

## ABBREVIATIONS

AG	Advocate General
art.	article
Brussels I Regulation	The Regulation No 44/2001
Brussels I Regulation recast	The Regulation No 1215/2012
CCP	Code of Civil Procedure
CISG	Convention on International Sale of Goods
Colum. L. Rev.	Columbia Law Review
ConVL	Conveyancer and Property Lawyer
Cornell Int'l L.J.	Cornell International Law Journal
ECJ	European Court of Justice
f.	footnote
FAA	Federal Arbitration Act
GCC	Greek Civil Code
Har. L. Rev.	Harvard Law Review
ibid.	ibidem
ICCA	International Council for Commercial Arbitration
IIC	International Review of Intellectual Property and Competition Law
Int.A.L.R.	International Arbitration Law Review
Int'l & Comp. L.Q.	International and Comparative Law Quarterly
JIDS	Journal of International Dispute Settlement
J Priv Int'l L	Journal of Private International Law
Law & Contemp. Probs.	Law and Contemporary Problems
MLR	Modern Law Review
No	number or numbers
NYC	The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (=The New York Convention)
OJ	Official Journal of the European Union
op. cit.	opere citato
p.	page
par.	paragraph, paragraphs
pp.	pages
S.Ac.L.J.	Singapore Academy of Law Journal

SCC	Arbitration Institute of the Stockholm Chamber of Commerce
σελ.	page or pages in greek abbreviation
Stan.L.Rev.	Stanford Law Review
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Ar- bitration (with amendments as adopted in 2006)
U.Pa.L.Rev.	University of Pennsylvania Law Review
Vol.	volume
ZPO	Zivil Prozess Ordnung

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## PREFACE

Anti-suit injunction in its rudimentary form of life, under the cloak of a *writ of prohibition*, was a device initially invented by English Law for the effective confrontation of the relentless, at that time, jurisdictional competition between state and ecclesiastical courts by curbing the torrential expansion of the latter's competence<sup>1,2</sup>. Subsequently, it was gradually transformed into the so-called *common injunction*<sup>3</sup>, rendered by the Court of Chancery<sup>4</sup>, so as to function as a bar to the exercise of common law courts' jurisdiction<sup>5</sup>. Then, by acting solely in personam<sup>6</sup>, it hampered the filing of an action or even the enforcement of a judgment when contravening

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<sup>1</sup> Wilson, "Let Go of That Case! British Anti-Suit Injunctions against Brussels Convention Members", *Cornell Int'l L.J.*, Vol.36:Iss. 1, Article 9, available at <http://scholarship.law.cornell.edu/cilj/vol36/iss1/9> (accessed on 07.11.2015 at 19.38 p.m.); Μουσταίρα, *Forum Non Conveniens-H επιείκεια στο πλαίσιο της νομιμότητας*, σελ.35.

<sup>2</sup> Grains of anti-suit injunction's model have been evidenced to be found in Ancient Rome as well, see Roberson, "Comity be Damned: The Use of Antisuit Injunctions against the Courts of a Foreign Nation", *U.Pa.L.Rev.*, Vol. 147 (No.2 Dec.,1998), p.413.

<sup>3</sup> Hayton, "The development of equity and the "good person" philosophy in common law systems", *ConV L*, Editorial (2012), p.4; Hartley, "Antisuit Injunctions and the Brussels Jurisdiction and Judgments Convention", *Int'l & Comp. L.Q.*, Vol.49, No.1 (Jan., 2000), p. 168.

<sup>4</sup> It shall be outlined that the early English judicial system had been unified and therefore under its auspices law and equity were applied by the same courts, see Roberson, *op.cit.*, p.413. Nevertheless, subsequently, the function of common law courts retrograded for they performed their duties in a strigent and stiff way. Thus, a two-tier network of jurisdiction was introduced, based on the distinction between common and equity law in order for the latter to cure the vacuums of the former, Ward-Akhtar, *English Legal System*, pp.5-6. Under that dual system, the Court of Chancery was a specialist *equity* court. Lord Chancellor Ellesmere's speech in the Earl of Oxford's case (1615) encapsulates the very essence of that pliable concept, as opposed to the rigidity of law, by underlining that «.....*The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstance. The Office of the Chancellor is to correct Mens Consciencs for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature so ever they be, and to soften and molify the Extremity of the Law.....*» (emphasis added) available at [https://www.griffith.edu.au/\\_\\_data/assets/pdf\\_file/0012/188688/early-intervention.pdf](https://www.griffith.edu.au/__data/assets/pdf_file/0012/188688/early-intervention.pdf) (accessed on 08.11.2015 at 18.23 p.m.). Afterwards, its competence has been transferred to the High Court Chancery Division by the Judicature Act 1873.

<sup>5</sup> Bell, *Forum Shopping and Venue in Transnational Litigation*, p.172 available at <https://books.google.gr/books?id=XBfoA-zf4xoC&pg=PA174&lpg=A174&dq=castanhov+v+brown+root&source=bl&ots=Va2Md6SnuQ&sig=f8tur8ydzHnVGdbLSFuYaBV3fd8&hl=el&sa=X&ved=0CD8Q6AewBWovChMIztqTuq2JyQIVC4ksCh05IAEu#v=onepage&q=castanho%20v%20brown%20root&f=false> (accessed on 08.11.2015 at 21.15 p.m.).

<sup>6</sup> Martin, *Modern Equity*, pp.7-8 and 17-20.

*good conscience*<sup>7</sup>. Under that version, injunction was infused by the concept of *equity*, which requiring the avoidance of *unconscionable*, *dishonest* and *unreasonable* conduct between the parties to a transaction has remained its cardinal characteristic up until today<sup>8</sup>. In the course of

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<sup>7</sup> Good conscience circumscribed in a negative fashion Chancelors' competence by authorizing them to intervene into common law courts' judicial power every time a case appeared, in their view, to be contrary to its requirements, Martin, op.cit.,p.8. Hence, dispensation of justice was literally utterly contingent on each Chancellor's subjective perception of good conscience or, in accordance with a proverbial expression, "Chancellor's foot". See an exhaustive inquiry into its meaning, Klinck, *Conscience, Equity and the Court of Chancery in early modern England*, available at [http://samples.sainsburysebooks.co.uk/9780754693444\\_sample\\_947596.pdf](http://samples.sainsburysebooks.co.uk/9780754693444_sample_947596.pdf) (accessed on 08.11.2015 at 19.25 p.m.) passim; Powell, "'Cardozo's Foot': The Chancellor's conscience and constructive trusts", available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4192&context=lcp> (accessed on 08.11.2015 at 20.10 p.m.). At that point, it should be crystallized that the Chancery functioned at two distinct levels. On the one hand, it filled the substantive gaps of common law. Therefore, it took action on the condition that common law remedies were inefficient to abide by equity for example due to the absence of specific performance claim under common law, see David-Brierley, *Major Legal Systems in the World today*, pp.341-343. So, in such a case a Chancellor once characteristically exclaimed «.....*You have made a promise. Promises are meant to be kept. Your immortal soul will be in danger if you do not keep your promises. I the Chancellor (who was originally a bishop) have a duty to safeguard your immortal soul. Accordingly, for the good of your soul, I am going to keep you in my prison until you decide to keep your promise.....*» available at [http://www.nswbar.asn.au/docs/professional/prof\\_dev/BPC/courses/files/Equity%20-%20Young%20J.pdf](http://www.nswbar.asn.au/docs/professional/prof_dev/BPC/courses/files/Equity%20-%20Young%20J.pdf) (accessed on 08.11.2015 at 19.00 p.m.). On the other hand, it interfered with common law courts' jurisdiction on equitable grounds. Exactly that function is the ancestor of the current notion of anti-suit injunction and it is not a coincidence that the thorn of deference to comity was present as well since «.....*much like modern courts, the early court of Chancery had to balance the protection of important interests through antisuit injunctions with the concern for comity between the courts.....*», Roberson, op.cit., p. 415.

<sup>8</sup> As observed in *Turner v. Grovit and others* it is «.....*necessary that the conduct of the party being restrained should fit "the generic description of conduct that is 'unconscionable' in the eye of English law". The use of the word "unconscionable" derives from English equity law. It was the courts of equity that had the power to grant injunctions and the equity jurisdiction was personal and related to matters which should affect a person's conscience. But the point being made by the use of the word is that the remedy is a personal remedy for the wrongful conduct of an individual. It is essentially a 'fault' based remedial concept. Other phrases have from time to time been used to describe the criticism of the relevant person's conduct, for example "vexatious" and "oppressive", but these are not to be taken as limiting definitions; it derives from "the basic principle of justice".....*», par.24 (emphasis added) available at <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd011213/grovit-1.htm> (accessed on 07.11.2015 at 13.00 p.m.).

time, it has been blossomed out into its current status quo of international standing<sup>9</sup>, tailored by common law jurisdictions in order to obstruct foreign litigation. By becoming a radical weapon in their arsenal, it has repeatedly endeavored to make fatal thrusts particularly into the civil law lines, bearing in mind that civilian jurisdictions do not have at their disposal a functional equivalent<sup>10</sup>. So, they would fight a losing battle if it were not for the ECJ to underpin them as *deus ex machina* in the forefront of that jurisdictional collision. In that sense, Europe has been destined to constitute the heated theatre of that smouldering war, fuelled incessantly by the unbridgeable gulf between the radically different legal cultures of common and civil law<sup>11</sup>. Exactly, this is the reason why the paper at hand concentrates on the treatment of anti-suit injunction within the EU, employing as starting point of its analysis the anti-suit injunction concept espoused by the UK as a member of the European family and further proceeding to group the basic requirements for its issuance and therefore the logic behind them. Afterwards, it delineates the core counter-considerations made by the continental Europe since the dialectical contrast of the whole argumentation allows its comparative assessment and thus its objectively critical approach.

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<sup>9</sup> Hartley, *op.cit.*

<sup>10</sup> Born, *International Commercial Arbitration*, Vol.1, pp.1041-1043 and especially p.1042, where the author characteristically comments that civil law not only defies anti-suit injunctions, but additionally some of its courts regard them as violation of their public policy, citing a judgment of the Oberlandesgericht Düsseldorf, according to which «.....*such injunctions constitute an infringement of the jurisdiction of Germany because the German courts alone decide, in accordance with the procedural laws governing them and in accordance with existing international agreements, whether they are competent to adjudicate on a matter or whether they must respect the jurisdiction of another domestic or a foreign court (including arbitration court).....These rights are safeguarded by the Germany procedural codes and, in many respects, by the [German Constitution]. **The courts must give effect to these rights. Instructions from foreign courts to the parties concerning the manner in which the proceedings are to be conducted and their subject-matter are likely to impede the German courts in fulfilling this task.....***» (citation omitted, emphasis added).

<sup>11</sup> That observation echoes a general acceptance described by the House of Lords in detail in *Airbus Industrie GIE v. Patel and others* available at <http://www.publications.parliament.uk/pa/ld 199798/ldjudgmt/jd980402/patel 02. htm> (accessed on 22.11.2015 at 15.50 p.m.), where it is underlined that «.....*Two different approaches to the problem have emerged in the world today, one associated with the civil law jurisdictions of continental Europe, and the other with the common law world. Each is the fruit of a distinctive legal history, and also reflects to some extent cultural differences which are beyond the scope of an opinion such as this.....*».

## SECTION I

### ANTI-SUIT INJUNCTION UNDER ENGLISH COMMON LAW

#### *I. The preliminary precondition to issue anti-suit injunction*

A pivotal stake of any courts' system is the *judicial economy*, namely the conduct of a trial in an as much as possible *convenient, prompt* and *inexpensive* manner as those ingredients guarantee the success of its "procedural recipe", mainly directed to the restoration of *social peace*<sup>12</sup>. However, that ideal is jeopardized by many obstructive factors<sup>13</sup>, amongst which the potential of parallel proceedings poses one of the most grave menaces since by devastating the unity of procedure, it amplifies the cost and time required for the dispute resolution, which by definition cannot be qualified as such, given the feasibility of issuance of two irreconcilable decisions. Hence, its prevention is in principle ranked as a high priority by all the developed legal orders<sup>14</sup>, which based on their legal background strive to "construct" the suitable conduit leading to the attainment of that fully desirable outcome. In common law area, that machinery is embodied in the concept of anti-suit injunction, as follows:

#### *II. The concept of anti-suit injunction*<sup>15</sup>

Anti-suit injunction is the procedural flagship of the jurisdictional allocation system in common law legal orders since not simply dictates but additionally coerces the disobedient litigant into having recourse to the competent judicial mechanism, by cutting his road to the foreign (allegedly) incompetent one and thus placing him in the stark dilemma in choosing between denial or dispensation of justice, even by an non-favorable forum. Specifically, functioning solely *ad personam*, it pursues to block a party to a dispute from commencing or persisting with an *abroad* litigation. That threshold feature indicates that the supply of anti-suit injunc-

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<sup>12</sup> Of course the other fundamental concern of civil trial is the unearthing of the substantial truth, which however often is sacrificed at the altar of the velocity. In essence, the best possible equilibrium between them is the perpetual goal of civil procedural law.

<sup>13</sup> However, most of them are *endogenous*, meaning they are contained in the inherent flaws of the procedure itself, such as for example the time of submitting the legal assertions, as opposed to the parallel proceedings factor, which is *exogenous*, namely it constitutes an external obstacle to the undermined trial.

<sup>14</sup> Nevertheless, it is submitted that comity considerations shall prevail over the parallel proceedings discomfort, see Baer, "Injunctions against the Prosecution of Litigation Abroad: Towards a Transnational Approach", *Stan.L.Rev.*, Vol.37, No. 1(Nov.,1984),pp 163 and 173.

<sup>15</sup> The exactly reverse case is represented by the so-called anti-arbitration injunctions, which are granted by state courts with the ulterior purpose to block the smooth operation of arbitration proceedings. See, Lew-Mistelis-Kröll, *Comparative International Commercial Arbitration*, pp.363-364.

tion is an unambiguously hostile to the foreign jurisdiction action and as such a purely offensive operation. So, by definition its issuance indispensably presupposes the occurrence of *special circumstances*, the degree of stridency of which sufficiently differ in accordance with the national identity of the granting authority<sup>16</sup>. In any event, their particularization takes always into account that anti-suit injunction, aiming at rendering substantial justice by preventing unconscionable procedural conducts undertaken by the parties to a dispute, is an *equitable* remedy and as such of *exceptional* nature. Those *particular* conditions justifying the issuance of anti-suit injunctions under English considerations will be elaborated on in the following:

### *III. The power to issue anti-suit injunction*

At the outset, it should be underscored that systematic grounds behove the paper to preliminarily draw a basic distinction regarding the entities vested with the authority to issue anti-suit injunctions, namely state courts and arbitral tribunals, since they base their power to dogmatically diversified legal foundations. Besides, that conceptual dichotomy is practically required as well, as it will certainly conduce the thread of that analysis to unravel in such a way so as to arrive at legally consistent valuations and thus at last to reach constructive conclusions. More specifically:

#### *1. State Courts' power*

State judicial mechanism is endowed with litigation "natural monopoly", by virtue of which it enjoys the inherently self-contained "competence-competence" to autonomously decide upon its jurisdiction over a given case. Once that adjudication is positive, the local forum is authorised to radically intervene into the foreign forum's realm by the way of anti-suit injunction in order to safeguard its legal order. In that respect, self-evident precondition for the exercise of that power appears to be the definite affirmation that local courts do have competence over the difference at question. Indeed, that conclusion in principle forms the basic rule, but as regards the UK approach there is a crucial variation acknowledged by its jurisprudence. Namely:

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<sup>16</sup>See, Born, op.cit., pp.1036-1041, in which it is illustrated the different approaches embraced by English and U.S. law, inter alia, upon the most typical example, the issuance of anti-suit injunctions in the case of arbitration agreements infringed by commencement of litigation by the recalcitrant party. In that event, whilst the former takes a much more liberal view fervently supporting a right to anti-suit injunction granting, the latter seems to adopt a by far more conventional and thus restrictive stance, drawing a distinction as to whether the disobedient party participates or not in arbitral proceedings. So, if in parallel she/he appears before arbitral tribunal-patently for challenging its jurisdiction-, she/he is more likely to be granted an anti-suit injunction. By contrast, if she/he undermines its authority by his striking absence, U.S. courts are inclined to provide anti-suit injunctions in order to clearly condemn that anti-procedural conduct.

According to that case-law an English forum retains its power to grant anti-suit injunction, provided that its jurisdiction over the dispute is typically established, even where the foreign forum is the only one before which a claim can be brought in an ad hoc situation. This exactly was the case in *Tropaioforos (No2)*<sup>17</sup> where a shipowner filed a lawsuit before English courts against a co-insurer and in parallel agreed that the ruling at stake would be binding, irrespective of its content, for all, including the other co-insurers, who not being sued were not litigants in the given dispute. Nevertheless, when the English court dismissed the claim, in absolute violation of the aforementioned undertaking the claimant blatantly brought a second action before Greek courts against the non-participants in the first trial co-insurers. Under those conditions, the last ones applied for an anti-suit injunction prohibiting the continuance of Greek proceedings before an English court, which in turn, holding that it did have competence by virtue of the Order 11 of rule 1 (1) of the Rules of the Supreme Court, decided to *varcare il Rubicone* by issuing an anti-suit injunction in order to enforce the crucial contractual obligation; and it acted so despite its ruling amounting to denial of justice as the plaintiff was hampered by the given agreement to having recourse to any other forum.

Furthermore, in addition to that purely *typical* prerequisite, construed rather liberally by the English judicial praxis, there can be enumerated three main categories of *substantial*<sup>18</sup> requirements that shall be met for the permissible issuance of anti-suit injunctions. Specifically:

*a) Legal bases of anti-suit injunction*

A vast jurisprudence has progressively specified the conditions, which render the granting of anti-suit injunctions legitimate and it is not a coincidence that all of them converge under a single common denominator, the serving of the very essence of justice by overcoming unfair clearly legalistic technicalities. Brevitatis causa, the paper rests emphasis solely upon the key points of the basic legal bases that nurture the international debate between case-law and academic community.

*i) Forum non-convenience*

Forum non-conveniens<sup>19,20</sup> is one more common law procedural peculiarity, the backbone of which is structured upon the notion that a court is permitted to stay its proceedings on the de-

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<sup>17</sup> See for a brief presentation of the case in Μουσταῖρα, op.cit., σελ. 282.

<sup>18</sup> That characterisation does not refer to the classical civilian distinction between procedural and substantive law, but it connotes the closer connection of those prerequisites with the evaluation as to whether anti-suit injunctions are to be granted or not, even if most of them doctrinairily belong, at least on their face, to the procedural law.

fendant's request where she/he maintains that the *natural forum*<sup>21</sup> of that case is placed in another jurisdiction<sup>22</sup>. Its precise construction has been shaped in harmony with the particular legal background of each country following the Anglo-American judicial system<sup>23,24</sup>. As regards the UK, its notional evolution started its journey as follows:

Basically, the seeds for its formulation were planted by the concepts of *vexatious*, *oppressive* and *abusive* proceedings<sup>25</sup>, which for a long time were acknowledged as the only legitimate ground for obtaining a suspension. In its landmark ruling in *Atlantic Mark*<sup>26</sup>, the House of Lords refined the aforementioned terms in order to "stretch" their content to their interpretative limits so as to further extend the possibility of stay judicial procedures. The crowning of that extra-expansive reading was the approach of the House of Lords adopted in *MacShannon v. Rockaware Glass Ltd*<sup>27</sup>, which was very characteristically expressed by the comment of Lord Salmon that «.....the real test of (whether to grant a stay) depends upon what the court

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<sup>19</sup> The term stems from the forum "non competens" concept, which was initially formulated by the Scottish jurisprudence of the 19<sup>th</sup> century, see for stimulating historical details in Μουσταῖρα, op.cit., σελ.9-14.

<sup>20</sup> It is very interesting that in *Re Harrolds (Buenos Aires)*, the court of appeal clarified that «.....it is very important to remember.....that "**conveniens**" is not adequately translated as "**convenient**". It is used in the sense in which lawyers use the word convenience, as in the phrase "balance of conveniens" in cases when the court is deciding whether or not to grant an injunction. **In such cases what the court is trying to do is achieve a balance of justice, or a balance of fairness between the parties, upholding existing rights and not upsetting matters which later will have to be undone, preserving the status quo so far as is reasonably possible. That is not convenience in the sense of what is nice and easy for the parties in any proper sense, and nor here do the words forum non conveniens mean the most handy court into which to pop.....**» (emphasis added), available at <http://www.uniset.ca/lloyddata/css/1992Ch72.html> (on 29.11.2015 at 19.37p.m.).

<sup>21</sup> That is defined «.....as being "that with which the action had the most real and substantial connection" and Lord Goff said....."It is for connecting factors in this sense that the court must first look".....», see in *Re Harrolds (Buenos Aires)*, ibid..

<sup>22</sup> Harris, "The Brussels I Regulation and the Re-emergence of the English Common Law", *The European Legal Forum (E) 4-2008*, p.I-183, available at <http://www.simons-law.com/library/pdf/e/888.pdf> (accessed on 11.11.2015 at 00.05 a.m.).

<sup>23</sup> O' Brian Jr, "The Hague Convention on Jurisdiction and Judgments: The Way Forward", *MLR*, Vol.66, No. 4 (Jul.,2003), p.496.

<sup>24</sup> See for a meticulous description of the English and U.S. approach in Μουσταῖρα, op.cit., σελ. 17-125.

<sup>25</sup> Pistis, "Forum non-conveniens", available at [http://www.judicium.it/old\\_site/news/pistis01.html](http://www.judicium.it/old_site/news/pistis01.html) (accessed on 11.11.2015 at 00.38a.m.); Μουσταῖρα, op.cit., σελ.97.

<sup>26</sup> See Μουσταῖρα, op.cit., σελ. 97.

<sup>27</sup> ibid.

*in its discretion considers that the justice demands.....»*<sup>28</sup>. Nonetheless, despite the purity of intentions the very fact remained that the implied, up to that point, forum non-conveniens idea was plunged into murky darkness. Nevertheless, the notable judgment of the House of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd*<sup>29</sup> cast new light upon that obscurity by determining certain factors that are to be used for its assessment. Specifically<sup>30</sup>:

a) A forum is considered as more proper, in other words convenient, to seize of an action provided that it is better qualified for serving the *interests of all parties* and the *ends of justice*<sup>31</sup>, assertion the onus of proof of which is on the defendant.

b) The criteria to be taken into account are *indicatively* determined and are primarily centralised upon painting the best possible overall picture of a case. In that vein, the law applicable to the dispute constitutes the decisive element, especially where there is a choice of law clause as obviously the more suitable forum for delivering a decision is only that applying its own law. Other equally crucial parameters colouring court's judgment are, inter alia, the proximity of witnesses and in general of evidences and the parties' residence or place of business.

c) It is for the claimant to counterattack by contending that the allegedly more appropriate and thus convenient forum cannot warrant restoration of justice for her/him.

While under those circumstances it is within court's *discretionary* power<sup>32</sup> to regard itself as non-convenient forum in order to negatively define its competence by staying proceedings, the mirror effect of that doctrine involves the exactly opposite instance. Namely, the case where a court, considering on the aforementioned grounds that it actually is the convenient

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<sup>28</sup> The exact passage is extracted from Pistis, op.cit.

<sup>29</sup> See the full text of that decision available at [http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/1986/10.html&query=title+\(+spiliada+\)&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/1986/10.html&query=title+(+spiliada+)&method=boolean) (accessed on 11.11.2015 at 01.45 a.m.).

<sup>30</sup> Pistis, op.cit.; Leow, "Forum non-conveniens: English or Australian approach", *S.A.C.L.J.*, Vol.2 (1990), p.44, available at <http://www.sal.org.sg/digitalibrary/Lists/SAL%20Journal/Attachments/16/1990-2-SAcLJ-041Leow.pdf> (accessed on 12.11.2015 at 00.20 a.m.); Μουσταῖρα, op.cit., σελ.101-103.

<sup>31</sup> That point expresses the original question of the forum non-conveniens doctrine, as is described in the old decision in *Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Français"* delivered by the House of Lords cited in Blair, "The Doctrine of Forum Non-Conveniens in Anglo-American Law", *Colum. L. Rev.*, Vol.29 No1 (Jan.1929), p. 20, according to which «.....*If in the whole circumstances of the case it be discovered that there is a real unfairness to one of the suitors in permitting the choice of a forum which is not the natural or proper forum, either on the ground of convenience of trial or the residence or domicile of parties, or of its being either the locus contractus, or the locus solutionis, then the doctrine of forum non conveniens is properly applied.....*» (citation omitted).

<sup>32</sup> Harris, op.cit.

forum, positively defends its jurisdiction against the invasion of a foreign, inconvenient one. Exactly in that event, it is equipped with the anti-suit injunction weapon in order to disarm the latter by preventing the (potential) claimant from bringing or continuing proceedings before it. That conclusion was assertively reached in *Castanho v. Brown & Root*<sup>33</sup> ruling, which in order to restrain foreign proceedings slavishly applied the forum non-conveniens test. However, the content of the latter, viewed through the hermeneutic prism of the interpretative aspect endorsed by the *Spiliada Maritime Corp. v. Cansulex Ltd*, was considerably broad and therefore as such vested English courts with almost absolute authority to manipulate foreign jurisdictions<sup>34,35</sup>. Hence, the Privy Council in *Société Nationale Industrielle Aérospatiale (S.N.I.A.S.) v. Lee Kui Jak*<sup>36</sup>, with the clear intention to significantly shrink that power, returned to the *oppressive* and *vexatious* proceedings concepts of the pre-Atlantic case era, as a distinct condition to be satisfied in order for a foreign forum to be evaluated as non-convenient<sup>37</sup>, which shall coincide cumulatively with the criteria established by *Spiliada*. Furthermore, it took a step forward by totally shifting the burden of proof on the defendant, who, applying for the granting of anti-suit injunction, ultimately shall additionally convince the court that the claimant of foreign proceedings will not suffer any injustice by being deprived of benefits conferred upon her/him by the foreign jurisdiction. So, under that construction, the application of forum non-conveniens legal basis for granting anti-suit injunction has significantly redressed the balance between the *foreign forum*'s alleged *inconvenience* and the *local forum*'s *convenience* and in so doing has come to its maturity.

That *equilibrium* coupled with the *discretionary* character of forum non-conveniens apparatus has rendered it a powerful procedural tool, which offers to common law courts a greater latitude for *adjusting* their judgment to the specific circumstances of each case, which additionally are contained in an open-ended list of parameters centralizing the resolution of a dispute on a specific jurisdiction. So, in the light of the adduced evidence, the judge is empowered to deliver an *ad hoc* decision predominantly premised on the indissoluble link that has been proven to exist ex post or/and ex ante between the case and the crucial forum, either local or

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<sup>33</sup> See its detailed analysis in Μουσταῖρα, op.cit., pp. 99-103.

<sup>34</sup> See Fawcett, *Declining Jurisdiction in Private International Law*, p.63 where the author characteristically aptly comments that «.....*The Spiliada criteria, if unthinkingly applied to the area of restraining foreign proceedings, would have led to English courts restraining foreign proceedings on the mere basis that the natural forum for trial was England.....*».

<sup>35</sup> See Colier, *Conflict of laws*, p.101; Μουσταῖρα, op.cit., σελ.280-281.

<sup>36</sup> See the factual background in Colier, op.cit., pp.101-102.

<sup>37</sup> See Colier, op. cit., pp.101-102; Μουσταῖρα, op.cit., σελ.269-271.

foreign one<sup>38</sup>, and in so doing she/he dispenses *individual justice*, meaning adaptable to the factual background of the case in question and therefore by far much fairer<sup>39</sup>.

*ii) Forum selection agreements*

Forum selection agreements are defined those conferring jurisdiction onto a court (*prorogatio*), even if the latter is extraneous to the case at question, and/or ruling out the authority of the otherwise competent one (*derogatio*)<sup>40,41</sup>. Despite the fact that procedural law echoes *public policy* considerations of the forum and therefore in principle cannot be by-passed, those agreements chiefly serve utterly *private interests*. Via them, specifically, each party pursues to render exclusively competent the courts of her/his place of business in order to seize the chance to be benefited in terms of a favourably prejudiced treatment presumably provided by local forums and also avoidance of excessively money and time-consuming abroad proceed-

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<sup>38</sup> While in the first event the court adjudicates upon the exercise of its own jurisdiction, in the second one it goes to the length of divesting itself of its competence, which in essence amounts to a denial to exert its authority. Nevertheless, the underlying ratio of that disobedience lies at the very heart of justice itself and specifically in the lofty idea of doing in concreto justice.

<sup>39</sup> The practical aspect of the forum non-conveniens doctrine, which is the relief of the overburdened dockets, was early underlined by the American pragmatism, Blair, op.cit., p. 1.

<sup>40</sup> Κεραμεύς, *Αστικό Δικονομικό Δίκαιο-Γενικό Μέρος*, σελ.78-79.

<sup>41</sup> They are governed by the *lex fori*, which means that the general rule is that the judge applies the procedural law of the forum unless the case is marked by internationality (The element of *internationality* has been proven rather controversial in the operation of the "Brussels I Regulation" and its forerunner the Brussels Convention, see for a concise presentation of the problem in Magnus-Mankowski, *Magnus: Brussels I Regulation*, Art.23 F in V par.23-26, pp.380-382). Then, the existence of an international legal instrument preponderates over any local regulation. At regional level provided that the preconditions set up by article 23 (that article succeeded art.17 of the Brussels Convention) of the "Brussels I Regulation"[Council Regulation (EC) No 44/2001 of 22 December 2000 "on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" (OJ L012 16/01/2001 p.0001-0023)] or by the subsequent provision 25 of the Regulation "Brussels I recast" [Regulation EU No 1215/2012 of the European Parliament and of the Council of 12 December 2012 "on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" (recast) (OJ L351/1-32 20/12/2012)], which applies on or after 10 January 2015 (art.66 §1 Brussels I recast), are fulfilled, they are subject to the normative framework of the respective aforementioned statutes. Worldwide, they are currently dealt with by the Hague Convention of 30<sup>th</sup> June 2005 on "Choice of Court Agreements" [Its text is available at <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf> (accessed on 13.11.2015 at 02.45 a.m.), see for its (potential) positive impact on the USA, "Recent International Agreement", *Har. L. Rev.*, Vol.119, No.3 (Jan., 2006), pp.931-938].

ings<sup>42</sup>. Taking into consideration those clearly individualised dimensions of civil trial, forum selection agreements are regarded as legitimately falling within the ambit of party autonomy and thus normally permitted through its principal expression, freedom of contracts.

Freedom of contracts constitutes the steam engine of private initiative throughout the civilized legal world for it enables the entrepreneurialism to flourish and therefore the volume of commercial transactions to constantly soar. Despite the boundaries established by modern legislations<sup>43,44</sup>, still it retains much of its power to decisively define the potential of contemporary economy. So, by virtue of its paramount importance, it comes as no surprise that it is express acknowledged by article 1:102 of the Principles of European Contract Law<sup>45</sup>, according to which «(1)Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles.....».

Indisputably, that provision articulates the common orientation of European legal family, but at the same time it reflects the tension lurking behind the words used. Namely, the invocation of good faith as an inherent boundary to freedom of contracts is evidently sealed by the civil law legal approach in complete, however, contradistinction to the upmost common law values<sup>46</sup>. Namely:

Freedom of contract is the "holy cow" of English common law tradition to the extent to which the maxim *pacta sunt servanda* exerts its catalytic influential effect without exceptions con-

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<sup>42</sup> *ibid.*, Art.23 A par.5, pp.373.

<sup>43</sup> Especially, where the counter contractual parties do not enjoy equal bargaining power, namely mainly in the case of consumers' and employment contracts.

<sup>44</sup> However, there has been increasingly raised a skepticism towards their unlimited adoption, the basic argument of which is that excessive protectionism breeds abusive behaviours of the presumably weak party, which harm businesses and at last the economic growth.

<sup>45</sup> Prepared by the Commission on European Contract Law.

<sup>46</sup> "Good faith" is a purely civilian concept and its reference to legal text of international scope is unquestionably the outcome of a negotiating marathon between civil and common law camps culminating in a compromise, which however subsequently produces many hermeneutic problems as to the essence of its invocation. A very striking example is the provision of art.7 of the CISG, according to which «.....In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of **good faith** in international trade.....». So, while civilian lawyers advocate that the aforementioned acknowledgment of "good faith" entails the generation of further (positive) contractual obligations, its common law reading as- setively refuses such an expansive interpretation since it causes great uncertainty and therefore dis- incetivizes the parties to enter into a contract. See for a detailed analysis of that provision of the CISG, Goode-Kronke-McKendrick-Wool "Trasnational Commercial Law-International Instruments and Commentary", pp.278-291.

ceded in the name of such an equivocal concept, such as good faith<sup>47</sup>. That practically means that once an economic operator decides as free individual whether to contract, with whom and on what terms, she/he is definitely bound by that promise and cannot circumvent her/his contractual obligations by stratagems ideologically attired by the blowing smoke of empty, meaning without pre-determined and thus foreseeable content, concepts. Consequently, freedom of contract prevails absolutely over any other consideration and this omnipotence is very vividly demonstrated by the inextricably linked to it doctrine of the binding force of contracts, for the expression of which it was coined the emblematic term "*sanctity of contracts*"<sup>48</sup>, that overmasters over English area of private law.

Therefore, from the common law perspective, forum selection agreements embody a promise which cannot be broken. Parties shall abide by contract fidelity by any means, id est even by way of granting anti-suit injunction. So, in that case, the latter in essence guarantees and safeguards the *specific performance* of a forum selection agreement, which otherwise would be reduced to a hollow threat so that the defendant would remain helpless to be led defencelessly by the disrespectful conduct of her/his counter party. Of course, it is well-known that as a matter of principle, in common law reality there is no right to the so-called *in natura* performance<sup>49</sup> since damages are considered an efficient remedy<sup>50</sup>. Nonetheless, that general principle, deeply rooted in English legal tradition<sup>51</sup>, is allowed to be derogated from, inter alia<sup>52</sup>, where a contract contains a negative obligation, the violation of which can be restrained by an injunction<sup>53</sup>. The breach of forum selection agreements represent such a case since the positive undertaking made to bring a suit before a specific forum is by definition equivalent to the negative one not to initiate proceedings elsewhere<sup>54</sup>. It is noteworthy that despite the fact that

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<sup>47</sup> Beale, *Chitty on Contracts (General Principles)*, Vol.1 par.1-020/021, pp.17-20.

<sup>48</sup> *ibid.*, par.1-017 in f.109, p.14.

<sup>49</sup> *ibid.*, par.27-001, p.1521.

<sup>50</sup> The traditional core argument is that damages adequately cover the loss suffered. Nevertheless, its axiomatic prevalence nowadays loses ground and English courts examine in concreto whether damages suffice to satisfy the lender or not and afterwards issue ad hoc judgments. See for an overall analysis *ibid.*, par.27-005/018, pp.1523-1531.

<sup>51</sup> *ibid.*, par.27-001, p.1521 and in n.7.

<sup>52</sup> *ibid.*, par.27-007/008/009/010/013/018, pp.1523, 1525-1526, 1527 and 1531.

<sup>53</sup> Of course this is the general rule. For further details and special distinctions *ibid.*, par.27-059/074, pp.1556-1565.

<sup>54</sup> This case remarkably resembles a category of contracts which is often allowed by the English courts to be enforced by injunction, namely those containing a covenant restraining competition provided that it is valid, which primarily means that it has limited duration. *Ibid.*, par.27-066, pp.1560-1561. Specifi-

under that derogation English courts exercise their discretion to recognise a right to specific performance cautiously, where it is for an infringement of a forum selection agreement they act without the slightest hesitation. This is explained by the fact that they bear in mind teleological considerations and basically the economic ramifications deriving from the irrecoverable breach of a forum selection agreement<sup>55</sup>, which is noticeable that it is primarily stipulated in cross-border transactions.

Undoubtedly, the enforceability of commercial contracts is their currency and once that currency is devalued, the credibility of the system will take a heavy and perhaps incurable blow, which would condemn the imperial reach of English law in commercial relations to its decay. So, in fact, the stance of English courts regarding the issuance of anti-suit injunctions for the enforcement of a forum selection clause is predominantly inspired by the pressing expediency to keep holding the reins of transnational commerce and this is a natural pursuit on their part since all the empires, led by their inherent instinct of self-preservation, do not lay down their arms, especially if they regard them as their traditional legal *acquis*. Consequently, instead of irrationally combating English positions, it is time to critically and creatively assimilate their example of prosperity<sup>56</sup>.

### *iii) Arbitration agreements*

According to its stereotypical definition set up by article II (1) of the NYC, arbitration agreement is «.....an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not,.....»<sup>57</sup>. Therefore, that agreement infuses the arbitral tribunal with the power to adjudicate upon the designated disputes and in so doing constructs a parallel judicial system for the dispensation of justice in a precisely definite area of law, confined by the arbitrability doctrine<sup>58</sup>. In that area, (again)<sup>59</sup> dominate private individual interests, such as for example the necessity for a neutral<sup>60</sup> mechanism of dis-

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cally, they are teleologically closely connected in that they are intended to serve the unimpeded function of the market.

<sup>55</sup> The loss of which is very difficult to be quantified, *ibid.*, par.27-008,pp. 15 25-1526.

<sup>56</sup> Vogenauer-Weatherill:Ashton, *The Harmonisation of European Contract Law*, p.246.

<sup>57</sup> In the same line, article 7 (1) of the UNCITRAL Model Law provides that an arbitration agreement is «..... an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.....».

<sup>58</sup> Born, *op.cit.*, pp.766-841.

<sup>59</sup> As is the case in forum selection agreements [see Section I under III (1) (a) (ii)].

<sup>60</sup> Born, *op.cit.*,pp. 72-74.

pute resolution being centralised<sup>61</sup> on a specific situs and rendering binding<sup>62</sup> and final<sup>63</sup> decisions, the avoidance of money and time-consuming litigation proceedings<sup>64</sup> through the procedural arbitral flexibility<sup>65</sup> and the protection of privacy<sup>66</sup> and confidentiality<sup>67</sup> of parties<sup>68</sup>. The prevalence of all those considerations elucidates why arbitration constitutes a "full-blooded" born of party autonomy, towards which common law community and especially the English one has an exquisite sensibility, as explained in detail above<sup>69</sup>. Nevertheless, in this case party autonomy does not stand alone, but it is armed by further conceptual reinforcement in reserve.

Specifically, as it is well-known, arbitration agreement is accompanied by certain contractual effects, the so-called *positive* and *negative* one, both of which are expressly acknowledged by the NYC and national statutes worldwide, as well. The former is steadily translated into the positive obligation to participate in arbitral proceedings in good faith, which is analyzed in co-operatively taking part in the whole process by affirmatively launching its smooth operation, by constituting the arbitral tribunal, paying promptly the arbitrators, abiding by the mutually established procedure and so forth<sup>70</sup>. Nonetheless, however significant procedurally and therefore in effect substantially, in essence there is no remedy available for its enforcement by the way of affirmatively directing the parties to arbitration proceedings with notably rare and welcome exceptions, such as that provided under §4 and 206 of the FAA in the US<sup>71</sup>.

The reverse side of the coin, *id est* of the positive obligation, is the negative one, according to which the parties to an arbitration agreement simultaneously with the commitment to promote

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<sup>61</sup> *ibid.*, pp.74-76.

<sup>62</sup> *ibid.*, pp.76-78.

<sup>63</sup> *ibid.*, pp.81-82.

<sup>64</sup> *ibid.*, pp.84-86.

<sup>65</sup> *ibid.*, pp.82-84.

<sup>66</sup> It is opposed to the publicity of the hearings and as such develops its power against third parties.

<sup>67</sup> It is binding only for the parties to an arbitration agreement.

<sup>68</sup> Born, *op.cit.*, pp. 87-88.

<sup>69</sup> See Section I under III (1) (a) (ii).

<sup>70</sup> See *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp.* (1981) A.C.909, 982-83, 985 (House of Lords), according to which «.....a necessary implication from their [meaning the parties]having agreed that the arbitrator shall resolve their dispute that both parties, respondent as well as claimant, are under a mutual obligation to one another to join in applying to the arbitrator for appropriate directions to put an end to the delay.....». The exact passage is extracted from Born,*op.cit.*, p.1010.

<sup>71</sup> See Μουσταῖρα, *op.cit.*, p.283 in f.382 where the author characterises that remedy as the "converse" form of anti-suit injunction.

arbitral proceedings self-evidently are bound themselves not to have recourse to litigation for its initiation cancels the expected fruits of the agreement to arbitrate, meaning the "fast-track", unquestionable and reliable resolution of a dispute. Hence, the NYC specifically provides in art.II that«.....1.*Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences.....between them.....*» and therefore a court «.....3...*when seised of an action in a matter in respect of which the parties have made an agreement whithin 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.....*».

The "conventional" means for the fulfilment of that requirement, in terms of their practical efficacy to promote arbitration, are either stay or dismissal of the lawsuit at stake. However, their adoption does not neutralize the poisoning of the whole procedure by the way of money and time unreasonable waste and as *justice delayed is justice denied*, it has been more than obvious the dire need for a more "effective medicine". That has been fleshed out in the "un-conventional" form of anti-suit injunction, that by instantaneously intervening in the questionable litigation prevents the life of arbitration values from being irrecoverably harmed.

From that angle, anti-suit injunction at least in arbitration context is not just another common law oddity, but the *appropriate* and *necessary* defense against the breach of arbitration agreement. The party undertaken to arbitrate by initiating litigation delivers a fatal wound to the very heart of arbitral agreement by canceling the *reasonable* expectation of the counterparty that their designated differences, including any question concerning the validity of arbitration agreement, will be resolved by the arbitral tribunal. In so doing, she/he compels the latter to ex ante disclaim by force any responsibility over their disputes without even having the opportunity to exercise its power to decide upon its own jurisdiction. Against that unilateral and therefore arbitrary action, which being a hitting under the belt produces a *fait accompli*, the only effective reply is a crucial counterblow capable of restoring the fundamentally impaired contractual balance. Exactly, that response is offered by means of anti-suit injunction, that is so interventionist in litigation so as to call to order the violating party. So, in arbitration field, injunctive relief should be viewed as an indispensable concomitant of arbitration agreement for without its power arbitration agreement is condemned to fall into complete disrepute, having been utterly devoid of its original allurements.

#### *b) Comity considerations*

However cogent and irresistibly appealing to the common sense of justice, English argumentation has been harshly emasculated by a growing current of scathing criticism permanently nourished by the steady *comity* polemic. Notwithstanding its corrosive effects, comity per se

is not strictly and precisely crystalized in terms of the criteria<sup>72</sup> required to be fulfilled in order to be activated. So, unavoidably, only its sweeping notion can be formed by groping about its traces in some crucial turning-points of its history.

First of all, comity ascribes the latin term *comitas gentium*<sup>73</sup>, id est the civility of nations, and was conceived by the Dutch school of legal thought represented by the titanic figure of Ulrich Huber to vindicate the application of foreign law by local forums<sup>74</sup>. Throughout the 18<sup>th</sup> and 19<sup>th</sup> century, based on its discretionary nature, courts either advanced the invocation of foreign legislation or abstained from it on grounds of public policy<sup>75</sup>. Meanwhile, that concept was successfully trasplanted to the fertile and mature legal syllogism of the pre-eminent judge and scholar, Joseph Story who fierily embraced it so as to lay the foundations of the conflict of laws moot question in the US<sup>76</sup>, which christened Private International Law. In 1895, the US Supreme Court in *Hilton v. Guyot* formulated its noted definition, according to which «..... 'Comity', in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.....»<sup>77</sup>.

Nevertheless, that approach is not only lacking the structural quality of a normative provision capable of being directly applied, but even the elementary form of a *general principle of law* providing *specific* guidelines for the application of law, namely the standards to be met, particularly taking into consideration its overflowing discretionary character. Operating to a grey zone between the prohibition of an absolute obligation and a mere courtesy at the same time without any concrete orientation, comity resembles a wayward ship drifted by the boisterous winds that each legal order is able and willing to unloose. So, despite its underlying lofty notion of emulation of each other nation, comity can be qualified solely as a *value* dictating the mutual deference to the states' jurisdictions, the observation of which is utterly contingent on their will, as the latter is expressed by the competent court that legally rationalize its decision

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<sup>72</sup> Look Chan Ho, "Anti-suit Injunctions in Cross-border Insolvency:a restatement", *Int'l & Comp. L.Q.*, Vol.52, No.3 (Jul., 2003), pp.713-717 and especially 716.

<sup>73</sup> Literally meaning "generosity", "courtesy" towards nations.

<sup>74</sup> Paul, "The Transformation of International Comity", *Law &Contemp. Probls*, Vol.71, No.3 (Summer, 2008), p.22.

<sup>75</sup> *ibid.*, pp.22-23.

<sup>76</sup> Ehrenzweig, "American Conflicts Law in its Historical Perspective:Should the Restatement be "continued"?", *U. Pa.L.Rev.*, Vol.103, No.2 (November, 1954), pp.135-138.

<sup>77</sup> The exact passage is extracted from Look Chan Ho, *op.cit.*, p.714.

to grant or not an anti-suit injunction by setting up certain criteria and thus boundaries to the exercise of its authority<sup>78</sup>.

Under that construction, comity is morphed into a workable instrument as it takes the required normative shape necessarily being animated by the fundamental principles of the local forum, as expressed by their well-established legal institutions. Those constitute concepts that intrinsically have co-evaluated the unavoidable co-existence with other legal orders worldwide by setting up specific prerequisites allowing a local court to exert its authority but simultaneously curtailing it not to do so beyond their fixed boundaries. Besides, that exactly is the very function of the rules determining the domestic jurisdiction of a forum and hence are alternatively called rules on the international jurisdiction, being the *keepers of the gateway* to their forum by opening or closing it based on strict orders, their rules. So, without a universally acceptable notion of comity, probably in the form of an international treaty, this is the only way to go forward.

Nonetheless, the automatically natural problem that arises out of that *factum* is its totally subjective conception, id est in accordance to the legal identity of local forums, the plethora of which are fundamentally diversified. This ultimately means that there are as many versions of comity as the respective legal orders all around the world, which unavoidably augurs the clash of jurisdictions, which is exactly the core question of that paper<sup>79</sup>.

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<sup>78</sup> Exactly that idea is conveyed by the judgment of the House of Lords in *Airbus Industrie GIE v. Patel and others* (see for the full text of the judgment op.cit.), pursuant to which «.....As a general rule, before an anti-suit injunction can properly be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction ....., comity requires that the English forum should have a **sufficient interest in, or connection,** with the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails.....» and Lord Goff continued remarking that «.....the problem which has arisen in such an acute form in the present case requires the English courts to identify, for the first time, the limits which comity imposes on the exercise of the jurisdiction to grant anti-suit injunctions. **In truth, the solution which I prefer gives.....due recognition to comity but, subject to that, maintains.....the traditional basis of the jurisdiction as being to intervene as the ends of justice may require.....**», concluding that «.....The basic principle is that only the courts of an **interested** jurisdiction can act in the matter;.....Such are the limits of a system which is dependent on a remedy of an anti-suit injunction to curtail the excesses of a jurisdiction which does not adopt the principle, widely accepted throughout the common law world, of *forum non conveniens*.....» (emphasis added). In that line of reasoning, it is worth mentioning that the House of Lords observed that it had no link with the case at bar since the UK did not constitute the natural forum for adjudicating upon an air crash having taken place in India. Hence, it denied to the French manufacturer of the aeroplane the granting of an anti-suit injunction aiming at discontinuing litigation in Texas courts, before which some victims resorted.

<sup>79</sup> See the Preface of that paper.

## 2. *Arbitral Tribunals' power*

Comity reservations are considerably mitigated where anti-suit injunctions are granted by arbitral tribunals in case of a breach of the contractual obligation to arbitrate by way of launching litigation by either of the parties to the arbitration agreement. Despite the *de facto* appreciation of that practice by arbitral tribunals, it remains widely open the vexed question of their *de iure* legitimacy to act in such a fashion so as to substitute for courts' function and therefore in that regard usurp to some extent their power. However, it is persuasively fairly strongly suggested that their authority is a "self-sown sprout" sprang up by the arbitrators' «... .. *jurisdiction to sanction, by equivalent or in kind, violations of the arbitration agreement... ..*»<sup>80</sup> and additionally «... .. *to take any measure necessary to avoid the aggravation of the dispute or to protect the effectiveness of the award... ..*»<sup>81</sup>. In other words, the arbitration agreement generates not only the *right* but in essence the binding and enforceable *obligation* to arbitrate, and in turn arbitrators are inherently intended to safeguard it by any means, including the issuance of anti-suit injunctions. But still, another query is left to be retorted concerning the foundation of arbitral tribunals' authority where the arbitration agreement is *per se* invalid<sup>82</sup> and as such incapable of producing legal effects.

Hence, it is submitted that the remoter source of such power flows from a self-luminous arbitral doctrine, which is traditionally called *Kompetenz-Kompetenze (Competence-Competence)*<sup>83</sup>, according to which each and every arbitral tribunal has the innate *imperium* to decide upon its own jurisdiction, as it is prescribed by the respective arbitration agreement. Specifically, that authority is expressed by two distinct aspects, the *positive* and the *negative* one. The former

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<sup>80</sup> Gaillard, "Anti-suit Injunctions Issued by Arbitrators", *ICCA Congress Series*, No. 13, *International 2006: Back to Basics*, available at [http://www.arbitration-icca.org/media/4/5\\_1236275887736/media012178544\\_334520back\\_to\\_basics\\_eg.pdf](http://www.arbitration-icca.org/media/4/5_1236275887736/media012178544_334520back_to_basics_eg.pdf) (accessed on 09.11.2015 at 18.25 p.m.), pp.237-239.

<sup>81</sup> *ibid.*, pp.239-240, see additionally pp.240-244, where the author examines in a doctrinairely consistent way the sources of the arbitrators' competence to issue anti-suit injunctions. On the contrary, it is maintained that there is no plain legal basis vesting arbitral tribunals with that power and therefore «... .. *arbitrators should only issue anti-suit injunctions when it comes to their attention that one of the parties has committed fraud or otherwise engaged in abusive behavior in order to revoke the arbitration agreement... ..*», Levy, "Anti-Suit Injunctions Issued by Arbitrators", available at <http://www.lk-k.com/data/document/anti-suit-injunctions-issued-arbitrators.pdf> (accessed 09.11.2015 at 20.00 p.m.), p.126.

<sup>82</sup> The case where the underlying contract suffers from a defect shall be distinguished as then the arbitration agreement becomes immune to it by virtue of the separability doctrine. See for the separability presumption and more specifically its relation with the *Kompetenz-Kompetenz* doctrine in Born, *op.cit.*, Vol.1, pp.872-876.

<sup>83</sup> *ibid.*, pp. 855-856 and 877-966.

means that arbitral tribunals (affirmatively) self-determine their jurisdiction and the latter entails that courts are obligated to refrain from making interlocutory decisions as regards tribunals' competence. While its *positive* dimension is universally express acknowledged by international conventions, the UNCITRAL Model Law and innumerable national legislations in an almost unanimous manner, the *negative* one remains a bone of contention in the sense that there is no consensus as to the degree of courts' abstention from adjudicating upon tribunals' jurisdiction<sup>84</sup>.

In particular, considering the existence of chaotically diversified legal orders all around the world, unsurprisingly there is not an internationally stabilized position even under the aegis of the NYC, that attentively avoids to touch the "hot potato" of the distribution of power between arbitral tribunals and state courts<sup>85</sup>. The fact that the UNCITRAL Model Law does address the issue, by in principle acknowledging the authority of arbitral tribunals to decide upon their own jurisdiction (art.16), subject to subsequent judicial review (art.34), while however at the same time allowing interlocutory decisions being made prior or even simultaneously with arbitral proceedings (art.8 § 1)<sup>86</sup>, patently does not offer a sound solution. Given that it is not a binding legal text, the unconditional adherence to it is rather dubious as states are most likely to adapt its content to their legal mindset. Consequently, the international territory is utterly infertile to produce clear rules determining the relationship between arbitral tribunals and courts. So, in effect it remains the local arena, which however preserves its crucial role, taking into account that arbitral proceedings are governed by the procedural law of the arbitral seat<sup>87</sup>. So, at national level, only the French approach approximates most closely to the negative expression in its pure form by providing in article 1458 §1 of the new CCP that «.....*Where a dispute submitted to an arbitral tribunal by virtue of an arbitration agreement is brought before a national court, such court shall decline jurisdiction.....*» (emphasis added). On the contrary, German legislative stance is much more interventionist by allowing an interlocutory decision to be made prior to the initiation of arbitral proceedings or in any case under certain conditions in parallel with them [art.1032 (1, 2) ZPO]<sup>88,89</sup>. In that obviously divided environ-

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<sup>84</sup> *ibid.*, pp. 856-872.

<sup>85</sup> *ibid.*, p.858.

<sup>86</sup> See for a meticulous analysis of the aforementioned provisions, *ibid.*, pp. 880-899.

<sup>87</sup> See a detailed presentation of the whole issue in Henderson, "Lex Arbitri, Procedural Law and the Seat of Arbitration", *S.Ac.L.J.* (2014), pp.886-910 available at [http://www.sal.org.sg/digitallibrary/List/s/SAL%20Journal/Attachments/703/\(2014\)%2026%20SAL%20AcLJ%20886-910%20\(Lex%20Arbitri%20-%20Alastair%20Henderson\).pdf](http://www.sal.org.sg/digitallibrary/List/s/SAL%20Journal/Attachments/703/(2014)%2026%20SAL%20AcLJ%20886-910%20(Lex%20Arbitri%20-%20Alastair%20Henderson).pdf) (accessed at 22.01.2016 at 17.32 p.m.).

<sup>88</sup> Article 1032 ZPO states «(1) *A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if the respondent raises an objection prior to the beginning of the oral hearing on the substance of the dispute, reject the action as inadmissible, unless the court finds*

ment, the English view, as expected, traditionally sticks to parties' agreement to arbitrate and by virtue of article 30 of the English Arbitration Act (1996) states that «.....(1)**Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-(a)whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with arbitration agreement.....**» (emphasis added). Nonetheless, even if the parties have not a priori agreed upon resorting to court, a posteriori it is offered a second chance to a party who participates in arbitral proceedings to seek an interlocutory decision under the condition that either **all the parties to the dispute agree upon** or at least the arbitral tribunal permits that action and simultaneously the court is satisfied [art.32 (1, 2)]<sup>90</sup>.

Exactly, that kind of regulation, which namely contains the current national rules directly applicable as *lex loci arbitri*<sup>91</sup>, standardizes certain *criteria* weighed by the local legislator himself so as to accurately allocate the jurisdiction between state courts and arbitral tribunals; and in so doing, it prescribes the *boundaries* within which arbitral tribunals are entrenched in order to legally intervene into courts' proceedings by hampering the disobedient party to litigate a dispute already contractually submitted to arbitration. Therefore, a *private* judicial mechanism, as is represented by the arbitrators, do not "put into its pocket" the *sovereign* authority,

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*that the arbitration agreement is null and void, inoperative or incapable of being performed. (2)Prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible (3) Where an action or application referred to in subsection 1 or 2 has been brought, arbitral proceedings may nevertheless be commenced or continued, and an arbitral award may be made, while the issue is pending before the court. », translation available at [http://www.trans-lex.org/600550/#\\_head\\_11](http://www.trans-lex.org/600550/#_head_11) (accessed on 18.11.2015 at 21.05 p.m.).*

<sup>89</sup> See, Born, op.cit., Vol.1, pp.907-910.

<sup>90</sup> Article 32 (1, 2) of the English Arbitration Act (1996) stipulates that «.....(1) *The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.....(2) An application under this section shall not be considered unless- (a) it is made with the agreement in writing of all the other parties to the proceedings, or (b) it is made with the permission of the tribunal and the court is satisfied:(i) that the determination of the question is likely to produce substantial savings in costs,(ii) that the application was made without delay, and (iii) that there is good reason why the matter should be decided by the court.....* ».

<sup>91</sup> See in n.87.

as is incarnated by national courts, but acting *intra ius* it is absolutely authorised to exercise its discretion<sup>92</sup>.

That construction shall surmount a last obstacle, *id est* the accusation that the issuance of anti-suit injunctions might infringe the fundamental right, most often constitutionally enshrined, to have free access to justice rendered by state courts<sup>93</sup>. However, as aptly is submitted<sup>94</sup>, that freedom has been bartered away by the parties to a dispute themselves when entering into the arbitration agreement. Besides, it is well-known, in the framework of civil trial, given that the latter pertains to private interests, parties maintain the power to dispose of their rights, either procedural or substantive ones, by abiding with certain formalities, for it is an *ex post* waiver and as such utterly permissible. The further remark that a party resorting to litigation by definition challenges the existence of an arbitration agreement and therefore there is no legally binding waiver, is rather legalistic as once an arbitration agreement has at least its external appearance, containing parties' consents, automatically activates the *Kompetenz-Kompetenz* doctrine. Therefore parties become inescapably subject to the arbitral tribunal's jurisdiction, even in the form of issuance anti-suit injunctions.

## SECTION II

### ANTI-SUIT INJUNCTION UNDER EU LAW

#### *I. The counterbalance of anti-suit injunction's device*

The response of the EU, which has been inundated with civil law countries<sup>95</sup>, to the parallel proceedings peril is rested upon a radically diversified foundation stone, namely the principle of *lis alibi pendens*<sup>96</sup>, which acclaims the first-filing rule. That one empowers the court first seized of an action to proceed with the litigation, irrespective of its actual competence or not, while it forces the second one to stay its proceedings. Solely, on the condition that the former adjudicates upon its lack of jurisdiction, the latter is allowed to further advance its own procedure. There is no doubt that this mechanism is heavily inspired by the notion of mutual def-

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<sup>92</sup> Besides, exactly that point explains the great delicacy manifested by the arbitral tribunals seated in the UK against arbitrary parallel litigation, considering in addition that the latter lacks the indispensable according to the English Arbitration Act (1996) consent of the parties and as such shall be thwarted.

<sup>93</sup> See the reference to that argument and its refutation in Gaillard, *op.cit.*, pp.241-242.

<sup>94</sup> *ibid.*

<sup>95</sup> In fact, the vast majority of the EU member states trace their legal legacy to civil law tradition, save the UK and Ireland.

<sup>96</sup> Which is literally translated as a dispute elsewhere pending.

erence to the jurisdictional sovereignty of each legal order whilst simultaneously ensures the predictability necessary for the smooth operation of the single judicial space within the EU<sup>97</sup>. Nevertheless, the blind adherence to it, as is has been set out by the Brussels I Regulation<sup>98</sup> and repeatedly interpreted by the ECJ, has been proven able enough to lead to inequitable and in the bottom line unjust effects, precipitating a crisis deeply discrediting the aforementioned EU legislative option, as follows:

### *1. The lis alibi pendens rule under the Brussels I Regulation*

Article 27 Brussels I Regulation<sup>99</sup> adopts the *unexceptional* application of the *lis alibi pendens* rule<sup>100</sup>, which despite its stiffness has been further ossified by the action's *same cause* concept espoused by the landmark decision *Gubisch Maschinenfabrik KG.v.Giulio Palumbo*<sup>101</sup>. Specifically, reading that term *autonomously*<sup>102</sup>, the ECJ has defined it extra-expansively so as to

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<sup>97</sup> Recital 11 of the Brussels I Regulation proclaims that «.....*The rules of jurisdiction must be **highly predictable** and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor.....*» (emphasis added).

<sup>98</sup> The paper starts its analysis with the Brussels I Regulation for its application has dominated since its entry into force on 1<sup>st</sup> March 2002 (art.76 Brussels I Regulation) up until relatively recently, namely on 10 January 2015 (art.81 Brussels I Regulation recast), provided that legal proceedings have instituted on or after that date (art.66 §1 Brussels I Regulation recast).

<sup>99</sup> The initial respective provision of its forerunner, namely the Brussels Convention, stated that «.....*Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court. A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.....*» (art.21 Brussels Convention).

<sup>100</sup> Specifically, pursuant to that provision «.....*1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.....*».

<sup>101</sup> C-144/1986 ECR 1987 04861.

<sup>102</sup> As a matter of principle, the interpretation of EU law is completely **autonomous**, meaning detached from the domestic legal systems of the Member States. As such does not constitute a conventional method of construing a legal text, such as literal, historical or systematic one, but rather an independent from the national laws form of legal approach in order to promote the uniform application of EU law and thus decisively conduce to the accomplishment of EU policies.

include any issue lying at the heart of two actions<sup>103</sup> with the result that the *lis alibi pendens* rule has easily pinched a great range of cases with its claws. In particular:

## *2. The lis alibi pendens rule under the ECJ's interpretation*

The ECJ has moved on to systematically unnailed the common law "pettifoggeries"<sup>104</sup> for evading parallel proceedings's minefield by an unprecedented recital of slavishly literalistic interpretation that has strived to deconstruct any point of the English positions. However, that attempt lacks substantial argumentation and the mechanistic invocation of article 27 Regulation Brussels I does not retrieve the whole situation, as will become patent in the ensuing paragraphs.

### *a) Forum non-convenience jurisprudence*

#### *i) Owusu v. Jackson*<sup>105</sup>

In this case, the plaintiff suffered a serious diving accident on its vacation in Jamaica<sup>106</sup>. Hence, he brought an action before English courts, by which he suited the lessor of the holiday villa, who was domiciled in the UK, for breach of the contractual obligation to provide him a safe stay and the companies entangled with the exploitation of the beach concerned, which were based in Jamaica, for their tortious conduct. At first instance, the defendants objected to the competence of English courts on grounds of them being a non-convenient forum since the dispute was closer linked with Jamaica. Nevertheless, the submission was dismissed as it was decided that the domicile of one of the defendants in the UK was sufficient in order to establish the English jurisdiction under the Brussels Convention for all of them<sup>107</sup>,<sup>108</sup>. Ultimately, on appeal, the court chose to refer the case to the ECJ for a preliminary ruling

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<sup>103</sup> Specifically, in that case, the one action was intended to enforce a contractual obligation and the adversary one to rescind it. So, according to the ECJ «.....*The question whether the contract is binding therefore lies at the heart of the two actions.....*» (emphasis added), C-144/1986, op.cit., at par.16.

<sup>104</sup> The term is obviously used in excess exclusively for emphatic reasons, mainly in order to stress the great ideological distance between common and civil law and does not imply anything else.

<sup>105</sup> C-281/02 [2005] ECR I-01383.

<sup>106</sup> Namely, it left him tetraplegic.

<sup>107</sup> In particular, the court ruled that it did have jurisdiction upon the UK domiciliary under the Brussels Convention and that the other defendants had to be sued there «.....*Otherwise, there would be a risk that the courts in two jurisdictions would end up trying the same factual issues upon the same or similar evidence and reach different conclusions.....*» (emphasis added), see for the reasoning of the English court in C-281/02 *Owusu* [2005], op.cit., par.18.

<sup>108</sup> In a previous decision in *Re Harrolds (Buenos Aires)*, the English court of appeal adopted the very same stance, holding though under a rather extensive consideration, that «.....*For the English court to*

upon whether it was empowered to stay its proceedings in favor of a court of a non-contracting state as a more convenient forum and if the answer was in the affirmative on what terms.

The ECJ did not leave any open door by ruling that the rules on jurisdiction laid down by the Brussels Convention are in principle mandatory «.....except in the cases expressly provided for by the Convention.....»<sup>109</sup> and «.....That is common ground that no exception on the basis of the *forum non-conveniens* doctrine was provided for by the authors of the Convention, although the question was discussed when the Convention of 9 October 1978 on the Accession of Denmark, Ireland and the United Kingdom was drawn up.....»<sup>110</sup>. Moreover, continuing its thought stated that «.....Respect for the principal of legal certainty, which is one of the objectives of the Brussels Convention.....would not be full guaranteed if the court having jurisdiction under the Convention had to be allowed to apply the *forum non conveniens* doctrine.....»<sup>111</sup>. Hence, «.....the jurisdictional rules.....should be interpreted in such a way as to enable a normally well-informed **defendant** reasonably to foresee before which courts, other than those in which he is domiciled, he may be sued.....<sup>112</sup>» (emphasis added).

That reasoning reveals the magnitude of the clearly mechanical understanding of the *lis alibi pendens* rule by the ECJ since keeping to the beaten track of purely formalistic thinking it invokes the necessity of protecting legitimate interests of the defendant in order to refute an objection raised by the defendant her/himself without even becoming aware of the logical contradiction contained<sup>113</sup>. So, the only sustainable argument is that one focusing on the strict

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*refuse jurisdiction, in a case against a person domiciled in England, on the ground that the court of some non-contracting state is the more appropriate court to decide the matters in issue does not in any way impair the object of the Convention of establishing an expeditious, harmonious, and, I would add, certain, procedure for securing the enforcement of judgments, since ex hypothesi if the English court refuses jurisdiction there will be no judgment of the English court to be enforced in the other contracting states. Equally and for the same reason such a refusal of jurisdiction would not impair the object of the Convention that there should, subject to the very large exception of article 4, be a uniform international jurisdiction for obtaining the judgments which are to be so enforced.....I do not accept that article 2 [of the Brussels Convention] has the very wide mandatory effect which Hobhouse J. would ascribe to it where the only conflict is between the courts of a single contracting state and the courts of a non-contracting state.....», (citation omitted), op.cit.*

<sup>109</sup> See C-281/02 [2005], op.cit., at par.37.

<sup>110</sup> *ibid.*, at par.37.

<sup>111</sup> *ibid.*, at par.38.

<sup>112</sup> *ibid.*, at par. 40.

<sup>113</sup> Harris, op.cit., p.I-184 where the author pointedly observes that «.....The reasoning is wholly erroneous on this point, as English courts only grant a stay if the defendant himself asks for it; and a de-

wording of art. 21 Brussels I Convention, the spirit of which art.27 Brussels I Regulation followed. The ratio behind them, at least in the given case, however controversial might it be, de lege lata could not be set aside.

ii) *Turner v. Grovit*<sup>114</sup>

The factual background of that case refers to a British lawyer domiciled in the UK, Mr Turner, who was taken on by a company, that was part of a wider group directed by Mr Grovit, in order to provide his services as Group Solicitor<sup>115</sup>. Mr Turner performed his duties in London, but in November 1997 he moved to Madrid, at his request, where he worked for the same employer on the premises of a Spanish company, member of the group, for only 35 days<sup>116</sup>. On 16 February 1998, he gave a notice of resignation and on March 1998 he commenced proceedings against his (English) employer before the Employment Tribunal in London for «.....*unfair and wrongful dismissal*.....»<sup>117</sup>. Meanwhile, the Spanish company<sup>118</sup> filed a lawsuit against Mr Turner before Madrid courts as well, claiming for damages<sup>119</sup> suffered for al-

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*pendant who asks a stay is hardly then likely to object that, if the court grants it, his legal certainty about whether the English court will hear the case or not is compromised .....»*. However, immediately after he reverses the argument, at least rationalizing it, by highlighting the necessity of legal certainty for the sake of claimant, who obviously should be a priori aware of which court is competent for adjudicating upon her/his suit in order to save money and time.

<sup>114</sup> C-159/02 [2004] ECR 2004 I-03565.

<sup>115</sup> Under that capacity, subsequently his contract was transferred to another member of the group.

<sup>116</sup> See the detailed facts and the course of judicial proceedings at par.7-20 of the decision in C-159/02 *Turner* [2004], op.cit.

<sup>117</sup> See *Turner v. Grovit and others* available at <http://www.publications.parliament.uk/pa/ld/200102/ldjudgmt/jd011213/grovit-1.htm> (accessed on 13.11.2015 at 22.30p.m.), at par.10, where specifically it is clarified that «.....*The nature of the claim he made was that there had been repudiatory breaches of his contract of employment which were tantamount to dismissing him*.....».

<sup>118</sup> It is questionable as to whether the rule of lis pendens could apply in that case since even if, under a lato sensu analysis, in general lines supported by the ECJ, the cause of the two actions was considered as identical, the parties, at least on the face, were not. Of course, as the Court of Appeal aptly remarked «.....*looking at the substance of the matter, the actions were between the same parties in that in each action it was aspects of the group that was involved. Mr Grovit was the directing mind of the group and Changepoint SA was for the purposes of the Madrid proceedings a front for the group*.....», *ibid*, at par.18. Additionally, see, Kruger, "The Anti-suit Injunction in the European Judicial Space: *Turner v Grovit*", *Int'l & Comp. L. Q.*, Vol.53, No. 4(Oct., 2004), p.1037.

<sup>119</sup> *ibid*, at par.14 «.....*The monetary amounts claimed.....are very substantial. They far overtopped Mr Turner's claim in the Employment Tribunal and, if to be sustained, would have more than cancelled out any sum which the Tribunal might award him*.....» (emphasis added).

leged violations of his contractual obligations. In addressing that action, Mr Turner sought the granting of an anti-suit injunction by English courts, the stance of which is noteworthy. Specifically, the reasoning of the House of Lords broke the record of interpretative creativity as not only it diligently evaded to use the *forum non conveniens* phrasing as the basis for the issuance of the anti-suit injunction at stake, but additionally it literally thundered that «..... *English law attaches a high importance to international comity.....*»<sup>120</sup> and «.....*This is the prime reason for **strictly limiting the making of restraining orders on grounds of forum non conveniens.....***»<sup>121</sup> (emphasis added). Nevertheless, despite the nominal renunciation of the aforementioned, controversial under the EU law<sup>122</sup>, doctrine, Lord Hobhouse "stole" its basic components, meaning the *vaxation* and *oppression* caused by foreign proceedings sought to be discontinued since «.....*The Spanish proceedings were an orchestrated response to the plaintiff's application before the Employment Tribunal and there is no candidate for the orchestra's conductor but Mr Grovit.....*»<sup>123</sup> so that «.....*The conduct of the defendants was **unconcionable because, in bad faith, it was designed to obstruct and frustrate the existing English proceedings.....***»<sup>124</sup> (emphasis added). Therefore, as such they were to be hampered. The only remaining obstacle for the granting of the requested anti-suit injunction was the presumable disrespect towards Spanish courts. In order to "pass that cape"<sup>125</sup>, Lord Hobhouse explained that «.....*It is recognised that to make an order against a person who is a party to proceedings before a foreign court may be treated as an interference (albeit indirect) in the foreign proceedings. Thus the English law requires the applicant to show a clear need to protect existing English proceedings.....[which is]regarded as a legitimate subject matter for an English court.....*»<sup>126</sup>. Nonetheless, being fully aware of the negative climate against the injunctive relief under the Brussels Convention regime, the House of Lords ultimately had recourse to the ECJ's lights.

As highly expected, the ECJ remained set in its view, according to which the principle of mutual trust dictates the uniform interpretation and application of the rules on jurisdiction laid

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<sup>120</sup> *ibid.*, at par.28.

<sup>121</sup> *ibid.*

<sup>122</sup> *ibid.*, at par.34 it is underscored that «.....*As Lord Goff said in Airbus Industrie, at p.132, the principle of forum conveniens "has no application as between states which are parties to the Brussels Convention". The present case out of which this reference arises is not such a case. The conduct of the defendants was unconscionable because, in bad faith, it was designed to obstruct and frustrate the existing English proceedings, not because the Madrid court was a forum non conveniens.....*».

<sup>123</sup> *ibid.*, at par.17.

<sup>124</sup> *ibid.*

<sup>125</sup> This is the accurate translation of a Greek expression which means to pass off an awkward situation.

<sup>126</sup> See, *Turner v Grovit and others*, *op.cit.*, at par. 28.

down by the Brussels Convention<sup>127</sup>. Hence, it ruled that the latter «.....does not permit the jurisdiction of a court to be reviewed by a court in another Contracting State.....»<sup>128</sup>. Besides, the issuance of an anti-suit injunction would render «.....ineffective the specific mechanisms provided for by the Convention for cases of *lis pendens* and of related actions.....»<sup>129</sup> whereas it would be «..... liable to give rise to situations involving conflicts for which the Convention contains no rules.....»<sup>130</sup>.

Under the structure of the Brussels Convention, which did not offer any pretext to embrace the *forum non conveniens* doctrine and/or its variations, that reasoning seemed to be inescapable, but still the factual circumstances of the case had to awake the legal intuitions of the ECJ as it represented a typical case of abusive procedural conduct. If the stronger party enjoys the generosity to hit the much weaker one behind her/his back by counter-attacking ostensibly under the disguise of a third person<sup>131</sup>, then justice is severely obstructed and this is a factor, which should not be ignored on the grounds of protecting the doctrinaire purity of a legal instrument.

*b) Forum selection agreements jurisprudence (Erich Gasser GmbH v. Misat<sup>132</sup>)*

Although the main case at issue emanated from an Austrian-Italian dispute, it is worth quoting a very representative ruling deriving again by the English courts, which manifestly demonstrates their intrinsic comprehension upon the scope of application of the *lis alibi pendens* rule. More specifically, in the *Continental Bank v. Aeakos Compania Naviera*<sup>133</sup>, an American Bank granted a facility loan to a group of Greek ship-owners containing a clause, by virtue of which the last ones became subject to the exclusive jurisdiction of the English courts<sup>134,135</sup>. In spite of that contractual obligation, however, they brought an action before Greek courts for claiming damages under article 919 GCC. Then, the bank reacted by seeking an anti-suit injunction by the English courts, based on the exclusive forum selection clause. On appeal, the court,

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<sup>127</sup> See C-159/02 *Turner* [2004], op.cit., at par.25.

<sup>128</sup> *ibid.*, at par.26.

<sup>129</sup> *ibid.*, at par.30.

<sup>130</sup> *ibid.*

<sup>131</sup> In this case, the Spanish company obviously acted as the alter ego of Mr Grovit.

<sup>132</sup> C-116/02 [2003] ECR 2003 I-14693.

<sup>133</sup> Available at <http://curia.europa.eu/common/recdoc/convention/gemdoc94/pdf/18-U-en-94.pdf> (accessed on 29.11.2015 at 17.35p.m.).

<sup>134</sup> The exact wording was that «.....each defendant "irrevocably submits to the jurisdiction of the English courts".....», *ibid.*

<sup>135</sup> It is to be mentioned that the given clause and the whole substantive agreement were governed by English law.

examining the interaction between article 17 and articles 21 and 22 of the Brussels Convention, adjudicated that «.....Article 17 has mandatory effect.....There is no discretionary power in the Convention itself to override the conclusive effect of an exclusive jurisdiction agreement which conforms with the requirements of article 17. It follows that if article 17 applies its provisions takes precedence over the provisions of articles 21 and 22.....»<sup>136</sup>, otherwise «.....It follows that a party will be able to override an exclusive jurisdiction agreement which is governed by article 17 by pre-emptively suing in the courts of another contracting state. The courts of the latter state which ex hypothesi have been deprived of jurisdiction would then be "the court first seised". The chosen court of the parties would then be obliged to decline jurisdiction or, if the jurisdiction of the other court is contested, to stay its proceedings. In this way a party who is in breach of the contract will be able to set at naught an exclusive jurisdiction agreement which is the product of the free will of the parties. The principle of the autonomy of the parties, enshrined in article 17, cannot countenance such a solution.....»<sup>137, 138, 139</sup>.

Nevertheless, the case *Erich Gasser GmbH v. Misat* proved that the English court of appeal built castles in Spain. More specifically, Gasser was an Austrian who sold children's clothing to Misat, an Italian company, seated in Rome. All the invoices, issued by the former and received by the latter, contained an exclusive selection clause in favor of Austrian courts without Misat ever objecting to it. In contavention to that contractual term, Misat sought a negative declaratory relief before Italian courts whereas Gasser filed subsequently an action claiming the repayment of the selling price owed by Misat in Austria. Under those circumstances, the Austrian court of appeal, namely the second seised, posed to the ECJ the query, inter alia, as to whether a court other than the court first seised could review the jurisdiction of the latter on the basis of an exclusive selection clause, especially where its proceedings «.....take an unjustifiable long time (for reasons largely unconnected with the conduct of the parties), so that material detriment may caused to one party.....?»<sup>140, 141</sup>. The ECJ replied assertively in

<sup>136</sup> See *Continental Bank v. Aeakos Compania Naviera*, op.cit.

<sup>137</sup> *ibid.*

<sup>138</sup> See the further analysis of that case in Σαηπεκίδου, *Η παρέκταση διεθνούς δικαιοδοσίας στον ενιαίο ευρωπαϊκό χώρο*, σελ.234-240.

<sup>139</sup> However, as Harris neatly comments «.....Even at the time, it was clear to many that the Court of Appeal's decision, whatever its commercial merits in upholding the sanctity of commercial agreements, could not withstand scrutiny.....», op.cit., p.I-182.

<sup>140</sup> See C-116/02 *Gasser* [2003], op.cit., at par. 20.

<sup>141</sup> To this regard, the question seems to "borrow", even unconsciously, some of the elements of vexation and/or oppression appeared in *Turner v. Grovit and others* adjusted to the factual background of the case.

the negative as the grammatical wording of the crucial provision of article 21 Brussels I Convention, in its view, overpowered the competence of the designated, but subsequently seised court<sup>142</sup>, taking into account that the first seised one was obligated to ascertain its own jurisdiction ex officio<sup>143</sup>. Ultimately, premised on those considerations, the ECJ remarked that the problem of delaying tactics employed by a party pursuing to retard the dispute resolution<sup>144</sup> per se was not sufficient to challenge the reading of any article of the Brussels Convention.<sup>145</sup> That decision constituted a rude awakening for the English courts, which afterwards were forced to comply with the ECJ's interpretative standards in similar cases, as became evident in *IP Morgan Europe Ltd v. Primacon AG and the Others*<sup>146</sup>. Nevertheless, it should be borne in mind that in *Gasser* the reservations towards article 21 Brussels Convention derived not from the usual suspect, meaning the UK, but a country embraced the civil law tradition. This element speaks volume for the disfunction caused by the absolute application of the *lis alibi pendens* rule, which at least in this case, could, teleologically assessed, be counter-balanced by the exclusive forum selection clause. Otherwise, such an agreement, express acknowledged by the Brussels Convention and all of its successors, is directly disarmed by the diversionary raid to file an action before other than the designated court<sup>147</sup> and the formal legalisation of that outcome renders it a scrap paper, on which no serious economic operator should be based. However, this is a very high price to be paid, especially within the EU with its well-known economic dimensions<sup>148</sup>.

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<sup>142</sup> See C-116/02 *Gasser* [2003], op.cit., at par.47.

<sup>143</sup> *ibid.*, at par.52.

<sup>144</sup> Specifically, underlined by the UK government.

<sup>145</sup> See C-116/02 *Gasser* [2003], op.cit., at par.53.

<sup>146</sup> See the analysis conducted by Weller, Hess-Pfeiffer-Schlosser, *The Heideberger Report on the Application of Regulation Brussels I in 25 Member States*, Study JLS/C4/2005/03, N°426-428 available online at [http://ec.europa.eu/civiljustice/news/docs/study\\_application\\_brussels\\_1\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf) (accessed on 07.11.2015 at 17.50 p.m.).

<sup>147</sup> It merits mention that the ECJ's tolerance towards the deliberate violation of forum selection clauses instigated the generalisation of the use of "torpedo actions". As such have been defined the actions for declaration of non-infringement of patent rights brought first before Member States, the courts of which suffer from lengthy delays in the dispensation of justice, in order to impede the actual patentee to file her/his suit before an effective forum, for example in France, Germany or the UK. This malpractice begun in Italy, well-known for the tardiness of delivering justice and thus more accurately there has been established the term "Italian torpedos". See, Veron, "ECJ restores Torpedo Power", *IIC*, Vol.35 (2004), pp.638-642.

<sup>148</sup> Despite the fact that arguments of purely economic nature have been much disregarded (see the AG opinion C-185/07 *Tankers* [2008] ECLI:EU:C:2008:466, at par.66), their consideration should be highly ranked given the economic aspects of the EU.

*c) Arbitration agreements jurisprudence*

*i) Allianz SpA, Generali Assicurazioni Generali SpA v. West Tankers Inc.*<sup>149</sup>

Despite the defeat suffered in the aforementioned fronts, common law ventured to bring up the question upon the permissible use of anti-suit injunction within the single judicial space of the EU, this time under the pretence of arbitration agreements, which allow a wider latitude of argumentative manoeuvring due to the express exception of arbitration from the ambit of the Brussels I Regulation (art.1 §2d)<sup>150,151</sup>. The commencement of litigation in Italy by two insurance companies<sup>152</sup> in violation of an agreement to arbitrate providing for a situs in London<sup>153</sup> gave rise to English justice to get its second wind, as their counter litigant sought an anti-suit injunction to block the continuation of those proceedings.

In particular, the House of Lords seized the opportunity to elude the trap set by the reasoning supported in *Turner and Gasser*<sup>154</sup>, namely that in essence member states' courts shall abstain from the granting of anti-suit injunctions in deference to each other's jurisdiction, anchoring in the exclusion of arbitration from the Brussels I Regulation regime, as it is construed expansively through the interpretative lens of the ECJ. Namely, pursuant to its settled case-law, the Regulation at stake does not apply to the *lato sensu* arbitral proceedings (art.1 §2d)<sup>155</sup>, which

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<sup>149</sup> C-185/07 [2009] ECR 2009 I-00663.

<sup>150</sup> Its exact wording is rather abstruse and therefore open to various interpretation, stating «.....2.This Regulation shall not apply to:.....d.arbitration.....».

<sup>151</sup> Exactly, the same exception is contained in the Brussels Regulation recast (art.1§2d).

<sup>152</sup> It should be noted that they had been subrogated to their insured's claims.

<sup>153</sup> More specifically, the factual background was the following: «.....In August 2000, the *Front Comor*, a vessel owned to *West Tankers Inc*(“*Tankers*”) and chartered by *Erg Petroli SpA* (“*Erg*”) collided with a jetty owned by *Erg* at *Syracuse* and caused damage. The charterparty was expressed to be governed by *English Law* and contained a clause providing for arbitration in *London*. *Erg* claimed upon its insurers.....up to the limit of its insurance cover and commenced arbitration proceedings against *Tankers* in *London* for the excess. *Tankers* counterclaimed that it was not liable for any of the damage caused by the collision..... On 30 July 2003, the insurers commenced proceedings against *Tankers* before the *Tribunale di Siracusa* to recover the amounts which it had paid *Erg* under the policies.....», *West Tankers Inc v. RAS Riunione Adriatica di Sicurtà SpA and Others*, at par.10 available at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070221/westt.pdf> (accessed on 01.12.2015 at 19.55p.m.), at par.2-3.

<sup>154</sup> Given that «.....are both based upon the proposition that the Regulation provides a complete set of uniform rules for the allocation of jurisdiction between Member States and that the courts of each Member State have to trust the courts of other Member States to apply those rules correctly.....», *ibid.*, at par.10.

<sup>155</sup> *ibid.*, at par. 12.

include not only arbitration procedures per se<sup>156</sup>, but additionally those ones pertaining to the protection of the right to attain the resolution of the dispute by arbitration<sup>157</sup>. So, under that construction, anti-suit injunctions, issued in aid of arbitral proceedings, remove the normative "embargo" placed upon by the Brussels I Regulation magnetic field of application and therefore are freely available for use. Beyond that crucial point, the House of Lords added that the absolute, leveling and arbitrary argument that any court order restraining a party from being subject to a jurisdiction is necessarily contrary to the Regulation Brussels I, is «...*divorced from reality (lebensfremd)*.....»<sup>158</sup>, citing Professor Schosser description, taking into account that the very same exception applies to orders made in the context of other excluded categories of cases, such as those referring to insolvency proceedings<sup>159</sup>.

Moreover, it moved on to teleologically evaluate the significance of the procedural and substantive extensions of arbitration, upon which parties have invested their dispute resolution<sup>160</sup>, such as for example confidentiality, neutrality and prompt deliver of justice. In parallel, it underscored the decisive role of the national courts of the arbitral seat, which oversee arbitral proceedings based on their own national law<sup>161</sup> and therefore should be allowed to act accordingly, as is the case at question. So, in that framework, English legal order had to be acknowledged the power to utilize anti-suit injunction, which is considered by it «.....*as an important and valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration*.....»<sup>162</sup> since «..... *As Professor Schlosser also observes, it saves a party to an arbi-*

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<sup>156</sup> C-190/89 *Rich v. Società Italiana Impianti* [1991] ECR 1991 I-03855, pursuant to par.29 of which «...*Article 1 (4) of the Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation*.....».

<sup>157</sup> C-391/95 *Van Uden Maritime v. Kommanditgesellschaft in firma Deco-Line and Others* [1998] ECR I-07091, according to par.32 of which «.....*Also excluded from the scope of the Convention are proceedings ancillary to arbitration proceedings, such as the appointment or dismissal of arbitrators, the fixing of the place of arbitration or the extension of the time-limit for making awards*.....». However, it is underlined at par.33 that «.....*provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings*.....» .

<sup>158</sup> *West Tankers Inc. v RAS Riunione Adriatica di Sicurta SpA and Others*, op.cit., at par. 15.

<sup>159</sup> *ibid.*, at par. 16.

<sup>160</sup> Such as privacy, informality, absence of any prolongation of the dispute by appeal, arbitrators' right to act as amiables compositeurs, *ibid.*, at par. 17 where Lord Hoffman concludes that «.....*The principle of autonomy of the parties should allow them these choices*.....».

<sup>161</sup> *ibid.*, at par. 18.

<sup>162</sup> *ibid.*, at par. 19.

*tration agreement from having to keep a watchful eye upon parallel court proceedings in another jurisdiction.....»<sup>163</sup> (emphasis added).*

Ultimately, the House of Lords, placing great emphasis upon the ratio served by anti-suit injunction, opined that such a remedy incentivizes parties to submit their differences to arbitration seated in a place providing for it as a means of irrevocably "locking" the proper performance of their agreement<sup>164</sup>. In that respect, if the Member States «.....are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of an arbitration agreement, there is no shortage of others states which will. For example, New York, Bermuda and Singapore.....»<sup>165</sup>.

Although the aforementioned methodologically exhaustive argumenation inspired a confidence to the House of Lords, the latter was meant to be deceived since the answer of the ECJ gave the coup-de-grâce to common law. Notwithstanding the literal, systematical and teleological argumentation, even when made by the authority of a civilian academic in order to a priori "dismantle" any european scepticism, the ECJ was again not convinced. From its angle, even if some sort of proceedure is excluded from the *ratione materiae* scope of the Regulation Brussels I, yet anti-suit injunction is capable of obstructing a court in exerting the authority conferred by it in the area of its application<sup>166</sup>. So, according to the ECJ, if a dispute is regulated by the Brussels I Regulation as such, then «.....a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity also.....»<sup>167</sup> does not evade to be caught in its toils; and exactly, this was the case at bar where the main dispute was a delictual claim governed by art.5 §3 of the given Regulation<sup>168</sup>. Consequently, anti-suit injunction could not be allowed in such a case.

Additionally, returning to its stable positions, the ECJ advocated that anti-suit injunction poisons the judicial system twofold. First, it contravenes the foundation stone principle of the Regulation Brussels I, pursuant to which state courts equally enjoy their own power to rule upon their jurisdiction<sup>169</sup>, and moreover in so doing it undermines the mutual trust amongst member states<sup>170</sup>. Simultaneously, at litigants' level, it "blows up" the bridge leading to na-

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<sup>163</sup> *ibid.*

<sup>164</sup> *ibid.*, at par. 20.

<sup>165</sup> *ibid.*, at par. 21.

<sup>166</sup> See C-185/07 *West Tankers* [2009], *op.cit.*, at par. 24.

<sup>167</sup> *ibid.*, at par.26.

<sup>168</sup> *ibid.*, at par.27.

<sup>169</sup> *ibid.*, at par.29.

<sup>170</sup> *ibid.*, at par.30.

tional courts, which practically is tantamount to a violation of the fundamental right to have access to the states' system of dispensation of justice<sup>171</sup>.

Lastly, in a clear attempt to embellish its reasoning with comparative arguments of international weight, the ECJ invoked article II (3) of the NYC and probably mainly its last intent as in its eyes reinforces its conclusion. So, to the ECJ's perception, that provision<sup>172</sup> purports that national courts are permitted to exercise their competence to adjudicate upon their jurisdiction in spite of the existence of an arbitration agreement since they are empowered to review its validity<sup>173</sup>.

Despite the fact that this time the ECJ endeavored to conduct a spherical and comprehensive analysis in order to defend itself against the incisive criticism suffered all the previous years by the common law community, its interpretative efforts err on many points. Insisting on embracing by any means an inflexible literal approach, it resulted in misreading the Regulation Brussels I and therefore deteriorating the quality of justice, rendered either by state courts or arbitral tribunals in member states, on the following concisely exposed grounds:

a) First of all, the literal interpretation suggested abolish the exception of arbitration clearly laid down by the Brussels I Regulation for any civil and commercial dispute by definition a priori falls within the latter's ambit and therefore on ECJ's logic it should not be subject to the arbitration exclusion. So, as is aptly remarked, in each case the initial question should be focused upon «.....*whether the matter fell within the parameters of the Regulation at all;.....*»<sup>174</sup> since if there is an agreement to submit to arbitration a commercial or civil dispute, then despite its legal nature the Regulation cannot be ad hoc applicable due to this jurisdictional shifting from national courts to arbitral tribunals. Besides, exactly that delegation of judicial authority to arbitrators is the reason why there is no violation of the fundamental right to have access to state courts, as parties voluntarily have chosen not to exercise it by binding themselves to have recourse to arbitration.

b) In addition, the blind application of the mutual trust principle, however enthralling might it be, goes so far as to generate considerable procedural impediments to the prompt resolution of disputes by the arbitral tribunals. However, in so doing, it amputates the efficacy of arbitra-

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<sup>171</sup> *ibid.*, at par.31.

<sup>172</sup> Pursuant to which «.....*The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.....*».

<sup>173</sup> See C-185/07 *West Tankers* [2009], *op.cit.*, at par.33.

<sup>174</sup> See Harris, *op.cit.*, p.I-187.

tion and therefore in effect subverts the function of the single European judicial space, which at the bottom line, is the ulterior purpose of its unification.

c) Ultimately, the oversimplistic argument drawn by the NYC is at least far-fetched for the aforementioned provision does not take any clear position as to the way by which the negative obligation emanating from the arbitration agreement not to litigate can be enforced and as such it is utterly open to contradictory readings, that are absolutely unsuitable for reaching any stable conclusion; but even if the NYC clearly rejected the use of anti-suit injunction, its stance would not matter in the EU context since from institutional aspect it does not constitute intergral part of its distinct legal order.

Consequently, all the above mentioned factors unquestionably witnessed that the grammatical arguments alone constitute absolutely insufficient interpretative crutches that cannot bear the burden of a complete, persuasive and the most significant sustainable reasoning, able to serve the original needs of a competitive unified judicial system. Bearing in mind that *summus ius, summa injuria*, the demand for a teleological approach curing the weaknesses arisen by the language adopted by the Brussels I Regulation at this stage of jurisprudential deadlock became more than evident.

ii) *Gazprom*<sup>175</sup>

The reverberations of *West Tankers* were huge as the ECJ crossed the red line set not only by common law, but the legal community as a whole. Its flop to satisfy the self-evident requirements for the proper operation of international commercial arbitration unified the voices fiercely criticising its argumentative inertia<sup>176</sup>. The ECJ was in an urgent need to reverse the pervasive negativism against it. Thus, it pounced at the opportunity to do penance for its sins when the *Gazprom* was pregnant with the favourable conditions. The peculiarity of that case paved the way for a noticeable variation in its jurisprudence, which only the course of time will finally prove if it is meant to be a turning point in its stance<sup>177</sup>. In particular, the dispute involved the granting of an anti-suit injunction by an arbitral tribunal seated in Sweden and the subsequent request for its recognition and enforcement in the Lithuanian Republic<sup>178</sup>. The

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<sup>175</sup> C-536/13 *Gazprom* [2015] ECLI:EU:C:2015:316.

<sup>176</sup> According to the AG opinion C-536/2013 *Gazprom* [2014] ECLI:EU:C:2014:2414, at par.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.....*».

<sup>177</sup> It is particularly expected what will be the subsequent stance of the ECJ, but at the moment there is no other decision in the pipeline.

<sup>178</sup> It is interesting to follow the thread of the full history behind the issue at question: The case referred to a company, named "Lietuvos dujos AB" (hereinafter Lietuvos dujos), that was formed under Lithua-

court seized of the latter application, simultaneously examined on appeal the substance of the case intended to be blocked. Concisely, it ruled that as the difference, in favor of which the anti-suit injunction was granted, lacked arbitrability under Lithuanian law in accordance with an already delivered decision of Lithuanian courts at first instance<sup>179</sup>, it was forced to dismiss the granting of recognition and enforcement and the appeal, at the same time. Additionally, in its view, the contentious anti-suit injunction posed under question the authority of Lithuanian courts to self-determine their own jurisdiction and therefore it violated their constitutionally entrenched independence with the result the request at stake to be contrary to Lithuanian public policy, as well. The case culminated in the Lithuanian Supreme Court which referred the case for a preliminary ruling to the ECJ, raising the question as to whether a court of a member state is empowered to refuse the recognition and enforcement of an award restraining its competence to determine its jurisdiction, as conferred by the Brussels I Regulation, and in any case whether it can act accordingly, in order to safeguard the primacy of the EU law and

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nian law and aimed at buying gas from "Gazprom". At the time of crucial facts, it belonged to three main shareholders, the German company "E.ON Ruhrgas International GmbH" (38,91%), the Russian public undertaking "Gazprom" (37,1%) and the Lithuanian Republik (17,1%). On 24<sup>th</sup> March 2004, all of them entered into a "shareholders' agreement", governed by Lithuanian law, which provided, inter alia, for the resolution of the relevant disputes by way of an arbitration mechanism in accordance with the Rules of the SCC. In particular, that term stated that *«.....any 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.....»*, see the opinion of the AG, op.cit., at par.29. Despite its contractual engagement, on 26<sup>th</sup> March 2011, the Ministry of Energy on behalf of the Lithuanian Republik brought an action before Lithuanian courts against the Lietuvos dujos, its general manager and two members of its board of directors, whom it accused of unduly favoring Gazprom's interests and therefore asked the removal from their positions and additionally the renegotiation of the purchasing price of gas with Gazprom. In response, the latter commenced arbitral proceedings against the Lithuanian Ministry before the SCC, asking for the withdrawal of its action, which on 31<sup>th</sup> July 2012, was partly accepted by a final award ordering it on the one hand to withdraw and on the other to reframe some of its requests. Nonetheless, in the meanwhile, on 3<sup>rd</sup> September 2012, the Lithuanian court accepted the claim, holding that the latter was lacking arbitrability under Lithuanian law and as such was exclusively subject to its jurisdiction. The judgment was challenged by the losing parties before the court of appeal which in parallel had to adjudicate upon the request submitted by Gazprom for the recognition and enforcement of the arbitral award delivered by the SCC. For further details see the elaborate factual background in the AG opinion, op.cit., at par.21-49.

<sup>179</sup> *ibid*, at par.42.

the full effectiveness of the Brussels I Regulation<sup>180</sup>, connoting that the the last ones should be regarded as part of the public policy of the forum under article V (2) (b) NYC. That factual background enabled both, the AG and the Grand Chamber of the ECJ to gather the momentum and gain some of the lost ground by turning the element referring to arbitration to account.

To begin with<sup>181</sup>, it should be borne in mind that the Lithuanian court referring the case to the ECJ operated in a dual capacity. So, it was competent for the recognition and enforcement of the anti-suit injunction where the arbitration agreement was the *main subject matter* and in parallel for adjudicating upon the substance of the dispute allegedly submitted to arbitration where the arbitration agreement was a *preliminary issue*. Hence, in order to be systematically consistent, the argumentation of the AG was based on two distinct pillars.

On the one hand, at the level of the recognition and enforcement, he focused on the origin of the given anti-suit injunction from an arbitral tribunal in order to exclude it from the *ratione materiae* scope of the Brussels I Regulation by virtue of the crystal clear language of article 32 thereof. According to that provision, the decisions which are to be recognised and enforced within its regime shall be exclusively issued by national courts<sup>182, 183</sup>.

On the other hand, at the level of the substance of the dispute at stake, the AG, being aware that the Lithuanian court was in the same position as that of the Italian one in *West Tankers*, attempted to surmount the obstacle raised by its adopted interpretation. So, he examined the case through the prism of the controversial exception of arbitration from the ambit of the Regulation (art.1§2d), as its dimensions are circumscribed in the light of the recital 12<sup>184</sup> of

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<sup>180</sup> Actually, initially there was another question as to whether the same answer would be delivered if the case at stake was pending before the court of another member state. However, the AG rejected it as impermissible, *inter alia*, due to its putative character, see AG opinion, *op.cit.*, at par.159. The ECJ from its part, consolidated all the topics raised into one single query as to whether the Brussels I Regulation regime is to be construed as preventing a court of a member state from recognising and enforcing a foreign arbitral award containing in essence an anti-suit injunction and as such enjoining a party from bringing a claim before its national courts, see C-536/13 *Gazprom* [2015], *op.cit.*, at par.26-27.

<sup>181</sup> It is to be underlined that in the AG's view the questions referred were characterised by debatable admissibility as the main dispute could be resolved irrespective of their being answered, see AG opinion, *op.cit.*, at par.58-61.

<sup>182</sup> *ibid*, at par.71.

<sup>183</sup> Article 32 of the Brussels I Regulation states that «*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, including a decree, order, decision, or a writ of execution, as well as the determination of costs or expenses by an officer of the court*».

<sup>184</sup> The full text of that recital, for the sake of which rivers of ink will definitely flow in an attempt to interpret it, is as follows: «..... *This Regulation shall not apply to arbitration. Nothing in this Regula-*

the Brussels I Regulation recast -despite the latter was not applicable to the case at issue-, which «.....in reality, somewhat in the manner of a retroactive interpretative law, explains how that exclusion must be and always should have been interpreted.....»<sup>185</sup>. Unfolding the long history of its drafting<sup>186</sup> and reading selectively, isolated from its entirety, some of its paragraphs in combination with the jurisprudential positions accepted before the *Waterloo of West Tankers*<sup>187</sup>, he ignored the overall and thus systematically consistent interpretation of the crucial recital as a whole. On the contrary, he concentrated on the second paragraph<sup>188,189</sup> of the recital 12, which, in his opinion, strongly advocates that «.....the EU legislature intended to correct the boundary which the court has traced between the application of the Brussels I Regulation and arbitration.....»<sup>190</sup> so that the verification of the validity of an arbitration

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*tion 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.....».*

<sup>185</sup> See the AG opinion, op.cit., at par.91.

<sup>186</sup> *ibid.*, at par.92-97 and 113-124.

<sup>187</sup> *ibid.*, at par.98-112.

<sup>188</sup> *ibid.*, at par.125-126.

<sup>189</sup> See in n.184.

<sup>190</sup> See the AG opinion, op.cit., at par. 132.

agreement as an incidental matter not to fall within the scope of the Regulation Brussels I<sup>191</sup>. Besides, in his view, the given position is further reinforced by the clear letter of the fourth paragraph<sup>192</sup> of the recital 12, as well<sup>193</sup>. Therefore, he concluded 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....., according to which ‘the Contracting Parties intended to exclude arbitration in its entirety’.....*»<sup>194, 195</sup> (emphasis added), namely either as a main or an incidental matter. In any event and in the alternative, underscoring that «..... *Arbitral tribunals cannot be bound by the principle of mutual trust.....*»<sup>196,197</sup> since inherently the latter presupposes state courts, view espoused by the ECJ, as well.

In addition, as regards the last part of the referred question, the AG refuted the implied idea<sup>198</sup> that the public policy under article V(2)(b) NYC<sup>199</sup> is to be interpreted as refusing the recognition and enforcement of a foreign arbitral award containing an anti-suit injunction where the latter restrains the right of a national court to ascertain its own jurisdiction on the basis of the Brussels I Regulation. Underlining the restrictive reading of public policy, which is rest exclusively upon national courts, he examined its concept on a comparative basis and remarked that the ECJ has sparingly characterised provisions of the EU law as containing public policy considerations, such as that of article 101 TFEU<sup>200,201</sup>. Ultimately, he reached the conclusion

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<sup>191</sup> Under that construction, the AG reached the conclusion that the anti-suit injunction in *West Tankers* would have been found compatible with the Brussels I Regulation, *ibid.*, at par. 134-135

<sup>192</sup> See in n.184.

<sup>193</sup> See, the AG opinion, *op.cit.*, at par. 137-138, 140.

<sup>194</sup> *ibid.*, at par.141.

<sup>195</sup> So, in the AG's view the recognition and enforcement of such an anti-suit injunction is exclusively governed by the NYC, *ibid.*, at par.157.

<sup>196</sup> *ibid.*, at par.152.

<sup>197</sup> On that point, the AG exclaimed «.....***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.....***» (emphasis added), *ibid.*, at par. 155.

<sup>198</sup> *ibid.*, at par.163.

<sup>199</sup> However, it is rather debatable whether the ECJ has the competence to interpret the notion of public policy enshrined in the NYC, even if the latter could incorporate some elements of the EU legal order.

<sup>200</sup> C-126/97 *Eco Swiss* [1999] ECR 1999 I-03055.

that the main criterion shall be focused 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.....*»<sup>202</sup>. Under that construction, the Brussels I Regulation could not be regarded as public policy legislation<sup>203</sup> for it does not obviously incorporate such considerations and additionally can be derogated from under certain conditions by forum selection agreements<sup>204</sup>. Besides, in any event, article 35 (3) thereof crystallizes that the rules on jurisdiction are not connected with public policy<sup>205, 206, 207</sup>.

Contrary to the extensive analysis employed by the AG, the response of the ECJ was succinct and unequivocal. Hastening to dispel the clouds of discredit generated by *West Tankers*, it clarified that the Brussels I Regulation governs exclusively the relationship of a national court vis-a-vis other national courts throughout the EU<sup>208</sup>. Therefore anti-suit injunctions rendered by arbitral tribunals are by definition not burdened with the duty of no interference in the jurisdiction of state courts deriving from the fundamental principle of mutual trust amongst national legal orders of member states<sup>209</sup>. Nevertheless, this fact does not lay bare, id est devoid of legal protection, the party, against whom such an anti-suit injunction is directed. In contrast, the latter is fully armed with the right to defend her/himself in the course of the procedure for its recognition and enforcement, based on the law being applicable by the forum<sup>210</sup>. Consequently, «.....*neither that arbitral award*<sup>211</sup> *nor the decision by which, as the case may be, the court of a Member State recognises it are capable of affecting the mutual trust between the courts of the various Member States upon which Regulation 44/2001 is*

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<sup>201</sup> Similarly, the Council Directive 93/12/EEC of 5 April 1993 "on unfair terms in consumer contracts" (OJ 21.04.1993 No L95/29-32), see C-168/05 *Mostaza Claro* [2006] ECR 2006 I-10421.

<sup>202</sup> See the AG opinion, op.cit., at par.177.

<sup>203</sup> *ibid.*, at par.181.

<sup>204</sup> *ibid.*, at par.183-184.

<sup>205</sup> Specifically, the provision of article 35 (3) states «.....3. *Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.....*»(emphasis added).

<sup>206</sup> See the AG opinion, op.cit., at par.186.

<sup>207</sup> Of course, as the AG observed that the mere fact that a particular discipline of law falls within the exclusive or shared powers of the EU (art. 3 and 4 TFEU), is self-evidently not sufficient for its characterisation as containing public policy provisions, *ibid.*, at par.182.

<sup>208</sup> See C-536/13 *Gazprom*, op.cit., at par.36.

<sup>209</sup> *ibid.*, at par.36-37.

<sup>210</sup> *ibid.*, at par.38.

<sup>211</sup> Namely, the award containing the anti-suit injunction (citation added upon clarification's grounds).

based.....»<sup>212</sup>. So, the ECJ in full harmony with the AG resulted in a teleologically expedient and systematically consistent position, the applicability of which however is limited to anti-suit injunctions issued by arbitral tribunals. In particular, such an approach cannot be extended *mutatis mutandis* in an equally invincible way to anti-suit injunctions granted by state courts since recital 12 of the Brussels I Regulation recast construed as a whole, is open to divergent interpretations and therefore, in reality it does not deliver such an assertive reply, as will be elaborated on at the respective paragraph<sup>213</sup>.

### 3. *A first pre-conclusion*

Certainty, mutual trust and self-determination of competence constitute fundamental values, which are enshrined in the Brussels I Regulation in order to be observed not as a self-end, but as servants of the notion of justice. Nevertheless, the latter is heavily wounded where in their name a parasitic environment functioning as a hotbed of abusive procedural conducts is bred under the blessings of the ECJ. Namely, as revealed, its aforementioned jurisprudence has one decisive element in common, the tidy reward of the shrewd litigant who incessantly attempts to manipulate national courts to stick in the letter of law in order to mangle its spirit; whilst in turn the last ones wash their hands of their own responsibility to take the lead of decisions by exploiting every single interpretative tool at their disposal, resulting in engulfing the interests of the diligent litigant.

In effect, the whole story strikingly reminds a Greek proverb stating that *the operation was successful, but the patient died*, which implies that the religious application of rules alone does not guarantee the desirable result since those have inherent flaws. Thus, self-action is indispensable, as well. However, the ECJ, save *Gazprom*, has stubbornly refused to teleologically read the Regulation Brussels I where this could be an option, namely in forum selection and arbitration agreements<sup>214</sup>. So, in the absence of such a generous construction, addressing in any case the problem in the short-term, a legislative initiative seemed more than indispensable in order to eliminate it once and for all in the long-term as the delaying and tactical manoeuvring, cultivated under the Brussels I Regulation, made the entire system to resemble a plumbing network being out of order and therefore in dire need of a drastic corrective intervention.

## II. *The paradigm of the Brussels I Regulation recast*

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<sup>212</sup> See C-536/13 *Gazprom*, *op.cit.*, at par. 39.

<sup>213</sup> See Section II under II (2).

<sup>214</sup> *De lege lata*, forum non-conveniens doctrine's application could not be considered as a viable option, see Section II under I (2) (a) (i).

The response was delivered by the Brussels I Regulation recast<sup>215</sup>, which has been the product of a lengthy reflection process, under which many compromises have been inescapably incubated. The controversial rule of *lis alibi pendens* symbolizes one of them since after the failure of its strict application, its absolutism had to be relativized by cautiously designed exceptions to counterbalance its loopholes. The question as to whether its new version satisfies the praxis is dealt with individually for each basic category of cases, as were classified above<sup>216</sup>, ranked in the order of the degree of their success in accomplishing that goal, as follows:

### *1. Forum selection agreements*

That group of cases is the only one that has been coped with *expressly, exhaustively and effectively*. Specifically, article 31 §2 and 3 Brussels I Regulation recast states that «.....2. Without prejudice to article 26, 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. 3. Where the court designated in the agreement has established jurisdiction in accordance with agreement, any court of another Member State shall decline jurisdiction in favour of that court.....»<sup>217</sup>. Its precise language coupled with the recital 22<sup>218</sup>, which mirrors all the points arisen out of the aforementioned

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<sup>215</sup> Regulation EU No 1215/2012 of the European Parliament and of the Council of 12 December 2012 "on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" (recast) (OJ L351/1-32 20/12/2012).

<sup>216</sup> See Section I under III (1) (a) (i, ii, iii).

<sup>217</sup> §4 of art.31 provides for an exception in favour of the presumably weaker parties in insurance, labour and consumer disputes, stating that «.....4. Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.....».

<sup>218</sup> Recital 22 of the Brussels I Regulation recast states that «.....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

case-law<sup>219</sup>, do not leave any room for doubting its real meaning, namely that the designated by an exclusive forum selection agreement court take *precedence* over any other irrespective of the order of filing. This practically means that anti-suit injunctions in favour of the forum contractually conferred jurisdiction shall constitute an indisputably permissible remedy from here on. Considering that under the new regime the suspension of proceedings by any other than the designated court shall be taken for granted, their issuance could serve the prevention from even entering into the examination of a case whatever this means in terms of spending money and time.

## 2. Arbitrations agreements

Against that background of clarity, arbitration agreements regime unfortunately has remained in the dark. It is fully indicative of the the drafters' Brussels I Regulation recast legislative timidity, bred by the utterly divergent approaches suggested<sup>220</sup>, that they preferred to introduce a non-binding legal text of allegedly interpretative value than to insert a normative provision with an analogous content as that concerning forum selection agreements<sup>221</sup>, namely giving priority to the courts of the arbitral seat. So, they have culminated in adding recital 12<sup>222</sup>, which however is equally ambivalent as the prophecies given by Pythia in the Oracle of Delphi. Consequently, in the loud absence of a clear solution, the point is whether the language used by it is susceptible of resulting in an equivalent effect, advancing the efficacy of arbitral proceedings.

To begin with, recital 12 is dominated by the constant repetition of the exclusion of arbitration from the scope of the Brussels I Regulation recast. That principal feature cultivates the misleading impression that the arguments raised in favour of the principle of self-determination and mutual trust amongst national courts of member states against the primacy of the courts

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*whether the non-designated court has already decided on the stay of proceedings. This exception should not cover situations where the parties have entered into conflicting exclusive choice-of-court agreements or where a court designated in an exclusive choice-of-court agreement has been seised first. In such cases, the general lis pendens rule of this Regulation should apply .....»* (emphasis added).

<sup>219</sup> See Section II under I (2) (b).

<sup>220</sup> See a concise reference to them in AG opinion C-536/2013 *Gazprom* [2014], op.cit., at par.92-97 and 113-124.

<sup>221</sup> See Commission's 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, p.36.

<sup>222</sup> See for its full text in n.184.

of arbitral seat and therefore anti-suit injunctions in support of them have been confuted<sup>223</sup> as arbitration supposedly operates in an area of law completely irrelevant to the Brussels I Regulation recast. However, on a closer analysis, the real meaning of a systematically consistent reading of recital 12 is solely partly that. Namely, whilst the latter confirms that arbitration as a principal subject matter is excluded from the scope of the Brussels I Regulation recast<sup>224</sup>(§4), which is an unavailing truism, unfortunately it persists with recycling the same problem of undermining arbitral proceedings on a multilevel basis where arbitration agreement constitute a preliminary question.

Specifically, paragraphs 1, 2 and 4 in essence repeat that the same exclusion applies to the latter case as well and from that angle one could infer on the aforementioned logic regarding arbitration as a main issue that the issuance of anti-suit injunctions in aid of arbitral proceedings does not fall within the ambit of the Brussels I Regulation recast and thus cannot be blocked. Nevertheless, such a conclusion is not absolutely accurate as what those paragraphs offer with the one hand, paragraph 3 takes it back with the other one. Specifically, the latter clarifies that a ruling on the merits of a dispute, which as such has obviously discredited arbitration agreement as being null and void, inoperative or incapable of being performed, not only can be issued but additionally is allowed to freely circulate within the EU in order to be recognised and enforced. This means that where the *ratione materiae* scope of the Brussels I Regulation recast on the one hand and the arbitration agreement on the other one are intersected by way of a preliminary issue, the exception of arbitration ceases to have the *absolute* effect, which does enjoy by definition where it constitutes the principal and therefore the single one question of a trial, and therefore it acquires a *relative* character. So, the latter simply purports that arbitration agreement is judged upon the law applicable by the forum and not the Brussels I Regulation recast. Beyond that point, the exception is prevented from having any impact on the jurisdiction conferred by the given Regulation to national courts of the member states, which are empowered to move on in order to decide upon the substance of the dispute. Under that construction, as a consequence, anti-suit injunctions can be regarded as an obstacle to the performance of courts' duties. So, in effect, recital 12 unfortunately seems to identify with *West Tankers* approach<sup>225</sup> rather than *Gazprom* reasoning especially elaborated on by the AG, which therefore is almost disarmed and ultimately can survive only by reason of the

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<sup>223</sup> Besides, that is the position of the AG's opinion C-536/2013 *Gazprom* [2014], op.cit., at par.132, 134-135.

<sup>224</sup> Hauberg Wilhelmsen, "European Perspectives on International Commercial Arbitration", *J Priv Int'l L*, Vol.10, No.1, p.123.

<sup>225</sup> Leandro, "Towards a New Interface Between Brussels I and Arbitration?", *JIDS*, 2015, p.10.

fact that the given anti-suit injunction originated from an arbitral tribunal and as such by definition fell outside the scope of the Regulation<sup>226</sup>.

Additionally, such an interpretation, namely that arbitration as preliminary matter does not preclude proceedings of courts to go ahead, is further reinforced by the crystal clear fact that paragraph 3 of recital 12 literally acknowledges the simultaneous operation of two parallel and competitive systems of delivering justice from national courts and arbitral tribunals. This firm acceptance connotes that Brussels I Regulation recast regime does not establish, even indirectly, any primacy in favour of arbitral tribunals and thus the last ones are forced to go along with state courts hand in hand without being entitled to be supported by anti-suit injunctions' shield of protection. This approach is not influenced by the last intent of paragraph 3, which makes a reference to the *precedence* of the NYC over the Regulation since it simply implies that a state court's decision subject to the recognition and enforcement framework of the Regulation shall not affect the exequatur proceedings of an arbitral award pending in a member state<sup>227</sup>.

Consequently, if the novel *lis alibi pendens* rule upon forum selection agreements' was a step forward, the management of arbitration agreements was ten step backwards. The exclusion of arbitration in the way by which is adopted has led to the formal foundation of two parallel and antagonistic procedures<sup>228</sup>, that being capable of reaching contradictory rulings, not only pollutes the climate of certainty, intended to be established, but additionally subverts the credibility of the whole judicial system.

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<sup>226</sup> Of course, there is an opposite view, according to which even where an anti-suit injunction is issued by an arbitral tribunal, it still restrains «.....*both the exercise of the jurisdiction under the Brussels I rules and the connected right of access to a court. As a result, the anti-suit injunction should not be enforced in the member State where it gives rise to such effects. It does not matter that the arbitral anti-suit injunction falls outside the scope of the Brussels I bis Regulation, as does indeed the anti-suit injunction granted by a court: the interest in question is, in fact, to protect the Brussels I Regulation effet utile against measures like the anti-suit injunctions as far as the functioning of the rules on jurisdiction is concerned.....*», *ibid.*, p.11. Despite the fact that the aforementioned syllogism has a strong point, it is an extra legem interpretation, which is not teleologically approved since it shrinks even more the potential of arbitral tribunals to perform their duties.

<sup>227</sup> It is submitted that the given interpretative instruction applies where the recognition and enforcement proceedings regarding an arbitral award precede those referring to a judgment under the Brussels I Regulation recast, see Hauberg Wilhelmsen, *op.cit.*, p.125. However, the inverse case does not mean that the Convention is not applicable, see Leandro, *op.cit.*, p.9.

<sup>228</sup> Hauberg Wilhelmsen, *op.cit.*

### 3. *Forum non-conveniens* cases

The failure of establishing a reliable *modus operandi* for arbitration agreements, which constitute an institution equally embraced by civil and common law, has meant that the anticipation to regulate the category of *forum non conveniens* cases, even in the disguised form of *Turner*<sup>229</sup>, was unrealistic. Civilian codifications of procedural law, constantly oriented to safeguard certainty via the obligatory compliance with the respectively applicable rules, could not tolerate the vagueness deriving from the discretionary power conferred by virtue of the *forum non conveniens* doctrine. So, the latter was an intruder within the system of Brussels I Regulation recast, from which therefore has been exiled.

Nonetheless, those reservations are not totally justified, taking into consideration that the *forum non-conveniens* concept may not have a corollary to civil law jurisdictions, but its logic strikingly resembles the well-known to civilian jurists function of the legal provisions introducing the so-called *generic clauses*, such as good faith. Pursuant to a stereotype wording, those ones are regarded as *abstract legal concepts*, that are to be specified by the judge with regard to the particular conditions of a case and so by definition are adjustable to each difference. This indicates that both<sup>230</sup> concepts primarily target at the specification of the concrete factors of a case in order to allow the judge to burst the heavy fetters of the rigidity of law and therefore dispense *individual*, namely substantial, justice. Exactly, from that angle, both of them are pure expressions of the equity, as each legal family conceives it.<sup>231</sup> So, viewed through that lens, *forum non-conveniens* doctrine does not appear at last to be so alien to the civilian community and in that respect the absolute suspicion against its application and thus its *a priori* overruling is *nieder* legitimate nor expedient. Only its *in concreto* examination on a case by case basis and therefore its *ex posteriori* assessment in the light of the given factual conditions shall determine its judicial treatment.

Furthermore, on closer examination, it should be additionally observed that the jurisprudential criteria crystallized for sustaining the *forum non-conveniens* objection in essence coincide with those established for undergoing the proportionality test<sup>232</sup>, which by the way is a purely

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<sup>229</sup> See Section II under I (2) (a) (ii).

<sup>230</sup> See Section I under III (1) (a) (i).

<sup>231</sup> Besides, genuine justice should have wide shut only its eyes and not its ears.

<sup>232</sup> The principle of proportionality was originally cultivated in the framework of the German Police Law and subsequently has been evolved to such an extent so as to become a general principle of Public Law, which regulates the relationship between state and citizens. In particular, traditionally it functions as a restriction of the boundaries set up by the executive or legislative power to the citizens' fundamental rights, namely as "a restriction of the restrictions" ("*Schranken-Schranke*" is the original German term). In parallel, its application has been extended to areas of Private Law as well, in which, however, it acts as an *initial* limitation to the exercise of rights; but the field where it has laid the foundations for

civilian brainchild. So, as illustrated in more detail above<sup>233</sup>, forum non-conveniens doctrine in the context of granting anti-suit injunctions, on the one hand presupposes that such conditions are fulfilled so that a local forum is much more equipped than that seised of an action abroad to adjudicate upon a dispute in terms of grasping deeper command of the applicable law, ensuring proximity of evidences for facilitating the hearings and reaching a considerably fairer decision and therefore saving money and time. That practically means that the local forum is more *appropriate*<sup>234</sup> to rule on the dispute, which constitute the first dimension of the proportionality principle. At the same time, on the other hand, foreign proceedings are required to be oppressive and vexatious, elements that make the local forum additionally *necessary*<sup>235</sup> for the proper resolution of the difference, which expresses the second aspect of proportionality. Lastly, the condition that the counter litigant shall not suffer an *excessive* injustice by being devoid of rights acknowledged by the foreign legal order clearly connotes the *weighing* of the latter's *cost* in comparison with the *benefits* of the litigant invoking the forum non-conveniens plea, which represents the so-called *stricto sensu* proportionality<sup>236</sup>. So, it seems that when deciphering the forum non-conveniens doctrine to the "civilian language" by the familiar to civil law jurists means of the principle of proportionality, it becomes not only comprehensible, but admissible as well<sup>237</sup>.

Under that view, the insertion of a provision in the form of a general clause for allowing national courts to disdain abusive procedural conducts by dismissing an action brought in bad faith based on the civilian reading of the forum non-conveniens test, would be most welcome as long as its application was confined to exceptional circumstances, which by definition should be the case. If such a rule could additionally prevail towards *lis alibi pendens* one, as well, it would ideally armour the entire system of jurisdictional allocation throughout the EU

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the re-determination of the rights' area of smooth operation is individual and collective Labour Law. The right to dismiss and strike, on which pivotal interests of the employer and the employee are contingent, constitute the most representative examples of its catalytic influence, which has been underpinned by a vast case-law, as well. See for a deep analysis of all those considerations and an extensive and exhaustive critical approach of the relevant German and Greek jurisprudence, Ζερδελής, *Η απόλυση ως ultima ratio*, passim; Ζερδελής, *Αναλογικότητα και Απεργία*, passim.

<sup>233</sup> See Section I under III (1) (a) (i).

<sup>234</sup> *Grundsatz der Geeignetheit* (the exact German term).

<sup>235</sup> *Grundsatz der Erforderlichkeit* or *Notwendigkeit* (the exact German term).

<sup>236</sup> *Grundsatz der Verhältnismässigkeit im engeren Sinne* or *Grundsatz der Proportionalität* (the exact German term).

<sup>237</sup> Considering always the extensive application of proportionality test by civil law jurisdictions.

against stratagems aiming at misusing it in order to dishearten the diligent litigant by causing excessive delay and cost.

#### CONCLUSION

The European legislator has opted for fragmentary combating the side-effects of the indiscriminate application of the *lis alibi pendens* rule by repressing solely the tactic of infringing forum selection clauses via the adoption of a rather pioneering provision at least for the civil law standards. The indisputable primacy of the designated court seems to open a new chapter in the history of anti-suit injunction within the civilian jurisdictions governed by the Brussels I Regulation recast. Nevertheless, its path does not seem to be paved with rose petals where anti-injunction is intended to be used as a hedge against the violation of arbitration agreements and the *forum non-conveniens* doctrine. While the European family has not yet become mature enough to assimilate the latter in order to adjust it to the design of the EU procedural law, common sense rebels at the missing of the unique boat to re-conceive the interplay between litigation and arbitration in such a way so as to transform Europe to a magnetic pole of transnational commercial transactions universally.

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