company asked the English courts, in their capacity as the courts supporting the arbitration, to appoint an arbitrator on behalf of the Italian company.

106. As in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69), the Italian company claimed that the real dispute between the parties was linked with the question whether the contract at issue did or did not contain an arbitration clause, and that such a dispute fell within the scope of the Brussels Convention and, accordingly, ought to be determined in Italy.

107. The question, therefore, was whether the proceedings initiated before the English courts seeking the appointment of an arbitrator fell within the scope of the Brussels Convention.

108. The Court held that, 'by excluding arbitration from the scope of the [Brussels] Convention on the ground that it was already covered by international conventions, [in particular the 1958 New York Convention,] the Contracting Parties intended to *exclude arbitration in its entirety*, including proceedings brought before national courts'.⁴⁷

109. Although the appointment of an arbitrator and the national proceedings in support of the arbitration do not fall within the scope of the 1958 New York Convention, the Court held that 'the appointment of an arbitrator by a national court is a measure adopted by the State as part of the process of setting arbitration proceedings in motion. Such a measure therefore comes within the sphere of arbitration and is thus covered by the exclusion contained in Article 1(4) of the [Brussels] Convention'.⁴⁸

110. The Court rejected the Italian company's argument that the Brussels Convention applied to disputes relating to the existence or the validity of an arbitration agreement, ruling that, '[i]n order to determine whether a dispute falls within the scope of the Convention, *reference must be made solely to the subject-matter of the dispute*. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the [Brussels] Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the [Brussels] Convention'.⁴⁹ The Court confirmed that approach in its judgment in *Van Uden* (C-391/95, EU:C:1998:543).⁵⁰

47 — Judgment in *Rich* (EU:C:1991:319, paragraph 18).

48 — *Ibid.* (paragraph 19).

49 — *Ibid.* (paragraph 26). Emphasis added.

50 — This case concerned arbitration proceedings initiated by a Netherlands company against a German company following the latter company's failure to pay certain invoices. The Netherlands company applied to the relevant Netherlands court for interim relief on the grounds that the German company was not displaying the necessary diligence in the appointment of arbitrators and that the non-payment of its invoices was disturbing its cash flow. It asked that the German company be ordered to pay it the amount of four debts arising under the contract. The question therefore was whether such provisional measures proceedings fell within the scope of the Brussels Convention. Following the principle set out in paragraph 26 of the judgment in *Rich* (EU:C:1991:319), the Court examined the subject-matter of the dispute before the Netherlands court and held that 'provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support' (paragraph 33).

111. In the judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69), instead of determining the applicability of the Brussels I Regulation by reference to the dispute in the main proceedings, as it had done in *Rich* (EU:C:1991:319) and *Van Uden* (EU:C:1998:543), the Court examined the subject-matter of the dispute in the light of another dispute, namely the dispute brought before the Italian courts.

112. In doing so, the Court departed from its position in the judgment in *Rich* (EU:C:1991:319, paragraphs 18 and 26) that only the subject-matter of the dispute in the main proceedings should be taken into account and that arbitration as a subject-matter was excluded in its entirety from the scope of the Brussels I Regulation.

113. Following the Heidelberg Report, the judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69) and the comments to which that judgment had given rise, the Commission published its *Green Paper on the Review of the Brussels I Regulation* ('the Green Paper'),⁵¹ in which it launched a public consultation, proposing the partial abolition of the exclusion of arbitration from the scope of that regulation with the aim of improving the interface between the regulation and arbitration.

114. A number of Member States, such as the French Republic, Hungary, the Republic of Austria, the Republic of Poland and the United Kingdom of Great Britain and Northern Ireland, as well as a number of players in the arbitration sector,⁵² were opposed to that proposal, being of the view that the Brussels I Regulation should not affect the application of the 1958 New York Convention and that the outright exclusion of arbitration from the scope of that regulation should be confirmed.

115. In its impact assessment accompanying the recasting of the Brussels I Regulation,⁵³ the Commission noted the criticism that the judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69) allowed parties acting in bad faith to escape their obligation to submit any dispute to arbitration⁵⁴ and indicated three possible options.⁵⁵

116. The first option was to maintain the status quo, namely the exclusion of arbitration from the scope of the regulation, which, in the Commission's view, did not exclude the risk of abuse that the judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69) did not prevent or prohibit.⁵⁶

117. The second option was to extend the exclusion of arbitration to any proceedings related to arbitration and in particular to 'proceedings in which the validity of an arbitration agreement [was] contested'.⁵⁷

118. Last, the third option consisted in enhancing the effectiveness of arbitration agreements, by providing that a court of a Member State seised of a dispute involving an arbitration agreement would have to stay proceedings if an arbitral tribunal or a court at the seat of the arbitration were seised.⁵⁸

51 — See Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (COM(2009) 175 final).

52 — See in particular, to that effect, the responses of the Association for International Arbitration; Allen and Overy LLP; the Barreaux de France; the Centre belge d'arbitrage et de médiation; the Camera arbitrale di Milano; the Chambre de commerce et d'industrie de Paris; Clifford Chance LLP; the Comité français de l'arbitrage; the Comité national français de la Chambre de commerce internationale; the Deutscher Industrie- und Handelskammertag; the Arbitration Committee of the International Bar Association; Professor E. Gaillard; Paris, The Home of International Arbitration; Lovells LLP; and the Club Español del Arbitraje and Spanish Section of the International Law Association, available on the Commission's website at the following address: http://ec.europa.eu/justice/newsroom/civil/opinion/090630_en.htm.

53 — Impact Assessment, Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), SEC(2010) 1547 final (available only in English). A summary of the impact analysis is available in French: SEC(2010) 1548 final.

54 — Ibid. (p. 35).

55 — Ibid. (pp. 36 and 37).

56 — Ibid. (pp. 37 and 38).

57 — Ibid. (pp. 36 and 37).

58 — Ibid. (p. 37).

119. In its proposal for a recasting of the Brussels I Regulation ('the proposal for a recast regulation'),⁵⁹ the Commission chose the last option, while retaining its proposal put forward in the Green Paper for the abolition in part of the exclusion of arbitration from the scope of that regulation.⁶⁰

120. As the Lithuanian Government and the Commission acknowledge in their answers to the questions put by the Court, the amendments proposed by the Commission were rejected by the EU legislature. By its resolution of 7 September 2010, the European Parliament '*[s]trongly oppose[d] the (even partial) abolition of the exclusion of arbitration from the scope*' and '*[c]onsider[ed] that Article 1(2)(d) of the Regulation should make it clear that not only arbitration proceedings, but also judicial procedures ruling on the validity or extent of arbitral competence as a principal issue or as an incidental or preliminary issue, are excluded from the scope of the Regulation*'.⁶¹

121. The Council also objected to the Commission's choice of the abolition in part of the exclusion of arbitration from the scope of the Brussels I Regulation (recast). By its note of 1 June 2012, the Presidency of the Council invited the Council to adopt as a compromise package the draft general approach set out in the annex to that note.⁶² That draft stated that the Commission's proposals concerning arbitration set out in its proposal for a recast should be rejected.⁶³

122. In fact, the text of the compromise provided for the introduction of a new recital with the wording now found in recital 12 in the preamble to the Brussels I Regulation (recast) and of a new provision, according to which that regulation 'shall not affect the application of the 1958 New York Convention'.⁶⁴

123. The Council approved that wording on 8 June 2012. Following the Council's approval, the Parliament adopted a legislative resolution approving the amendments to the regulation concerning arbitration, as set out in the document approved by the Council.⁶⁵

124. In its final version, the Brussels I Regulation (recast) maintains the exclusion of arbitration from its scope and includes the new recital 12 and also the new Article 73(2), which provides that '[t]his Regulation shall not affect the application of the 1958 New York Convention'.⁶⁶

125. To my mind, these new provisions, and in particular the second paragraph of recital 12 crowned by the new Article 73(2), correspond to the second option presented by the Commission in its impact assessment accompanying its proposal for a recast regulation, which sought to exclude from the scope of the regulation any proceedings in which the validity of an arbitration agreement was contested.⁶⁷

59 — Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) (COM(2010) 748 final).

60 — Article 29(4) of the proposal for a recast regulation provided that '[w]here the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement. ... Where the existence, validity or effects of the arbitration agreement are established, the court seised shall decline jurisdiction'. Article 33(3) of that proposal provided that '... an arbitral tribunal is deemed to be seised when a party has nominated an arbitrator or when a party has requested the support of an institution, authority or a court for the tribunal's constitution'.

61 — European Parliament Resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (P7_TA(2010)0304, paragraphs 9 and 10). Emphasis added.

62 — Documents 10609/12 JUSTCIV 209 CODEC 1495 and 10609/12 JUSTCIV 209 CODEC 1495 ADD 1.

63 — See Articles 1(2)(d) and 29(4).

64 — See Article 84(2).

65 — European Parliament legislative resolution of 20 November 2012 on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (P7_TA(2012)0412).

66 — Article 73(2).

67 — See point 117 of this Opinion.

126. Indeed, while the wording of the regulation's provisions were not altered, the second paragraph of that recital states that '[a] ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed *should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question*'.⁶⁸

127. The passage in italics shows that the verification, as an incidental question, of the validity of an arbitration agreement is excluded from the scope of the Brussels I Regulation (recast), since if that were not so the rules on recognition and enforcement in that regulation would be applicable to decisions of the national courts concerning the validity of an arbitration agreement.⁶⁹

128. That was not the Court's interpretation in the judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69, paragraph 26),⁷⁰ where it based its position concerning the fact that the proceedings initiated by Allianz and Generali against West Tankers before the Tribunale di Siracusa, in breach of the arbitration agreement, themselves came within the scope of the Brussels I Regulation on the assumption that the verification, as an incidental question, of the validity of an arbitration agreement *was included* in the scope of that regulation.

129. The Court observed:

'... if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of [the Brussels I Regulation], *a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application*. This finding is supported by paragraph 35 of the Report on the accession of the Hellenic Republic to the [Brussels] Convention ..., presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p. 1). That paragraph states that *the verification, as an incidental question, of the validity of an arbitration agreement* which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, *must be considered as falling within its scope*'.⁷¹

130. Consequently, I do not share the view of the Lithuanian and German Governments and the Commission that the interpretation which the Court gave to the exclusion of arbitration from the scope of that regulation in paragraph 24 of the judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69) is unaffected by the recasting of the Brussels I Regulation.

131. Nor do I share the view which the Commission expressed at the hearing that paragraph 26 of that judgment was merely an obiter dictum. Quite to the contrary, it constitutes the central point of the judgment, on the basis of which the Court established the applicability of the Brussels I Regulation and thus defined the boundary between the scope of the Brussels I Regulation and arbitration.

68 — Emphasis added.

69 — That is confirmed by the third paragraph, which states that 'where a court of a Member State ... has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's *judgment on the substance of the matter* from being recognised or, as the case may be, enforced in accordance with this Regulation'. It may be inferred *a contrario* that the decision on jurisdiction (and the arbitration agreement) is not subject to the rules on recognition and enforcement in the regulation.

70 — See point 81 of this Opinion.

71 — Emphasis added.

132. I can understand the view thus expressed by the Commission only in the light of its own proposals on that demarcation between arbitration and the scope of the Brussels I Regulation, which, however, were rejected outright by the Parliament and the Council when the Brussels I Regulation was recast. I therefore infer from the legislative history set out above that the EU legislature intended to correct the boundary which the Court had traced between the application of the Brussels I Regulation and arbitration.⁷²

133. That means that, if the case which gave rise to the judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69) had been brought under the regime of the Brussels I Regulation (recast), the Tribunale di Siracusa could have been seised on the substance of the case on the basis of that regulation only from the time when it held that the arbitration agreement was null and void, inoperative or incapable of being performed (which is possible under Article II(3) of the 1958 New York Convention).⁷³

134. In those circumstances, the anti-suit injunction forming the subject-matter of the judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69) would not have been held to be incompatible with the Brussels I Regulation.

135. Indeed, the fact that the Tribunale di Siracusa had been seised of an action the subject-matter of which fell within the scope of the Brussels I Regulation (the question of the validity of the arbitration being in that case an incidental or preliminary issue) would not have affected the English courts' power to issue anti-suit injunctions in support of the arbitration because, according to the second paragraph of recital 12, the verification, as an incidental question, of the validity of an arbitration agreement is excluded from the scope of that regulation 'regardless of whether [the Tribunale di Siracusa] decided on this as a principal issue or as an *incidental* question'.⁷⁴ The use of the word '*incidental*' clearly shows that the second paragraph also applies when a court of a Member State is seised, as the Tribunale di Siracusa had been, of an action as to the substance of a dispute which obliges it first of all to examine its jurisdiction by verifying, as an incidental question or a preliminary issue, the validity of the arbitration agreement between the two parties to the action.

72 — See, to that effect, Nuyts, A., 'La refonte du règlement Bruxelles I', 2013, vol. 102, *Revue critique du droit international privé*, p. 1, 15: ('... it can be inferred [from the second paragraph of recital 12] that a plea founded on an arbitration clause alleging a lack of jurisdiction *falls in itself outside* the scope of the regulation. It is therefore necessary, in my view, to abandon the interpretation adopted in the *West Tankers* judgment ... The reversal of the *West Tankers* case-law in this respect must be welcomed ...').

73 — See European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (P7_TA(2010)0304, recital M), which states that 'the various national procedural devices developed to protect arbitral jurisdiction (anti-suit injunctions so long as they are in conformity with free movement of persons and fundamental rights, declaration of validity of an arbitration clause, grant of damages for breach of an arbitration clause, the negative effect of the "*Kompetenz-Kompetenz*" principle", etc.) must continue to be available and the effect of such procedures and the ensuing court decisions in the other Member States must be left to the law of those Member States as was the position prior to the judgment in *Allianz and Generali Assicurazioni Generali*'.

74 — Emphasis added. In that sense, the solution provided by recital 12 is different from that applied in the judgment in *Gothaer Allgemeine Versicherung and Others* (C-456/11, EU:C:2012:719, paragraph 41), where the Court held that 'a judgment by which a court of a Member State has declined jurisdiction on the basis of a jurisdiction clause, on the ground that that clause is valid, binds the courts of the other Member States both as regards that court's decision to decline jurisdiction, contained in the operative part of the judgment, and as regards the finding on the validity of that clause, contained in the *ratio decidendi* which provides the necessary underpinning for that operative part'. In that case it was not an arbitration agreement that was at issue but a clause conferring jurisdiction, which, unlike an arbitration agreement, falls within the scope of the Brussels I Regulation (see Article 23) and of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007 and approved on behalf of the Union by Council Decision 2009/430/EC of 27 November 2008 (OJ 2009 L 147, p. 1), which was applicable to that case (Article 23). Conversely, according to the second paragraph of recital 12 in the preamble to the Brussels I Regulation (recast), if a decision given by a court of a Member State declaring an arbitration agreement null and void, inoperative or incapable of being performed arrives for recognition and enforcement before the courts of another Member State, it cannot be either recognised or enforced on the basis of the Brussels I Regulation. See, to that effect, Cour d'appel de Paris, 15 June 2006, *Legal Department du Ministère de la Justice de la République d'Irak v Sociétés Fincantieri Cantieri Navali Italiani*, available on Legifrance's website at the following address: <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000006951261&fastReqId=65424442&fastPos=9>.

136. As the third paragraph of that recital makes clear, it is only the ‘judgment on the substance’ that could be recognised and enforced in accordance with that regulation.⁷⁵ However, to say that, owing to the possibility that the Tribunale di Siracusa would deliver a judgment on the substance, whether or not it was likely to do so, the English courts would be unable to issue an anti-suit injunction in support of the arbitration would have the effect of specifically preserving the effects of the judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69) that the EU legislature wished to exclude when the Brussels I Regulation was recast.

137. The conclusion that anti-suit injunctions in support of the arbitration are allowed by the Brussels I Regulation (recast) is supported by the fourth paragraph of recital 12, which states that ‘[t]his Regulation should not apply to an action or *ancillary proceedings relating to, in particular, ... the conduct of an arbitration procedure or any other aspects of such a procedure, nor to ... the ... recognition or enforcement of an arbitral award*’.⁷⁶

138. Not only does that paragraph exclude the recognition and enforcement of arbitral awards from the scope of that regulation, which indisputably excludes the present case from its scope, but it also excludes ancillary proceedings, which in my view covers anti-suit injunctions issued by national courts in their capacity as court supporting the arbitration.

139. It will be recalled in that respect that in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69) the House of Lords had been asked to issue an anti-suit injunction in its capacity as the court acting in support of the arbitration, which resulted from the fact that the parties had fixed the seat of the arbitral tribunal within that court’s jurisdiction.

140. Since an anti-suit injunction is 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 and in that sense constitutes ‘ancillary proceedings relating to, in particular, ... the conduct of an arbitration procedure’, its prohibition can no longer be justified on the basis of the Brussels I Regulation (recast).

141. For those reasons, I consider that the recasting of the Brussels I Regulation reinstated the interpretation given to the exclusion of arbitration from the scope of the Brussels I Regulation by the judgment in *Rich* (EU:C:1991:319, paragraph 18), according to which ‘the Contracting Parties intended to *exclude arbitration in its entirety*’.⁷⁷ Consequently, the Brussels I Regulation is not applicable to the dispute in the main proceedings.

142. That solution does not undermine at all the effectiveness of the Brussels I Regulation, because it does not prevent the referring court from ‘itself determin[ing], under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it’.⁷⁸ On the contrary, Article V(1)(a) and (c) of the 1958 New York Convention allows it to ascertain whether the arbitral tribunal had jurisdiction, in addition to Article V(2)(a), which allows it to determine whether, under its own law, the dispute before the arbitral tribunal is capable of settlement by arbitration.

75 — That means that where the judgment of a court of a Member State declaring an arbitration agreement null and void, inoperative or incapable of being performed and then making a determination on the substance of the dispute arrives for recognition and enforcement before the courts of another Member State, it must be recognised and enforced in accordance with the Brussels I Regulation. However, since, as a general rule, arbitration proceedings are quicker than proceedings before the national courts, it is likely that the court addressed will have already recognised and enforced an arbitral award on the substance of the same dispute. In such a case, the court addressed would not be required to recognise and enforce the judgment of the national court, since the arbitral award would already have acquired the authority of *res judicata* (see Article 45(1)(c) of the Brussels I Regulation (recast), according to which ‘... the recognition of a judgment shall be refused ... (c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed ...’).

76 — Emphasis added.

77 — Emphasis added.

78 — Judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69, paragraph 29).

143. In that regard, I would repeat that, as the French Government and the Commission observe, the referring court relies on Lithuanian law according to which a question relating to the initiation of an investigation of the activities of a legal person cannot be the subject of arbitration. It would therefore be open to the referring court to refuse to recognise and enforce the arbitral award on the basis of Article V(2)(a) and, quite obviously, to do so without referring a question for a preliminary ruling.

144. Thus, ‘the applicant, which considers that [the arbitration agreement] is void, inoperative or incapable of being performed, would [not] be barred from access to the [national] court’.⁷⁹

145. As a supplementary point, I would observe that that clarification of the exclusion of arbitration in the Brussels I Regulation (recast) is part of an effort to combat the delaying tactics of parties who, in breach of their contractual undertakings, initiate proceedings before a court of a Member State which manifestly lacks jurisdiction, tactics which had been discussed in the proceedings which led to the judgments in *Gasser* (C-116/02, EU:C:2003:657),⁸⁰ *Turner* (EU:C:2004:228)⁸¹ and *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69).

146. The Brussels I Regulation (recast) thus introduces a new Article 31(2), which provides that ‘where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement’. According to Article 31(3), ‘[w]here the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court’.

147. As indicated in recital 22 in the preamble to that regulation,⁸² those new provisions will no longer permit the solution provided by the Court in the judgment in *Gasser* (EU:C:2003:657), where it held that the court second seised but having exclusive jurisdiction under an agreement conferring jurisdiction could not, in derogation from the rules on *lis pendens*, adjudicate on the dispute without waiting until the court first seised had declared that it had no jurisdiction.

79 — Judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69, paragraph 31).

80 — In that judgment, the Court, relying on the ‘trust which the Contracting States accord to each other’s legal systems and judicial institutions’, on which the Brussels Convention was based, and on ‘legal certainty’ (paragraph 72), denied that the ‘excessively long’ duration (paragraph 73) of judicial proceedings in the State of the court first seised can have any impact on the application of that convention and rejected the argument based on ‘delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause’ (paragraph 53). For a critique of that judgment and the risk of forum shopping before courts lacking jurisdiction by parties acting in bad faith, see Franzosi, M., ‘Worldwide patent litigation and the Italian torpedo’, *European Intellectual Property Review*, 1997, vol. 7, pp. 382, 385; Véron, P., ‘ECJ Restores Torpedo Power’, *International Review of Intellectual Property and Competition Law*, 2004, vol. 35, pp. 638, 638 and 639; and Muir Watt, H., ‘Erich Gasser GmbH c. MISAT Srl’, *Revue critique de droit international privé*, 2004, vol. 93, pp. 444, 463.

81 — For a critique of that judgment which emphasises the possibilities afforded by the Brussels Convention (or the Brussels I Regulation, which succeeded it) to parties acting in bad faith of impeding the rapid and equitable settlement of disputes, see Lord Mance, ‘Exclusive Jurisdiction Agreements and European Ideals’, *Law Quarterly Review*, 2004, vol. 120, p. 357; Fentiman, R., ‘Access to Justice and Parallel Proceedings in Europe’, *Cambridge Law Journal*, 2004, vol. 63, p. 312; and Romano, G.P., ‘Le principe de sécurité juridique à l’épreuve des arrêts Gasser et Owusu’, *Cahiers de droit européen*, 2008, pp. 175, 209 and 210.

82 — ‘However, in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general *lis pendens* rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. *In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement.* This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings.’ Emphasis added.

148. The response of the Brussels I Regulation (recast) to delaying tactics intended to breach a clause conferring jurisdiction is to give priority to the court indicated by the clause conferring exclusive jurisdiction, even where it is the second court to be seised. That means that arbitral tribunals and courts of the Member States in their capacity as courts supporting the arbitration may take the necessary measures to ensure the effectiveness of the arbitration without being prevented from doing so by the Brussels I Regulation.

149. As regards breach of an arbitration agreement, the response of the Brussels I Regulation (recast) is to exclude arbitration completely from its scope, with the consequence that the verification, as an incidental question, of the validity of that agreement does not fall within its scope, and to refer the parties to arbitration.

150. In fact, reproducing almost verbatim the wording of Article II(3) of the 1958 New York Convention, recital 12 states in its first paragraph that '[n]othing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law'.

151. As the French Government observes in its written answer to the questions put by the Court, the consequence of that paragraph of recital 12 is that, unless the arbitration agreement is null and void or *manifestly* incapable of being performed, the parties must be required to comply with it and therefore be referred to the arbitral tribunal, which will decide on its own jurisdiction,⁸³ whilst the national court will have the opportunity to determine the validity of that clause during the proceedings for the recognition and enforcement of the arbitral award.⁸⁴

152. That position is wholly consistent with Article II(3) of the 1958 New York Convention, which provides that a 'court of a Contracting State, when seised of an action in a matter in respect of which the parties have made an [arbitration] agreement, shall ... refer the parties to arbitration ...'. This referral to arbitration is 'mandatory and cannot be left to the courts' discretion',⁸⁵ save where the arbitration agreement is 'null and void, inoperative or incapable of being performed'.

b) Arbitral tribunals cannot be bound by the principle of mutual trust in the Brussels I Regulation

153. Even if the Court should decide not to take the Brussels I Regulation (recast) into consideration or not to agree with my interpretation of that regulation, I consider that the solution applied in the judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69) cannot be applied to anti-suit injunctions issued by arbitral tribunals whose recognition and enforcement fall within the scope of the 1958 New York Convention. That solution would therefore be limited to the case in which the anti-suit injunction is issued by a court of a Member State against proceedings pending before a court of another Member State.

83 — I would refer, in that regard, to the law applicable in France, one of the pioneer countries of arbitration, under which, where a dispute covered by an arbitration agreement is brought before a French court, that court is to declare that it *has no jurisdiction* unless the arbitral tribunal has not yet been seised and the arbitration agreement is manifestly null and void or manifestly incapable of being performed (Articles 1448 and 1506-A of the Code of Civil Procedure). See, to that effect, Gaillard, E., and de Lapasse, P., 'Le nouveau droit français de l'arbitrage interne et international', *Recueil Dalloz*, 2011, vol. 3, pp. 175 to 192.

84 — See Article V(1)(a) and (c) of the New York Convention.

85 — UNCITRAL (United Nations Commission on International Trade Law) Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958): extract, guide on Article II, paragraph 61 (UNGA A/CN.9/814/Add.2), available on the Internet at the following address: <http://www.newyorkconvention1958.org/pdf/II-English-140211.pdf>.

UNCITRAL, which is the principal United Nations legal body in the field of international trade law, draws up modern, equitable and harmonised rules on commercial operations, including the 1958 New York Convention.

154. As Gazprom, the French and United Kingdom Governments, the Swiss Confederation and the Commission observe, the arbitral tribunal involved in the present case is not subject to the Brussels I Regulation and is not bound by either that regulation or the principle of mutual trust applicable between the courts of the Member States. In addition, its awards are not recognised or enforced in accordance with the provisions of that regulation.⁸⁶

155. Moreover, what could an arbitral tribunal do, when it considers that the arbitration agreement from which it derives its jurisdiction has been breached by one of the parties, other than order that party to comply with the agreement and to submit to the arbitrators all its claims covered by the agreement? An anti-suit injunction is therefore the only effective remedy available to an arbitral tribunal in order to rule in favour of the party who considers that the arbitration agreement has been breached by the other contracting party.⁸⁷

156. That is all the more true in the present case where, as the Arbitral Tribunal observes, '[t]he [Ministry of Energy] does not challenge the Tribunal's power to order specific performance if it finds that [the Ministry of Energy] has breached the arbitration clause in the [Shareholders' Agreement]. As a consequence, the Tribunal finds that it has jurisdiction to order the ministry not to bring a request before the [Vilniaus apygardos teismas] that could affect the rights of the shareholders under [that agreement]'.⁸⁸

157. Consequently I propose that the Court should answer the first question referred for a preliminary ruling in the negative. To my mind, the recognition and enforcement of the arbitration award at issue in the main proceedings falls exclusively within the scope of the 1958 New York Convention.

C – Second question

158. Since the second question submitted by the referring court arises only if the first question is answered in the affirmative, there is no need to answer it.

159. Furthermore, as the French Government observes, it envisages a situation where, in contrast to the facts of the dispute in the main proceedings, the anti-suit injunction is issued in a dispute pending before the courts of a Member State other than the Republic of Lithuania. It is therefore a hypothetical question and, according to consistent case-law, must be declared inadmissible.⁸⁹

86 — Nor, moreover, are judgments of the courts of the Member States ordering enforcement of an arbitral award, because they are not judgments within the meaning of Article 32 of the Brussels I Regulation. Admittedly, the Court held in the judgment in *Gothaer Allgemeine Versicherung and Others* (EU:C:2012:719, paragraphs 23 and 24) that 'the concept of "judgment" covers "any" judgment given by a court of a Member State, without any distinction being drawn according to the content of the judgment in question'. However, as the German, French and United Kingdom Governments stated at the hearing, there can be no enforcement of enforcement. Since review of a judgment by the enforcing court under the Brussels I Regulation is more restricted than under the New York Convention, to allow judgments enforcing an arbitral award to be recognised and enforced in accordance with the provisions of that regulation would in reality deprive the courts of the Member States of the right conferred on them by that convention to review themselves the arbitral award on the basis of the criteria set out in Article V of that convention.

87 — I consider that it would be compatible with the Brussels I Regulation if an arbitral tribunal or a national court could, at the request of the injured party and in so far as the law applicable to the arbitration agreement allowed it to do so, order the party which initiated proceedings before national courts in breach of that agreement to pay damages in the amounts which those courts might have ordered the injured party to pay. That is the position, for example, in English law: *Mantovani v Carapelli SpA* [1980] 1 Lloyd's Rep 375 (CA). *Mutatis mutandis* for breach of a clause conferring jurisdiction: *Union Discount Co v Zwoller* [2001] EWCA Civ 1755, [2002] 1 WLR 1517; *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 Lloyd's Rep 425. See, to that effect, European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (P7_TA(2010)0304, recital M).

88 — Arbitral award, paragraph 266.

89 — See judgments in *PreussenElektra* (C-379/98, EU:C:2001:160, paragraph 39); *Owusu* (EU:C:2005:120, paragraph 50); *Régie Networks* (C-333/07, EU:C:2008:764, paragraph 46); *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 27); *Unió de Pagesos de Catalunya* (C-197/10, EU:C:2011:590, paragraph 17); and *Radu* (C-396/11, EU:C:2013:39, paragraph 22).

D – *Third question*

160. If the Court were to find that the Brussels I Regulation is not applicable in the present case and that, in any event, an anti-suit injunction issued by an arbitration tribunal is not contrary to that regulation, the third question should be answered.

161. By its third question, the referring court asks whether, with a view to safeguarding the primacy of EU law and the full effectiveness of the Brussels I Regulation, it may refuse to recognise an arbitral award if that award restricts the right of the national court to decide on its own jurisdiction and powers in a case which falls within the scope of that regulation.

162. As I stated in point 45 of this Opinion, the referring court is seised of an appeal in cassation against the decision of the Lietuvos apeliacinis teismas which upheld the decision of the Vilniaus apygardos teismas to conduct an investigation of the activities of Lietuvos dujos. It will be recalled that in my preliminary observations I proceeded on the assumption that the Vilniaus apygardos teismas was correctly seised on the basis of the Brussels I Regulation.⁹⁰

163. The third question must therefore be taken to mean that the referring court is asking whether it must interpret the concept of public policy enshrined in Article V(2)(b) of the 1958 New York Convention⁹¹ in such a way as not to recognise and enforce an arbitral award containing an anti-suit injunction in so far as that injunction limits, as the referring court states at page 10 of its request for a preliminary ruling, its right to decide on its own jurisdiction.

164. Before proceeding to that analysis, I would repeat that, as the French Government and the Commission observe, it was not necessary for the referring court to have recourse to the concept of public policy on the basis of the 1958 New York Convention in order to refuse to recognise and enforce an arbitral award.

165. As the referring court itself observes, at page 9 of its request for a preliminary ruling, investigation of a legal person's activities cannot be subject to arbitration. That means, as the Lietuvos apeliacinis teismas has already held,⁹² that the recognition and enforcement of the arbitral award at issue could be refused on the basis of Article V(2)(a) of the 1958 New York Convention.⁹³

1. The concept of public policy

166. According to Article V(2)(b) of the 1958 New York Convention, recognition and enforcement of an arbitral award may be refused 'if the competent authority in the country where recognition and enforcement is sought finds that ... [t]he recognition or enforcement of the award would be contrary to the public policy of that country'.

167. Since 'public policy' is not defined in that convention, such definition is a matter for the courts of the Contracting States. However, as UNCITRAL has noted in its guide on the convention, 'public policy' is generally defined restrictively as 'a safety valve to be used in those exceptional circumstances when it would be impossible for a legal system to recognise an award and enforce it without

⁹⁰ — See point 57 of this Opinion.

⁹¹ —

'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: ... (b) The recognition or enforcement of the award would be contrary to the public policy of that country.'

⁹² — See points 41 to 43 of this Opinion.

⁹³ — 'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject-matter of the difference is not capable of settlement by arbitration under the law of that country; ...' See points 59 to 61 of this Opinion.

abandoning the very fundamentals on which it is based'.⁹⁴ That guide refers to the definition of public policy provided by the United States Court of Appeals, Second Circuit, according to which '[e]nforcement of foreign arbitral awards may be denied on [the basis of public policy] only where enforcement would violate the forum state's most basic notions of morality and justice'.⁹⁵

168. Likewise, the courts of the Member States define the concept of public policy restrictively. For example, according to the Cour d'appel de Paris, which is responsible for the recognition and enforcement of foreign arbitral awards in France, 'the French concept of international public policy extends to all rules and values breach of which cannot be tolerated by the French legal order, even in international situations'.⁹⁶

169. In the same vein, the German courts have also considered that an arbitral award contravenes public policy where 'it violates a norm which affects the basis of German public and economic life or irreconcilably contradicts the German perception of justice'.⁹⁷

170. The English courts have also held that the concept of public policy covers cases where 'the enforcement of the award would be clearly injurious to the public good or, possibly, enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised'.⁹⁸

171. The Court interprets the concept of public policy in the same way with respect to the recognition and enforcement of judgments in the context of Article 34(1) of the Brussels I Regulation.⁹⁹

172. According to settled case-law, the concept of public policy must be 'interpreted strictly'¹⁰⁰ and recourse thereto 'is to be had only in exceptional cases'.¹⁰¹ Consequently, such recourse 'can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which

94 — UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958): extract, guide on Article V(2)(b), paragraph 4, available on the website of the guide at the following address: <http://www.newyorkconvention1958.org/index.php?lvl=cmsspage&pageid=11&provision=304>.

95 — Judgment in *Parsons & Whittemore Overseas v Société Générale de l'Industrie du Papier (RAKTA)* 508 F.2d 969, 974 (1974). This definition of public policy has been adopted by the courts of a number of Contracting States: see *BCB Holdings Limited and The Belize Bank Limited v The Attorney General of Belize* [2013] CCJ 5 (AJ) (Caribbean Court of Justice, Appellate Jurisdiction); *Traxys Europe SA v Balaji Coke Industry Pvt Ltd* [2012] FCA 276 (Federal Court, Australia); *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205 (Court of Final Appeal, Hong Kong); *Renusagar Power Co Ltd v General Electric Company & anor* 1994 AIR 860 (Supreme Court of India); and *Brostrom Tankers AB v Factorias Vulcano SA*, (2005) XXX Ybk Com Arb 591 (High Court of Dublin, Ireland).

96 — Cour d'appel de Paris, 16 October 1997, *Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar v M. N'DOYE Issakha*.

97 — UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958): extract, guide on Article V(2)(b), paragraph 9, available on the Internet at the following address: (<http://www.newyorkconvention1958.org/index.php?lvl=cmsspage&pageid=11&provision=304>), citing the judgments of the Oberlandesgericht München, 34 Sch 019/05, 28 November 2005; the Oberlandesgericht Düsseldorf, VI Sch (Kart) 1/02, 21 July 2004; the Hanseatisches Oberlandesgericht Bremen, (2) Sch 04/99, 30 September 1999; and the Bundesgerichtshof, III ZR 269/88, 18 January 1990.

98 — Judgment in *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Shell International Petroleum Co Ltd* [1990] 1 AC 295 (Court of Appeal).

99 — 'A judgment shall not be recognised: ... if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.'

100 — Judgment in *Krombach* (C-7/98, EU:C:2000:164, paragraph 21). See also, to that effect, judgment in *Solo Kleinmotoren* (C-414/92, EU:C:1994:221, paragraph 20).

101 — Judgment in *Krombach* (EU:C:2000:164, paragraph 21). See also, to that effect, judgments in *Hoffmann* (EU:C:1988:61, paragraph 21) and *Hendrikman and Feyen* (C-78/95, EU:C:1996:380, paragraph 23).

enforcement is sought inasmuch as it infringes a fundamental principle'.¹⁰² That infringement 'would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order'.¹⁰³

173. Although it is for the referring court to determine the concept of public policy covered by Article V(2)(b) of the New York Convention, the Court has already had the opportunity to state that, in interpreting that concept, the courts of the Member States must take into account certain provisions of EU law that are so fundamental that they form part of European public policy.¹⁰⁴

174. In *Eco Swiss* (C-126/97, EU:C:1999:269) and *Mostaza Claro* (C-168/05, EU:C:2006:675), the Court raised Article 101 TFEU¹⁰⁵ and Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts¹⁰⁶ to the rank of public-policy provisions in that they constitute 'fundamental provision[s] which [are] essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market'.¹⁰⁷

175. However, beyond the fundamental rights which, according to the case-law of the Court,¹⁰⁸ are a matter of public policy, the Court has not determined the criteria against which a provision of EU law may be considered 'fundamental' or 'essential' within the meaning of its case-law.

176. According to Advocate General Kokott, the Court's case-law implies that the concept of public policy 'protects *legal interests*, or in any event *interests expressed in a rule of law*, connected with the political, economic, social or cultural order of the Member State concerned'.¹⁰⁹ On that basis, the Advocate General considered that '[p]urely economic interests, such as the threat of pecuniary damage — however high', cannot be characterised as public-policy interests.¹¹⁰

177. In my view, the emphasis should be placed not essentially on the legal nature of the interests protected by public policy, but rather on whether the rules and values involved are among those *breach of which cannot be tolerated* by the legal order of the place in which recognition and enforcement are sought because such a breach would be unacceptable from the viewpoint of a free and democratic State governed by the rule of law. It is therefore a question of the body of 'principles that form part of the very foundations of the [EU] legal order'.¹¹¹

102 — Judgment in *Krombach* (EU:C:2000:164, paragraph 37). See also, to that effect, judgments in *Renault* (C-38/98, EU:C:2000:225, paragraph 30); *Apostolides* (C-420/07, EU:C:2009:271, paragraph 59); and *Trade Agency* (C-619/10, EU:C:2012:531, paragraph 51).

103 — Judgment in *Krombach* (EU:C:2000:164, paragraph 37). See also, to that effect, judgments in *Renault* (EU:C:2000:225, paragraph 30); *Apostolides* (EU:C:2009:271, paragraph 59); and *Trade Agency* (EU:C:2012:531, paragraph 51).

104 — See judgments in *Eco Swiss* (C-126/97, EU:C:1999:269) and *Mostaza Claro* (EU:C:2006:675).

105 — In that regard, I would observe that the judgment in *Eco Swiss* (EU:C:1999:269) does not strike me as being easily reconcilable with the judgment in *Renault* (EU:C:2000:225). I would point out that what had led the court of the State in which recognition and enforcement were sought in *Renault* (EU:C:2000:225) to ask whether the foreign judgment was contrary to the public policy of its State was a possible error on the part of the court of the State of origin in the application of certain rules of EU law, in particular the principle of free movement of goods and free competition. In spite of the similarity between the problem in that case and that in *Eco Swiss* (EU:C:1999:269), the Court ruled that '[t]he court of the State in which enforcement is sought cannot, without undermining the aim of the [Brussels I Regulation], refuse recognition of a decision emanating from another Contracting State solely on the ground that it considers that national or Community law was misapplied in that decision' (judgment in *Renault*, EU:C:2000:225, paragraph 34; see also judgment in *Apostolides*, EU:C:2009:271, paragraph 60). I do not see the logic in the fact that the court of a Member State is required to annul an arbitral award where it is incompatible with Article 101 TFEU but is required to recognise and enforce a decision emanating from a court of another Member State which is also incompatible with EU competition law.

106 — OJ 1993 L 95, p. 29.

107 — Judgment in *Eco Swiss* (EU:C:1999:269, paragraph 36). See also, to that effect, judgment in *Mostaza Claro* (EU:C:2006:675, paragraph 37).

108 — See judgments in *Krombach* (EU:C:2000:164, paragraphs 25, 26, 38 and 39) and *Trade Agency* (EU:C:2012:531, paragraph 52).

109 — Opinion of Advocate General Kokott in *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2046, point 84).

110 — *Ibid.* (point 85). See, to that effect, judgment in *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2046, paragraph 56).

111 — Judgment in *Kadi and Al Barakat International Foundation v Council and Commission* (C-415/05 P, EU:C:2008:461, paragraph 304).

178. The question therefore arises whether the provisions of the Brussels I Regulation as interpreted by the Court, and in particular the prohibition of anti-suit injunctions, form part of European public policy.

179. I would observe that, having regard to my answer to the first question, that prohibition continues to apply, following the recasting of the Brussels I Regulation, only as regards the anti-suit injunctions referred to in the judgment in *Turner* (EU:C:2004:228),¹¹² that is to say, those issued by the courts of the Member States in order to safeguard their own jurisdiction when they are seised in accordance with the provisions of the Brussels I Regulation.

2. Do the provisions of the Brussels I Regulation on jurisdiction in civil and commercial matters form part of European public policy within the meaning of the judgment in *Eco Swiss* (EU:C:1999:269, paragraphs 36 to 39)?

180. To my mind, the provisions of the Brussels I Regulation cannot be characterised as public-policy provisions.

181. First, I do not consider that the Brussels I Regulation forms part of the foundations of the public policy of the European Union comparable to those of which the Court spoke in paragraph 304 of its judgment in *Kadi and Al Barakaat International Foundation v Council and Commission* (EU:C:2008:461). The Brussels I Regulation, its provisions on the allocation of jurisdiction between the courts of the Member States and its interpretative principles such as mutual trust between the courts of the Member States do not compare with respect for fundamental rights, breach of which would shake the very foundations on which the EU legal order rests.

182. Second, like the German Government, I do not agree that the judgments in *Eco Swiss* (EU:C:1999:269, paragraph 36) and *Mostaza Claro* (EU:C:2006:675, paragraph 37) should be interpreted in such a way that the mere fact that a particular sphere forms part of the exclusive or shared powers of the European Union in accordance with Articles 3 TFEU and 4 TFEU is sufficient to raise a provision of EU law to the rank of public-policy provisions. If that were the case, EU law in its entirety, from the Charter of Fundamental Rights to a directive on pressurised equipment, would be a matter of public policy for the purposes of Article V(2)(b) of the 1958 New York Convention.

183. Third, Article 23 of the Brussels I Regulation expressly provides that the parties may derogate from the rules on jurisdiction in that regulation by choosing the courts of a Member State other than that which would have jurisdiction in application of that regulation to settle any disputes which have arisen or may arise in connection with a particular legal relationship, provided that that clause conferring jurisdiction is not contrary to Articles 13, 17 and 21 of that regulation (jurisdiction in respect of insurance, consumer contracts and individual contracts of employment) and does not infringe Article 22 (exclusive jurisdiction).¹¹³

¹¹² — It will be recalled that that judgment did not concern arbitration.

¹¹³ — Article 22 sets out the rules on jurisdiction in respect of: rights *in rem* in immovable property or tenancies of immovable property (paragraph 1); the validity, nullity or dissolution of companies or legal persons having their seat in a Member State, or the validity of the decisions of their organs (paragraph 2); the validity of entries in public registers (paragraph 3); the registration or validity of patents, trade marks, designs or other similar rights required to be deposited or registered (paragraph 4); and the enforcement of decisions (paragraph 5).

184. In that regard, it is recognised that only mandatory rules can be characterised as public-policy rules.¹¹⁴ Indeed, it is difficult to envisage a rule forming part of the foundations of a legal order that would not be mandatory. However, a provision which is not mandatory cannot in any event be considered to be a matter of public policy.

185. In this instance, even if the action brought by the Ministry of Energy with a view to the initiation of an investigation of the activities of Lietuvos dujos did, as the Spanish Government maintains, come within the exclusive jurisdiction of Article 22(2) of the Brussels I Regulation, which is not the case,¹¹⁵ the recognition and enforcement of the arbitral award would not constitute a manifest infringement of a rule of law regarded as essential in the EU legal order.

186. In any event, as the German Government submitted at the hearing, the fact that, in accordance with Article 35(3) of the Brussels I Regulation, '[t]he test of public policy ... may not be applied to the rules relating to jurisdiction' clearly shows that the rules on jurisdiction are not a matter of public policy.

187. As regards the argument as to infringement of public policy that is based on the prohibition of anti-suit injunctions, I would observe that, as I have stated in points 90 to 157 of this Opinion, such a prohibition does not apply to anti-suit injunctions issued by the courts of the Member States in support of an arbitration and *a fortiori* anti-suit injunctions issued by arbitration tribunals.

188. The answer to the third question should therefore be that the fact that an arbitral award contains an anti-suit injunction, such as that at issue in the main proceedings, is not a sufficient ground for refusing to recognise and enforce it on the basis of Article V(2)(b) of the 1958 New York Convention.

VI – Conclusion

189. I therefore propose that the Court answer the questions referred by the Lietuvos Aukščiausiasis Teismas as follows:

- (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 must be interpreted as not requiring the court of a Member State to refuse to recognise and enforce an anti-suit injunction issued by an arbitral tribunal.
- (2) The fact that an arbitral award contains an anti-suit injunction, such as that at issue in the main proceedings, is not a sufficient ground for refusing to recognise and enforce it on the basis of Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958.

114 — See the UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958): extract, Guide to Article V(2)(b), paragraphs 17 and 18, available on the website of the guide at the following address: (<http://www.newyorkconvention1958.org/index.php?lvl=cmsspage&pageid=11&provision=304>). See also, to that effect, Hanotiau, B., and Caprasse, O., 'Public Policy in International Commercial Arbitration' in Gaillard, E., and Di Pietro, D., (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, Cameron May, London, 2008, pp. 787, 791 to 794.

115 — The requests made by the Ministry of Energy (in particular the request that Lietuvos dujos should be required to enter into negotiations with Gazprom in order to fix a fair and correct price for the purchase of gas) do not relate to the validity, nullity or dissolution of Lietuvos dujos or the validity of the decisions of their organs.