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January 2018
Thessaloniki - Greece
Abstract

In this “multi-dimensional game” each legal order tries to find its position and to ascend in the highest point of the judicial “pyramid”. This Thesis outlines the conceptual foundations of an Anti-suit and Anti-arbitration injunction in International Commercial Arbitration. It is exhibited the drawing of an anti-suit injunction encountered with the international law and stepping further to comity and state’s own sovereignty deliberations, evaluating its pragmatic facet and concerns on the enforcement phase, accompanied with propositions on alternatives for national courts and counsels. It is also submitted the drawing of an anti-arbitration injunction outfaced with international and customary law including sovereignty considerations and seeking solutions for curtailing the eventual maltreatment adding the tribunal’s confrontation on this command. Afterwards, the EU “practice” is analyzed, indicating the justification of the anti-suit injunctions’ barring and admissibility through the ECJ’s crucial jurisprudence and the preparation for the novel expectancy of Brussels I Recast, scrutinizing its Recital 12. Furthermore, both injunctions are captured through the English courts insights and inner legislation, demonstrating the pivotal preconditions of their issuance, detecting further the repercussions of the Brexit’s Referendum on their application and decomposing the British’s persona. They are also placed in the Greek legal reality contesting interim measures and greek public policy speculations. This Thesis results with an application on the symbiotic relationship between national courts and arbitral tribunals and dictates the properness of the injunctions in international commercial arbitration and the predominance in each jurisdiction, detecting recent developments in the judicial sphere.

Keywords: anti-suit injunctions, anti-arbitration injunctions, procedural pleas, international arbitration, Brussels regime

Chrysanthi Markaki
13/02/2018
Preface

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law at the International Hellenic University. I craved to deepen my knowledge in the field of international commercial arbitration and, principally, in the further assessment of jurisdictional and procedural matters in an international extent in order to detect the attitudes in both legal forums, a civil law and common law jurisdiction and their eventual impact in the nucleus of international commercial arbitration. Anti-suit and Anti-arbitration injunctions and their exponentially increased employment in the international arbitration arena were the appropriate utensils to labor this task and to evaluate their effectiveness via a theoretical and intra-court background.

The main difficulty that I coped in the course of my research was that I had to consider the judgements and standpoints of both national courts and arbitral tribunals in conjunction with the experiences, views and feelings of judges, arbitrators and parties of various nationalities, in order to base my scientific analysis. This was what exactly I wanted to gain from my thesis’s journey. Anti-suit v. Anti-arbitration injunctions: it seems that everyone desires to be part of this “legal debate” and so am I. I wanted to offer a complete picture for each practitioner in order to be sufficiently informed and be confident to answer in this inquiry.

Certainly, I would like to express my gratefulness to my Thesis supervisor Prof. Dr. em. Athanassios Kassis for his ardent support and encouragement during my research responding to all my concerns; and I owe him my inspiration to entry into the international commercial arbitration arena. I would like also to thank all the LLM Faculty for their excellent cooperation and willingness to assist in my educational effort.
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INTRODUCTION

Are you a dreamer? Which are your Dreams? Do you have a vision about international commercial arbitration? It is said that the great aspiration and “dream” for international commercial arbitration is to be solidified and duly piloted by the internationally established practices, far from the commands of “parochial” national laws. There should be no intricacy by national jurisdiction or, at least as little as viable can be, for the arbitration agreements and awards to be truly recognized and enforced respectively. Accordingly, the “nightmare” script is colonized in cases where national law affords a slender right of ingress in the international arbitration arena, interposing in the arbitral procedure or re-appraising the resolutions of an international arbitral tribunal.1 The “dream” is captured in the conceptual scheme of the “anti-suit injunctions”, while the “nightmare” is hanged on the concoction plan of the “anti-arbitration” injunctions.

In this Thesis it will be outlined the concepts of an anti-suit (Chapter I) and anti-arbitration injunction (Chapter II) in international commercial arbitration, being assessed through the doctrinal legal reflections as to exhibit the contrastive stances towards their conformity and effectiveness, escorted with propositions on alternatives. Ex post, it is imperative to stride into the EU “practice”, indicating the justification of their prohibition and admissibility via the ECJ’s semantic jurisprudence and the up-to-date Brussels I Recast, reviewing its Recital 12 (Chapter III). Furthermore, the anti-suit and anti-arbitration injunctions would be placed in both a common and civil law jurisdiction, detecting the English and Greek courts resolutions in this regard, and proposing solutions for the post-Brexit’s Referendum day in international commercial arbitration (Chapter IV). This Thesis’s aim is to conclude with a suggestion on the symbiotic cohabitation between national courts and arbitral tribunals, responding on the inquiry which order eventually conquers this “battle” and prevails in each above jurisdiction, turning the belief in a self-sufficient nature of international commercial arbitration, succeeding its “dream”.

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I. ANTI-SUIT INJUNCTIONS IN INTERNATIONAL COMMERCIAL ARBITRATION

A. THE DRAWING OF AN ANTI-SUIT INJUNCTION

An anti-suit injunction is a procedural beacon of the jurisdictional apportionment method ordaining the intractable litigant resorting to the qualified adjudicator by slashing his route to gain access into the unqualified one. Anti-suit injunctions, an affrontive form of forum non conveniens, institute a procedural “device” of common law jurisdictions, according to which a national court orders a party to refrain from “raising an action before the courts of another forum or, if the party has already brought such an action, orders to withdraw from, or to suspend, the foreign proceedings”. In the sphere of international arbitration, the anti-suit injunctions aim to impede or intercept a foreign litigation, in violation of an arbitration agreement, standing by the side of the arbitral process. Specially fabricated to operate merely in personam, it endeavors to inhibit a party from initiating or insisting with court procedures in an alien jurisdiction, designing a scheme of “extraterritorialité des personnes”.

Detectable from the fifteenth century England, the remedy initially was revealed as a “writ of prohibition” by the common law courts to the ecclesiastical ones, preventing their diffusive jurisdictional proclamations. Initially, confined in the allocation of jurisdiction among the antagonistic domestic courts, from the early nineteenth century, were found competing procedures in Scotland, Ireland and the British colonies. From the Pena Copper Mines Ltd case by hindering the performance of a

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5 In theory, it is capable that an anti-suit injunction can be addressed against a judge of a state court. However in practice this has never placed due to the fact that it would undoubtedly lead to a maltreatment of “judicial courtesy” - Nicholas Poon, “The Use and Abuse of Anti-Arbitration Injunctions - A Way Forward for Singapore”, 25 SAcLJ 244, 295 (2013), p.247


7 Supra n.2, p. 642

8 Pena Copper Mines Ltd v Rio Tinto Co Ltd, [1911] 105 LT 846
foreign process patronizing an arbitration agreement, it was then that anti-suit injunctions were outspread in foreign states within the arbitral coliseum, evolving into a worldly-wise status quo.

Anti-suit injunctions pursuing to prevent or block court procedures in infringement of an arbitration agreement, are more consistent in appearance, with the courts being more complaisant to grant these remedies, as their bourn is to enforce the parties’ accord. These kinds of concurrent procedures can thwart the progressing or expected arbitration guiding to a re-litigation of the idem subject matter that has already determined and become res judicata. A decision issued may, additionally, obstruct the final enforcement of the tribunal’s award if its deliberations are antithetical in signs with the award.9 This exact stance was supported by the English courts in the Aggeliki Charis Compania Maritima v. Pagnan case (“The Angelic Grace”)10, which was signified as the prototype case for the pertinent granting of an anti-injunction. The Court of Appeal contended that in the event, where an injunction pursues to refrain a party from processing in an alien court, in disrespect of an arbitration agreement, English courts would not bear any compunction in supplying the injunction with the justification that “in either case without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy”. Thus, the Court of Appeal elucidated that regarding the enforcement of the arbitration agreements, anti-suit injunctions should be issued more effortlessly than those concerning injunctions in a foreign process and are grounded on forum non conveniens considerations11. As Millet LJ has debunked this “ritual incantation” that this is a jurisdiction that should be employed circumspectly, he denies admitting that any court would be afflicted by the issuance of an anti-suit injunction to inhibit a party from evoking a jurisdiction which betrothed not to bring, being the former’s obligation to repulse. He observed that in a collation between an injunction to inhibit actions in violation of an arbitration clause and one in violation of an exclusive jurisdiction clause, as was the issue in Continental Bank NA v Aeakos Compania Naviera SA case12, there is not a variation and should be treated in equal terms.13

Borrowing from the U.S. Circuits conceptions the rapprochement of this judgement was labelled as a “lax or liberal” one, which is more eager in granting international


11 Supra n.9, p.365

12 Continental Bank NA v Aeakos Compania Naviera SA and Others [1994] 1 WLR 588, para.26

13 Supra n.3, p.202
anti-suit injunctions. Such orders are well-fitted when there is a duplication of parties and subject matters, emphasizing in certain key-lineaments such as the harassment, expense, delay, excruciating inconvenience and diverging decisions procreated from the alien action\textsuperscript{14,15} Although in the posterior jurisprudence of the national courts this method has been more attentive, the judgement on the Angelic Grace case has steadily been corroborated.

B. DOCTRINAL LEGAL REFLECTIONS ON THE ADMISSIBILITY OF ANTI-SUIT INJUNCTIONS

\textit{i) Conformity with International law}

The NYC does not expressly include a ruling concerning the compatibility of anti-suit injunctions in the context of arbitration. However, the sole shortage of an explicit article, is not appearing as an adequate rationale for pleading the conformity or inconsistency with the Convention. What is expressly identified by the NYC\textsuperscript{16} is that, under the auspices of the formulaic definition in Article II(1)\textsuperscript{17} of the NYC, an arbitration agreement imbues the arbitral tribunal with the authority to rule upon the delegated disputes, building in the same time a concurrent judicial order for the distribution of justice and the further recognition of this accord by each signatory-state. In this idem provision inhabits the ism that an arbitration agreement is escorted by contractual side effects. The positive side effect is interpreted as a \textit{sui generis} duty,

\textsuperscript{14} Under a more confined viewpoint, it is confessed that there can be a simultaneous progress of two different procedures, without meditating issues deduced from the lis pendens and forum non convenience principles; the decisive matters are met in the case where the foreign act either jeopardizes directly the jurisdiction of the forum court, or menaces a robust national policy. The third viewpoint discards the preceding appraisals; it declares that the “gatekeeping” process is merely whether the issue that concurrent suits concern the \textit{idem} parties and subject matters, and only if this term is accomplished, should the court come in the position to assess the facts, determining the aptness of the injunction. If, after checking all the circumstances, comprising also the principal of international comity, the court may result that a fair reasoning predominate in the approval of the relief, and then might order an anti-suit injunction. - José I. Astigarraga, “Comments on Control of Jurisdiction by Injunctions Issued by National Courts”, in Albert Jan van den Berg (ed.), International Arbitration 2006: Back to Basics?, ICCA Congress Series, Volume 13 (Kluwer Law International 2007), pp.222-223


\textsuperscript{16} New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (“NYC”)

\textsuperscript{17}Article II(1), “Each Contracting State shall recognize 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, concerning a subject matter capable of settlement by arbitration.”
to be actively involved in the arbitral process in "good faith", which is further expanded in the collaborating participation in the entire process by authentically propelling its even performance, adhering the reciprocally canonized procedure. Tossing the penny, the adverse negative duty finds the contracted parties ipso facto committed not to resort to litigation through the commencement of which the anticipated boons of a high-speed and effective resolution of the dispute would be rebutted. The NYC in its Article II(3)\textsuperscript{18} sets that when a state courts seized in a matter in respect of which the parties have made an arbitration agreement "shall refer the parties to arbitration" unless it concludes that the vindicated agreement is voidable.\textsuperscript{19}

So, it is heartfelt that, there is no accessible remedy furnishing this exact enforcement by way of directly compelling the parties to arbitration, with remarkably exceptional records, such as the 4, 206 and 303 of the FAA\textsuperscript{20} in the US.\textsuperscript{21} Hence, the institutional aid for the achievement of this demand, in the context of real efficacy, is found among a suspension or a halt of the suit in each instance, and even this is doubtful in a non-arbitration-friendly forum: the court would not order the parties to arbitration “sua sponte or ex officio”\textsuperscript{22}. But this situation does not strike against the ill-treatment of the entire process, a system where parallel proceedings are not ostracized, permitting the pre-arbitration ones in more than one signatory-forum\textsuperscript{23}. Therefore, it has been a flaming urgency in founding a more effectual antidote, and this is what exactly embodies an unregistered obstructionist order, the anti-suit injunction. The ratio for issuing an anti-injunction is inhabited in the defendant’s engagement not to initiate foreign court proceedings in breach of the arbitration agreement\textsuperscript{24}. A party attempting to prevaricate a potential deleterious arbitral award,

\textsuperscript{18} Article II(3), “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.”


\textsuperscript{20} Section 4, Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination - Section 206, Order to compel arbitration; appointment of arbitrators - Section 303, Order to compel arbitration; appointment of arbitrators; locale


\textsuperscript{22} Supra n.19, pp. 1263-1264, 1269, 1282

\textsuperscript{23} Supra n.2, p. 647

\textsuperscript{24} predestinated to suspend coeval court procedures in a foreign country.
or a decision may seek for resolution on the merits in a propitious forum (usually its own place of residence), which would probably render a decision favoring him, entrapping the adverse party in an onerous position by pleading a court with an incompetent jurisdiction, exposed to the detriments of immoderate delay, cost and inconvenience. The order’s objective is to contain the claimant in the alien proceedings from placing the other party through this tribulation of a falsely commenced bulk of proceedings.\(^{25}\)

**ii) The Pragmatic facet and Enforcement of Anti-suit injunctions**

The rudimental effectiveness of the anti-suit injunction device is that it institutes a debarment inflicted by a court not simply dictating, but coercing the party brought before an alien court, meaning that if the defendant trespasses the content of the injunction would be accountable of “contempt of court, imprisoned, fined or his property seized”. The disobedience would supplementary result to the effect that any decision acquired by the defendant from the alien forum may not be enforced.\(^{26}\) Hence, in the international commercial arbitration arena, anti-suit injunctions should be perceived as an *invaluable attendant* of arbitration agreements, reprobated to drop into a subversion and ignominy ocean, being totally divested by its initial attainments.

Nevertheless, the enforcement phase of an anti-suit injunction is said that obscures certain imperfections; it is not contingent on the cause on which the injunction is grounded, but on the austerity of punishment or the effective locality and access to the refractory party’s property. Sensing this functionalism, it is not for the party to exhibit optimum basis for the granting of an anti-suit injunction, which will perforce flourish, but operable matters such as the carver of the sanctions or the placement of the breaching party’s assets are preponderated.\(^{27}\) An extra requisition for the injunction to be successful is that the party and its possessions must be instated within the area of the national court’s jurisdiction, which is going to enforce the sanction. If this condition is not met the indifference for the injunction would stay innocuous, and court process will continue to proceed, albeit the existence of the arbitration

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\(^{26}\) Ibid n.25, p.292

agreement. Even so, the judgement resulted from such a process will not be recognized in the country which had granted the anti-suit injunction at issue.28

**iii) Comity and Resistance of state’s own Sovereignty**

At a first glance, the majority would greet this kind of injunction, underpinned that such measures strengthen and perfectly boosts the “pro-arbitration” approach: anti-suit injunctions in assistance of arbitration have a different tenor, to defend the parties’ consensus to arbitrate. The parties have determined to resolve their dispute under the aegis of a specified mechanism which the courts strive to support by stunting a party from trying to evade its engagement to arbitrate.29

However, the rising tendency on the part of the merciless parties in international arbitration to develop riotous tactics towards the national courts has created an increasing disinclination and mistrust. A second glance can guide us to an entirely adverse verdict; the image is not as clear and plain as it seems, it creates an illusory effect. There is an extended atmosphere in the arbitration field that this is another additional step, showing the path to the court intervention, in something that is alleged to be a private law, a non-court procedure: it is the “fine line of a novel and perilous block”. It is enshrined in the conceptual idea of arbitration that court intervention of any type is completely incompatible, except for the enforcement stage and certain individual instances that is needed.30 However, it is true that every remedy has its own price.

An anti-suit injunction is visualized as an irrational penetration by a national judge in the legal culture of another jurisdiction. Though anti-suit injunctions are not issued against an alien court, but to one of the litigants in dispute, it is manifest that they are planned to safeguard the forum’s competence, which in the view of the court addressing the injunction, overcomes the competence of another jurisdiction, and thereof intrinsically stripping its inborn right to be the master of its own jurisdiction,

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29 Supra n.27, p.125

piloting to questions of own state’s sovereignty\textsuperscript{31}, reiterated by the Regional Court of Appeal in Düsseldorf in its judgement \textit{11/95}\textsuperscript{32}.

An interdictory order by a national court such an anti-suit injunction, substantially criticizes the ministerial picks of the alien state with respect to the operation of its judiciary, concluding to an averment of contravention to public international law and \textit{comitas gentium}\textsuperscript{33}. Concomitantly, an anti-suit injunction \textit{de facto} pokes one national judge hostile to another, cogitating a deficiency of credence by one national adjudicator to the other. These pleas are presenting the civil law legal cultivation, giving impetus to the public rather than to the private adjudicators\textsuperscript{34,35}.

In view of sovereignty and comity considerations, anti-suit injunctions can be evolved into a defiance and plainly guide the alien forum to shield its sovereignty by invoking a germane order, like the materialization of an anti-anti-suit injunction.\textsuperscript{36} Imagine the chaos that would be created the moment it evolves into a self-destruction tit-for-tat play. An illustrative example of this effect is the famous \textit{Pertamina} case\textsuperscript{37}. In this case a sequence of injunctions by national courts was took place ordering the other state’s parties, with the one side of state court attempting to annul the other state’s decisions. Like Americans says the parties were troubled “\textit{between a rock and a hard place}”\textsuperscript{38}.


\textsuperscript{32} Oberlandesgericht Düsseldorf, 10 January 1996 [3 VA 11/95] Re the Enforcement of an English Anti-Suit Injunction [1997], ILPr 320

\textsuperscript{33} “courtesy,complacence...a principle in accordance with which the courts in one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation but out of deference and respect”, Buhala - Mauro Rubino-Sammartano, “International Arbitration-Law and Practice”,3rd Edition, JurisNet, LLC (2014), p.556

\textsuperscript{34} Another piece of perturbation is also founded when the anti-suit injunction is sought to the litigants before alien fora, furnishing the sentence of a national court with an “extraterritorial” dimension, where in another situation there might not be such incurrence. Anti-suit injunctions also tempt providence on repulsing a party from its vital and constitutional right of access to justice.- Supra n.31, p.285

\textsuperscript{35} Supra n.27, p.126

\textsuperscript{36} Supra n.31, p.285


\textsuperscript{38} Supra n.30, p.21; See also Michael E. Schneider, “\textit{Court Actions in Defence Against Anti-Suit Injunctions}”, in Anti-Suit Injunctions in International Arbitration (Emmanuel Gaillard ed., 2005), Juris Publishing Inc. and International Arbitration Institute (IAI), pp.44-46
C. THE ARBITRAL TRIBUNAL’S “DEVOIR” ON GRANTING “ARBITRAL” ANTI-SUIT ORDERS

This dissension and skepticism emerged from the court-based jurisprudence, have straightly pollute the standpoint for anti-suit injunctions in the coliseum of international commercial arbitration, and in reality, most arbitrators are being reluctant to step in. On the one hand, many have supported that judges must not acquire such power and that arbitrators must be restrained uniformly for the identical ratios. Others are not willing to capture the instance in which arbitrators may have more substantial or dissimilar powers in this respect than the national courts. Furthermore, it is voiced that a private tribunal is essentially in a minor judicially position than a judge, to meddle in a sovereign court procedure: the concept of intervening with a state court has been deemed as being far from the arbitrator’s command.\(^{(39)}\)

Refuting this argumentative syllogism, international arbitration as chiefly a child of contract is liberate from the barriers that the national courts are engaged to propound to each other like: the solemn regime of international comity, the vigilant respect of their regional and sovereign borders upon their jurisdiction, the vital adherence to the principles of forum non convenience and lis pendens as to the allotment of the jurisdiction and the performance within a European autonomous system. Of course, this does not support the idea that international arbitrators are completely discharged to mingle at their volition with national court procedures\(^{(40)}\), but it recommends that, worries illustrated in the court orders should be employed with attention when arbitrators “take the reins”.

It is confessed that sovereignty demur is confoundedly alleviated where anti-suit injunctions are ordered by arbitral tribunals in violation of an arbitration agreement. The authority of arbitrators to address anti-suit relief is inducted in a twofold basis: the “jurisdiction to sanction all breaches of the arbitration agreement” and “power to take any appropriate measures either to avoid the aggravation of the dispute or to ensure the effectiveness of their future award”. It is ossified in the arbitral that both side effects of the arbitration agreement do not merely fuel the obligation to the contracted parties to arbitrate, but it guides a fortiori to the assignment of jurisdiction on the arbitral tribunal to determine all the disputes covered by the agreement and the incumbent duty to shield it with all the possible modes, containing the granting of remedies impersonated in anti-suit injunctions. Arbitrators have the power to punish any contractual violation either through an award of damages (“interim award”), or by enjoining certain performance (“procedural order”) for reparation. Hence, an anti-suit injunction is not less than an order addressed by the arbitrators, to the escaping

\(^{(39)}\) Supra n.31, p.286

\(^{(40)}\) Supra n.31, p. 287
party to be conformed with its contractual commitment to arbitrate the agreed disputes and amiss had tendered in the domestic courts. Each international tribunal is equipped with the coalescent jurisdiction to address anti-suit injunctions as they institute the pivotal arbitral “lifelines”, guarding the tidy arranging of the disputes, echoed as a “general principle of law” within the nuance of Article 38(1)(c) of the SICJ.

When it is requested to restrict a party from initiating proceedings before a national court, the arbitral tribunals must show a sturdy character to extract any kind of worries as to the intervention with a sovereign national procedure, the substantial constitutional rules, the national court’s magistracy and the latter’s right to its own “competence-competence”. It has also been doubted that the effectiveness of these measures is not productive if granted by arbitrators, and urges to be cogitated before boarding on a relevant petition: an arbitral anti-suit order is not per se enforceable, forfeiting the compulsive power that courts attain, and such an “astreinte” becomes inert without the countenance of enforcement by national courts.

**D. SENTENTIOUS MEMOS ON SEARCHING FOR ALTERNATIVES**

The basic step to a felicitous international dispute management is for the parties and their counsels to fabricate the arbitration clause cautiously earning in legal predictability, costs and time economy. By corroborating the granting and ramifications of anti-suit injunctions internationally, examining closely, in a comparative assessment the national arbitration laws, what is applied procedurally, containing jurisdiction to order such injunctions and the pertinent referral to arbitration, and substantively, checking-twice the preliminary matter of the validity of the arbitration agreement or the enforceability of the promise to arbitrate. A

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42 Article 38(1)(c), “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: the general principles of law recognized by civilized nations”

43 Supra n.31, p. 292

44 Supra n.31, p. 286

45 An “astreinte” institutes the menace of a civil sanction guaranteeing conformity with the judge’s decision emanating from the French law. - Supra n.27, pp.225,231

46 As a paradigm, in a dispute where a national court denies postponing the legal procedure by contrast to a valid arbitration agreement, defining (in the agreement) that court process can be commenced by either of the contracting parties merely after an arbitral award has been issued on the identical subject, may be fruitless according to certain arbitration regimes such as the English one. - Guido Carducci,
preventative measure, which is indicative to be taken, is the conclusion of the arbitration agreement with a clear indication of the governing law, which is usually overlooked in the negotiations of the main contract and the dispute settlement agreement. Depending solely on the principle of “separability presumption” in order to surpass a choice-of-law would be an erroneous movement, since it merely hinders the invalidity reliance of the main contract to the arbitration agreement and does not settle the law governing the latter47, extruding also from an eventual benefit of “juge d’appui”48 opting for the French statute.

Lieu in vigorously enforcing an arbitration agreement, national courts can reveal a more passive stance, fostering the arbitration agreement impliedly. A court may adjourn a harassing lawsuit raised before it, in violation of the agreement as an alternative of protruding a party to cease a parallel court procedure or to proceed to arbitration. Hence, this indirect mode presses the claimant to resort to arbitration, since he will not occupy any judicial forum to hold his declaration.49 A descriptive exemplar is the Channel Tunnel case, where Eurotunnel brought a claim in the English courts calling for an injunction to restrict Trans-Manche Link from stemming their operations, with the latter pleasing for a stay of the procedure on behalf of arbitration. The House of Lords dictated to procrastinate the process, resting on the court’s intrinsic jurisdiction to perform so in case of an infringement of arbitration.50 It seems that this passive support tenders a more secure course to placate the court’s concerns.

47 Ibid n.46, p. 17

48 A judge, who is normally the president of the Tribunal de Grande Instance, intercedes in pitfalls with the composition of an arbitral tribunal and in the event of a “denial of justice” to enter into the arbitral procedure, sustaining arbitration. – Supra n.33, pp.557-558

49 Supra n.3, pp.205-206

II. ANTI-ARBITRATION INJUNCTIONS IN INTERNATIONAL COMMERCIAL ARBITRATION

A. THE DRAWING OF AN ANTI-ARBITRATION INJUNCTION

Anti-arbitration injunctions have been lived in the judicial sphere for a long time, surfacing in the late 19th and early 20th century, where the vast authority proposed that where a claim in an arbitration was not included in the arbitration agreement, the court has not the ability to block it and in this lodgment, an arbitration did not result to a breach of a “legal right” 51. Anti-arbitration injunctions’ mission is to impede the arbitral process, in order to safeguard the jurisdiction of a State court over a specified case. This kind of injunction is manifestly addressed against the arbitration, ejecting the jurisdiction of an arbitral tribunal, and that its name. Analogous to anti-suit injunctions, anti-arbitration injunctions are applied “in personam”; they can be opposed to one of the parties to the arbitration, the arbitral tribunal or a specific arbitrator or, additionally, to the arbitral institution. 52 Anti-arbitration injunctions have two alternative aims: firstly, they endeavor to impeach the performance and realization of the arbitral process or secondly, to obstruct the actual enforcement of the arbitral awards (“anti-enforcement injunctions”) 53.

Such injunctions emerge mainly, when the existence or validity of an arbitration agreement is called into speculation, albeit this is the guise of the ultimate purpose to cease or undermine and weaken the arbitral proceedings. A petitioner who claims that it is not liable to the arbitral tribunal’s jurisdiction can request injunctive relief from the national courts to safeguard his right not to participate in the arbitration through a declaration. If he meets the prospects of the court that he is not committed by any agreement, the latter will have a footing to grant an anti-arbitration injunction 54.

The triggered issue, here, is if a party having signed an arbitration agreement has a reasonable right to take the first step into a court hall, pursuing to impede the arbitration process from being commenced, insisting or concluded. In typical terms, a party can be fairly justified to utilize an anti-arbitration injunction pleading that it would be extremely unjust, inadequate and overpriced to proceed with the arbitration, merely to have the award set aside after a long-lasting arbitration process, and after to re-insert the claim afresh to the competent national court. The path which leads the matter immediately before the qualified national court is pondered to be

51 Supra n.5, p.248
52 Supra n.3, p.188
53 Supra n.27, p.120
54 Supra n.5, pp.247-248
reasonable gaining in time and money spent pointlessly, chiefly in the exceptional “construction disputes”. It is well admitted that this argument is worthy of speculation, but it neglects the essence of international arbitration. However, it is essential to seek into each individual preceding case to comprehend whether an anti-arbitration injunction may be reasoned at any point or whether lawyers are utilizing this kind of remedy as an “ace up in their sleeves” to dilute or gravely sabotage an arbitration, rather than in the merits of the dispute.55

B. DOCTRINAL LEGAL REFLECTIONS ON THE ADMISSIBILITY OF ANTI-ARBITRATION INJUNCTIONS

So, we have to take a step back and consider: are anti-arbitration injunctions reasoned at any point? Still in the case where a national law caters the power to its courts to order anti-arbitration injunctions, is this practice appropriate anyway? An anti-arbitration injunction can hardly ever be justified56.

i) Sovereignty and Conformity with International law

In a brief gaze, anti-arbitration injunctions do not attract the same stricture amounted to the anti-suit injunctions, owing that they do not directly penetrate the jurisdiction of national court’s sovereign status57. Albeit arbitration is subject to a judicial regime of a specified jurisdiction by the supporters of the “conventional” idea, it is indeed very difficult to be interpreted as a prolongation of a state’s judicial apparatus. Hence, objections on the mistreatment of state sovereignty against the anti-suit injunctions are not efficient in the field of anti-arbitration injunctions. Nevertheless, their legitimacy is suspected, as they present an irreconcilable character with the international arbitration law.58

When a national court operates in its functions, it operates as a jigger of the state, turning the latter in international level liable. When a national court grants an anti-arbitration injunction, impeding the international arbitration consented in the agreement, that is the court that deducts the parties to arbitration as Article II(3) commands. It is the identical court, that does not accomplish to recognize an arbitral award as binding and enforceable as Article III59 orders, and it declines it, in advance,

55 Supra n.3, pp.189, 215
56 Supra n.3, p.215
57 Supra n.3, p.289
58 Supra n.5, p.247
59 Article III, “Each Contracting State shall recognize arbitral awards as binding and enforce them...There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition
The parties engaged to a treaty are bound under international law, conforming blindly with the Vienna Convention on the law of Treaties, to act in a “good faith”. As the Convention states, the party should not recourse to the rules of its internal domestic law, declaring it as an *alibi* for its defection to implement the treaty. The genuine intention of the NYC is to guard that arbitration agreements and their arbitral awards, as their judicial creatures, are truly recognized and enforced *ab initio*. It seems that if a court grants an anti-arbitration injunction, acting away from recognizing and enforcing an arbitration agreement, paralyzes the arbitration process, which endeavors to perform this agreement, is incompatible with the duties promised by the State on the substance of the NYC, manipulating its *pneuma*.60

The UNCITRAL Model Law61 does not explicitly outfaces with the anti-arbitration injunctions, but *Article 5*62 accompanied with the spirit of the enactment, advocates bluntly on the forbiddance of these injunctions. It has been indicated that these “matters” are encompassing “the assistance” to the arbitral procedure and “the control of legality” of the latter. Anti-arbitration injunctions veritably perform as *auditors* to the legitimacy of the arbitral procedure in all circumstances, whether the injunction is addressed against the parties or the arbitrators. It hunts to inspect the jurisdiction of the arbitral tribunal and, hence the legitimacy of the entire arbitral procedure. As an outcome, anti-arbitration injunctions should be counted as matters falling inside the scope of the provision. Correspondingly, the national courts of a Model Law state, should not depend on their inner national law for the issuance of anti-arbitration injunctions, principally in a segregation of domestic and international arbitration. It is a necessity to be declared that, under *Article 1(2)* of the Model Law, *Article 5* solely is in force, if the injunction is addressed by a court of the *locus* of arbitration. The meaning of this fission pilots to the conclusion, that the Model Law does not interdict domestic courts from preventing an arbitration abroad. This ceiling is misplaced, since the legal certainty cannot be delimited to the intervention from the courts of the arbitral *situs*. However, there is a forceful allegation to load this gap: an anti-arbitration injunction trying to impede an arbitration abroad, is adversely affecting the regime which the Model Law creates, serving the inquiring of the arbitral

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62 Article 5, “In matters governed by this Law, no court shall intervene except where so provided in this Law.”
procedure ex post the procurement of the award. This statement was certified in the eighteenth assembly of “travaux préparatoires” of the UNCITRAL to reduce the court chances to easily pierce into the arbitral process, disincentivizing dilatory strategies. Therefore, anti-arbitration injunctions run counter to the non-interventionist regime of the Model Law, forbidding national courts to grant anti-arbitration injunctions.63

**ii) Compliance with Customary international law**

Moreover, there are principles which must be respected and obeyed under the customary international law. As a first situation, it has been long admitted that a state, which embargoes a foreign citizen or company to access its national courts, it was automatically accused guilty of “denial of justice”. This principle should also be applied, when a state declines the entrance to the arbitral proceedings conferred by an existing arbitration agreement. This kind of decision should be announced as a modus of a State’s abnegation of its commitment to arbitrate. Abiding the words in the *Benteler* case, when a national court, in the scene of international arbitration, stunts the ingress to the arbitration procedure through the granting of an anti-arbitration injunction, that amounts equally to a “denial of justice”, being simultaneously a breach of international public policy.

A second branch of infraction of customary international law is erected in the State’s abstention to grasp the property and the contractual rights of a foreign citizen in the spectrum of its jurisdiction, maneuvering in an “arbitrary, tortious or confiscatory” mode. The contractual right of a party to arbitrate its disputes is valuable, ascending frequently as the indispensable part of the closing of the contract at the first place. An extra segment of illicitness is found in its contradiction with the cardinal principle of the law of contracts, which is generally endorsed as a “source of law” by the Statute of the ICJ. This principle is there to ensure that the parties expectations from the contract, with its crucial Terms of Reference, are going to be interpretatively decisive for the execution of the former. When the parties in an international contract determine international arbitration as the sole means of resolving their conflicts, it is manifest that the parties’ expectations are conquered by the granting of an anti-arbitration injunction, striking-out arbitration. In this background the principle of “party autonomy” is being at discrepancy with such injunction. In the *Salini* case the

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63 Supra n.3, p.198


65 Supra n.60, pp.12-13

ICC tribunal opined that, since the parties’ accord was to settle their dispute through arbitration, it would overlook the injunction, persisting with arbitration indicated by the parties’ agreement.67

The last, but not least, basal principle, which is trespassed blatantly is that the arbitral tribunal is the sole adjudicator of its own jurisdiction. The spring of this authority rolls from the well-established legal fiction68 in international arbitration of “competence-competence” (Kompetenz-Kompetenz). In specific, this innate weapon is communicated through two dimensions: a positive and a negative one. The positive expresses the arbitral tribunal’s power to self-identify its own jurisdiction, while the negative one, that the arbitral tribunal should have the precedence in founding jurisdiction and the national courts should be prevented to a prima facie inquiry, cherishing a prospective assessment after the decision of the tribunal. Notwithstanding the universal concord on the positive side of competence-competence, the negative one stands as the “apple of discord” when reckons on the measurement of national court’s curb from meddling in the arbitrators’ jurisdiction.69

While the Model Law gears with an explicit recognition the arbitrators’ competence-competence jointly with a procedural plan on operating its authority (Article 16(1)), with any jurisdictional judgement being exposed to a subsequent judicial inspection (Article 16(3) and 34(2)(a)), whereas at the same time permitting interlocutory judicial speculation on jurisdictional matters ex ante or simultaneously (Article 8(1)), while the arbitral process progresses on the same issue (Article 8 (2)), it is perceptible that does not furnish a healthy solution. Although, this is an internationally accepted principle, the international forum is not mature enough to generate net rules, so its prosecution in national arbitration legislations is contingent on the jurisdictions posture towards the correlation among national courts and arbitral tribunals.70 Hence, the ball is on each state’s terrain to decide, according to the procedural law of the arbitral locus.

The most progressive paragon of the negative dimension of “competence-

67 A fundamental principle of international arbitration which is sacrificed for the granting of an anti-arbitration injunction, is the so-called “separability presumption”. In the situation where the main contract is challenged, the “invalidity, termination, nullification or suspension” of the contract does not affect the arbitration commitment for the parties. The arbitration clause is deemed to be completely severable from the main contract which it merely forms part. This is a notable remark, because very often anti-arbitration injunctions are issued in this allegation, evoking that the main contract is invalid or is concluded in circumstances of depravation. Hence, the remedy is not affiliated with the principle of the “separability presumption” at any point. – Supra n.60, pp.13-14


70 Ibid n.69, pp.1078-1081
“competence” is detected in France and Switzerland (Article 186(1bis) of SPILA\textsuperscript{71}), with the former, furnishing a clear-cut rule on prioritization of tribunals over courts. According to Article 1458 of the revised code of FCCP\textsuperscript{72}, French courts should deny jurisdiction over disputes, which are encompassed by an arbitration agreement, without examining the merits of the dispute or the validity of the agreement to arbitrate, once the dispute being stuck to a prima facie test (“\textit{save where the arbitration agreement is manifestly null}”)\textsuperscript{73}. Whilst the decision on jurisdiction can be reviewed by a national court, the latter does not have the power to hinder or obviate the materialization of that judgement by the arbitration’s mechanism. Thus, anti-arbitration injunctions aiming to block the arbitral tribunal’s \textit{ex ante} power to rule upon their own jurisdiction and the mere granting of an injunction grounded on a court’s perception on the validity and scope of an arbitration agreement audibly \textit{“negates the principle of competence-competence”}, as Professor Fouchard has signified and for this single rationale should be restrained\textsuperscript{74}.

These axioms are well-canonized in the field of international arbitration law. They may owe their birth in one regime or another, but they are elementary to the machinery and operation of international arbitration. These doctrines have been evolved into \textit{norms} of customary international law via their extensive admission and codification in the NYC, the UNCITRAL Model Law and in most of the modern arbitration statutes.\textsuperscript{75}

\textbf{C. CURTAILING THE POTENTIAL MALVERSATION}

It is imperative to ponder futile ways to attempt to reverse this cumbersome situation for the arbitration process. One measure that can be taken is addressed to the tribunal to dictate “cost orders” on the parties of the dispute, being independent from the other penalties until the finale of arbitration. This technique can be evolved

\textsuperscript{71} Article 186(1bis) SPILA, “It shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a state court or another arbitral tribunal, unless there are serious reasons to stay the proceedings.”

\textsuperscript{72} Article 1458 FCCP, “Where a dispute, referred to an arbitration tribunal pursuant to an arbitration agreement, is brought before a court of law of the State, the latter must decline jurisdiction. Where the case has not yet been brought before arbitration tribunal, the court must also decline jurisdiction \textit{save where the arbitration agreement is manifestly null}. In both cases, the court may not raise sua sponte its lack of jurisdiction.”

\textsuperscript{73} Supra n.69, pp. 1112-1114

\textsuperscript{74} Supra n.3, p.216

\textsuperscript{75} Supra n.3, p.217
into a strong device for sanctioning parties *de facto*, pleading an allegation of this precarious quality without having some substance\(^{76}\).

It is strenuous to consider cases in which there would stand a vindication for a national court to interfere and immobilize arbitration. Although this is not a *panacea* and there would always exist certain exception from this absoluteness. Sadly, these cases emerge under the dogma of the natural propensity that national courts are there to shield the interests of the parties, despite the parties’ agreement\(^{77}\), and the national court should at all costs take care of its own citizens as their sacrosanct duty. A contention in this court *chauvinism* is that the “perfect” settlement should be rested to the arbitrators in the second forum to disband the concurrent procedures: a second tribunal should be in charge and not a national court\(^{78}\).

**D. THE “RIPOSTE” OF THE ENJOINED TRIBUNAL**

Now, how should an arbitrator react when confronted with an injunction from a national court, commanding that he individually, or a tribunal in which he participates, should postpone its process or discontinue the arbitration? Should the arbitrator contemplate his allegiance to the contracting parties and their arbitration agreement and set aside its idem private liberty, particularly in cases where the sanction for violating a court injunction may be fees or incarceration for contempt of court? The first potential is to plainly neglect the injunction, justifying that the court ordering the injunction is not the competent one (the court of the situs of arbitration is) and that infringes the law and *modus operandi* of the international arbitration. Taking the risk, this would be a valorous maneuver, putting the arbitrator or the tribunal, in an onerous condition, especially where any member of the synthesis have to travel to the jurisdiction under dispute. Nevertheless, the arbitrators should demonstrate a rightful stance, if they have determined to obey their commitment to the parties, according to their primordial loyalty, to strive with tenacity in issuing a strong and enforceable award. It is advised that the rapprochement for the arbitrators, coping with an anti-arbitration injunction, will be contingent in a case by case inspection, evaluating the repercussions that would afflict the tribunal and each of the parties. The arbitrators must ruminate, that an award issued ignoring an injunction, may not be enforceable in the state, where its national courts granted the order and should be truly convinced

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\(^{77}\) Ibid n.76, p.39

\(^{78}\) Ibid n.76, pp.32-33
that this action would not imperil the enforceability of the award. But even in this storyline, the party have the fortune to search the enforcement of the award in another country than the enjoined one.\textsuperscript{79}

An illustrative paradigm of this confrontation presented in an ICC case 5294, a Danish company and an Egyptian employer came into an agreement for the implementation of a cattle abattoir in Egypt, enclosuring for an ICC arbitration in Zurich. The Egyptian party contested the jurisdiction of the arbitrator, conjuring that the arbitration clause was invalid, and thereof the arbitration process should be adjourned with the Egyptian courts addressing an anti-arbitration injunction. The sole arbitrator disregarded the injunction and oppugned that there was no notification of the injunction rightly on his face and irrespectively, “court proceedings in Egypt did not and do not have any direct influence on the present arbitration proceedings, since Egyptian Courts would not have jurisdiction of either these proceedings or the arbitrator.\textsuperscript{80,81} Venturing to reinforce and boost the administration of justice, anti-arbitration injunctions ended to have accomplished the exact adverse effect: the manipulation of the arbitral process. It is the practical reality that lawyers are searching for ways to safeguard their clients concerns more than trying to solve in fact the dispute. In doing this flashback, it is easily intelligible that anti-arbitration injunctions are “used and abused” in the sake of the obstruction and retardation against arbitration.\textsuperscript{82}

*Ex post* the doctrinal legal reflections of the anti-suit and anti-arbitration injunctions, it is imperative to lessen the “theory” and stride into the “practice” keeping the eyes in the unremitting happenings of EU’s legal saga.

\textsuperscript{79} Supra n.3, p.219


\textsuperscript{81} Ibid n.80, pp.137-141

\textsuperscript{82} Supra n.3, p.215
III. EUROPEAN UNION AND ANTI-SUIT/ANTI-ARBITRATION INJUNCTIONS

A. “WITH THE EYES” IN THE EU AND THE BRUSSELS REGIME

A law student of European chronicles studies a Europe “disunited”. From Spain and England struggling for predominance over the seas to France and Germany’s never-ending ground battles, Europe’s tale is a belligerent one, with states widely shielding their own land, dialect, habits and perceptions. But with the advent of the devastation that the second World War created, a “brand new” Europe endeavors for the profits of a better coordination and slighter quarrelling. A progressively amalgamated Europe earns more strength and magnitude in the global palestra.\(^83\)

The Convention on jurisdiction and enforcement of judgements in civil and commercial matters (“Brussels Convention”)\(^84\) institutes a vital component on the constant strive of Europe’s integration. The staple purpose of the Convention is that the signatory-states are deemed as a one and unified judicial order: discrimination and disbelief towards an alien court are contradictory to and out of the “psyche” of the Convention. The judgements of a member state’s court are truly enforceable in the other member states with a very restricted adjectival review.\(^85\) The Brussels I Recast\(^86\) supersedes the Brussels I Regulation 44/2001\(^87\), which successively superseded the Brussels Convention.

i) The “Vetoing” of Anti-suit injunctions via the EU jurisprudence

If anti-suit injunctions are a successful procedural utensil employed to strengthen jurisdiction agreements and block parallel procedures, then why are they undesirable? Why does the ECJ ban their usage? It is advisable to exhibit the reason of their

\(^{83}\) Maura E. Wilson, “Let Go of that Case - British Anti-Suit Injunctions against Brussels Convention Members”, 36 Cornell Int’l L.J. 207 (2003), pp.207-208


prohibition via the semantic jurisprudence in the EU sphere, before we move to assess whether they might be admissible at all costs, under the up-to-date Brussels I Recast.

The seminal case that the ECJ condemned the usage of anti-suit injunctions was Turner v. Grovit. Mr. Turner brought actions in London to obstruct the defendants from persisting the proceedings in Spain, with the justification that they were challenged in “bad faith”. Then, he referred to the Court of Appeal and the latter, in its turn, issued an anti-injunction, supporting that the real cause of the suit commenced by the defendants was to menace and exercise compulsion on Mr. Turner. Hence, the defendants made an appeal to the House of Lords, who pushed the topic to the ECJ to decide. The ensuing ECJ’s denotation was that even when a party is conducting in an unconscionable manner by inserting a case in a foreign jurisdiction to thwart the ongoing procedure, a court cannot grant an anti-suit injunction to stunt the recalcitrant party from retaining the litigation in the foreign court. The government of UK contested that anti-suit injunctions were not addressed against the foreign court but against the party individually, though the ECJ was negative again, since a sanction restricting the party from attending an action towards a foreign court automatically leads to the deprivation of its control upon jurisdiction to adjudicate the case. The decision of the ECJ was utterly counted on the doctrine of “mutual trust”, which in the sphere of EU is translated into a silent duty nominating each member state to defer the authority of the other’s legal regimes, to operate individually, but in a concrete and harmonious way to achieve the aim of the EU’s integration. Thus, the ECJ in Turner case consulted that the issuance of anti-suit injunctions by a court of a member state prohibiting a party from initiating or persisting on procedures before a foreign court of another member state is inadmissible with the Regulation and this remedy is totally banned in the territory of the EU.

But what about anti-suit injunctions to safeguard arbitration more than litigation? Someone can consider that the explicit exclusion of arbitration under the Article 1(2)(d) of the Brussels I Regulation should assume that the latter does not furnish any power to impede an injunction aiming at defending arbitration. Nevertheless, in West Tankers case the ECJ underpinned that an anti-suit injunction in favor of arbitration was not reconcilable with the Regulation.

The case initiated after a clash involving a vessel chartered by West Tankers and Erg Petroli Spa (Erg) in Italy. Erg started arbitration procedures against West Tankers,

88 Case C-159/02 Turner v Grovit [2005] ECR 1-03565
89 Case C-159/02 Turner v Grovit [2005] ECR 1-03565, para.31-34 – Supra n.25, p.274
abiding their charter party agreement, in London. Then, West Tankers reacted to this action, and sought for an anti-suit injunction at the English High Court, disputing that the conflict was emerged from the charter party being relied on London arbitration provision. The High Court issued the injunction but on the appeal the House of Lords had some second-thoughts and brought the case before the ECJ. The crux in this instance was, whether is compatible to the Brussels regime for a member state’s court, to prohibit a party from commencing procedures in another state’s court, on the basis that are in violation of an arbitration agreement. In its judgement the ECJ exhibited three justifications for contending that, regardless the arbitration exclusion, anti-suit injunctions were not accepted by the Regulation. As its first ratio\textsuperscript{92} cited that, when the subject of the dispute is evidently within the context of the Regulation, then the validity of the arbitration agreement is erected into a preliminary matter which fell into the competence of the Italian Court. The ECJ determined that the subject matter of the actions in Italy was for tort damages, being a crucial evaluation to determine its protection under its “veil”, and it was not at the authority of the English court to issue an anti-suit injunction and impede the Italians to practice their imperium.\textsuperscript{93} Secondly\textsuperscript{94}, the ECJ declared that a state’s court does not have the right to challenge a total removal of another state’s court to rule upon its jurisdiction by enjoining a party to secede the process in that court. Following this pace would also injure deeply the “\textit{effet utile}” on which Judgements Regulation is rooted. As its last inference\textsuperscript{95}, the ECJ held that the corollaries of an anti-suit injunction would be \textit{au fond} unfair, because the compelled litigant would be obstructed from its admission to the national court, being dispossessed by its salient right to be protected by the justice. The court also recommended that its judgement was completely in line with the NYC, but the problem in this allegation is that the latter does not meditate on questions of timing or precedency.\textsuperscript{96}

After this judgement, a sizeable disension emerged from the arbitration society with certain arguments being well-founded, declaring that the deficiency of lucidity in certain facets of West Tankers decision and the clouded landscape of the interface among arbitration and litigation on the EU, had led to an ardent debate. The judgement of West tankers revived concerns about the problem of “torpedo

\textsuperscript{92} Supra n.90, para.26-27


\textsuperscript{94} Supra n.90, para.28,30

\textsuperscript{95} Supra n.90, para.31

\textsuperscript{96} Supra n.91, pp.11-12
actions”

97, parties were attempting to manipulate Brussels Regulation by freezing lawsuits. The principle of “mutual trust” was upheld may times by case-law, even in the case of an unconscious torpedo, forcing English courts to refuse their jurisdiction. Some are frightened that West tankers can be evolved into a hazardous pace authorizing a behavior towards a proliferation of more “torpedo actions”, instead of pursuing the harmonization of European courts, as the doctrine demands. Despite that, this “doomsday” scenario, was overall characterized as an excessive reaction and unnecessarily inflamed recent economic grief. The sentence created also doubts even on the efficacy of the ECJ as a well-rationalized “catalyst of justice”. Professor Jonathan Harris opined that: “It is difficult to conceive of a more thinly reasoned or incomplete judgment It fails sufficiently to examine the central question as to the meaning and scope of the arbitration exclusion. In this respect, the question arises as to whether the validity of the arbitration clause can be so easily dismissed as a preliminary issue in foreign litigation that does not alter the civil and commercial character of those foreign proceedings”.

Skepticism and criticism are a vital element of ameliorating the judicial system, but not when they are transformed into a jitter. Better than carrying on this road of ego-disaster, it is the time for the commanders of the EU arbitration to be activated and find pragmatic solutions. Vannevar Blush’s, a famous U.S. engineer, pronouncement in the field of engineering, fits perfectly on this tremble concerning the West tankers case: “Fear cannot be banished, but it can be calm and without panic; it can be mitigated by reason and evaluation”. So, a “newborn” expectancy had to be revealed, being the sole path to exemplify the situation.

### ii) Preparedness for the Brussels Recast: Seeking a “newborn” expectancy

The time the West Tankers judgement in February of 2009 issued, recommendations had being spread, concerning the potent rectification of the Regulation. The

97 The Brussels I Regulation in its Article 27 paragraph 1 and 2 supports that once a Member state’s court determines upon a litigated issue, no other court in the EU can proceed with the same issue until the first court has decided whether it has jurisdiction. The outcome would be what European people designate a “torpedo tactic”, which denotes that a litigant with expedient intention to retard may attempt to bring the first suit in a jurisdiction with an egregiously dilatory court system. Because there are cases when the court first seized might employ a great period of time even years to render a judgement, it skillfully “torpedoes” any opportunity for a suitable and quick settlement of the dispute, something that is often spotted in the Italian courts interchangeably the “Italian torpedo”. The court second seized does not have the power to order a party in its court to suspend the suit in the ineffectual first court because according to the Brussels I it must defer the probity of the other court to define the jurisdictional query. - Supra n.91, pp.9-10

98 Supra n.93, p.577-579

99 Supra n.93, p.594
Regulation itself demanded in its Article 73 that in five years the latest after its entrance (2001), the Commission should make a report on its reverberations. Somehow overdue, on 21st of April 2009, the commission introduced a report and a green paper, pressing in the first-line urgency the “interaction among the regulation and the arbitration”\textsuperscript{100}. In order to resolve the barrier of parallel proceedings, the Commission suggested to erase the preclusion for arbitration, completely or to a limited extent, because it would ameliorate the interaction with the court procedure. Thus, court collateral procedures benefiting arbitral process, could be included in the scope of Regulation’s application. This report was founded on numerous researches, but it provided material magnitude on the study of the Heidelberg report of 2007\textsuperscript{101},\textsuperscript{102}

On 14 December of 2010 the Commission’s Proposal\textsuperscript{103} tendered a “conciliation”: the arbitration preclusion would continue to subsist under the Regulation, but with a slight deviation (\textsuperscript{Article 29(4)}\textsuperscript{104}). The competent court for jurisdictional matters would be the member state’s court agreed as the situs of the arbitration or the arbitral tribunal, once were conducted the procedures. When a court process or an arbitration was initiated in the seat, the foreign Member State’s court whose competence is provoked, grounded on the arbitration agreement, should immediately stay its process. Furthermore, once the validity or enforcement of the arbitration agreement is canonized in the seat, the alien court should refuse jurisdiction. This type of ruling was resembled to the so-called lis pendens principle.\textsuperscript{105} This norm substantially gears

\textsuperscript{100} and signified the need of the New York convention to be intact, but not at the point where Brussels I regulation cannot view upon arbitration, not for the controlling of arbitration, but as its ultimate goal to safeguard the mild and even circulation of judgements in Europe. - Barbara Den Tandt, “The Recast of the Brussels I Regulation and Arbitration: Mission Accomplished”, 21 Colum. J. Eur. L. 89, 108 (2014), p.97


\textsuperscript{102} Supra n.100, pp.95-97


\textsuperscript{104} Article 29(4), “Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement. This paragraph does not prevent the court whose jurisdiction is contested from declining jurisdiction in the situation referred to above if its national law so prescribes. Where the existence, validity or effects of the arbitration agreement are established, the court seised shall decline jurisdiction.”

\textsuperscript{105} Supra n.91, pp.15-16
a self-activating anti-suit injunction, without labelling it anti-suit injunction. By holding on the parties’ selection of the locus as the competent jurisdiction to determine the validity of the arbitration agreement, it equips a fair-minded solution to discourage the breaching parties to the torpedo harassment, because the latter action would plainly be ceased. The Commission’s Proposal was perceived by many as a positive progress, founding proponents, like the International Bar Association (“IBA”) and peers as a headway over the ECJ’s construction on the forbiddance of anti-suit injunction under the Regulation. This is precisely the concept which has already be promoted by the U.S. of “primary” and “secondary” jurisdiction.

However, there were others, who contradicted to this solution, denoting that any mention to arbitration would give the bargain to a court to govern arbitration-related affairs, pointing what was materialized by the ECJ in the West Tankers case. Indeed, Rapporteur of the European Parliament Tadeusz Zwiefka published a report, where sturdily opposed to the dilution of the preclusion of arbitration from the Brussels Regulation, even the limited one and commented that the West Tankers decision should be “binned”. The Council of the EU patronized its view on the exclusion of arbitration, with the Parliament as its “synergy”, abandoning the endorsements of the European Commission.

### iii) Recital 12: Delineation on the construction of arbitration exclusion - A felicitous elucidation?

Article 1(2)(d) of the Brussels I Recast explicitly precludes the arbitration from its “veil” of protection, like its antecedent, but the distinguishing element accommodated on the Recast is the direction that provides on the construction of the arbitration preclusion. In its Recital 12, there exist four paragraphs, which directly outface the arbitration exclusion. It is peremptory to evaluate, whether any of its paragraphs runs counter to the anterior jurisprudence of the ECJ, aborting the use of anti-suit injunctions.

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109 Supra n.100, pp.101-104
The first paragraph of Recital 12 declares that a court’s judgement concerning an arbitration agreement will not be included in the jurisdictional scope of the Recast. This phrase is perfectly complying with Article II(3) of the NYC. So, when a court first directed an issue where an arbitration agreement has been claimed, this does not force the second court to anticipate its judgement on jurisdiction; actions in both courts can performed concurrently. The meaning of this paragraph is that courts are liberate to perform their national legislation to decide upon the validity of an arbitration agreement before sending the parties to the competent arbitral tribunal.\(^{110}\) In this meaning there is not a sign accepting the admissibility of anti-suit injunctions.

The second paragraph stipulates that a decision on the existence and validity of an arbitration agreement should not rely on the rules of recognition and enforcement of the Recast, even in the guise of an incidental’s interrogation, connected with the substance of the dispute in the context of the Recast. This concession purports that in a hypothesis like Endesa\(^ {111}\), the English courts would not be engaged by the Spanish court’s judgement and could render its decision autonomously, ruling on the validity of the arbitration agreement. This situation features a dangerous contraption for manipulating strategies, which would definitely result to parallel proceedings and conflicting decisions.\(^ {112}\)

This paragraph was the more controversial one, as many attempted off-beat to interpret it. First Evrigenis and Kerameus in their report contended that “the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope\(^ {113}\)”, being the opposite meaning of the second paragraph which expressly elucidates this matter. It was also falsely supported that the second paragraph inverted the West Tankers judgment. Advocate General Wathelet was the one, who contended on the Gazprom case, that the Recast permits the granting of anti-suit injunctions in favor of the arbitration process, since a decision on the existence and validity of an arbitration agreement is excluded from its scope. He also presumed that if the case of West Tankers was governed under the Recast, the anti-suit injunction composing the subject matter of the decision, would not have been viewed as

\[\begin{align*}
\text{\supra n.25, p.277} \\
\text{\supra n.91, pp.20-21} \\
\text{Evrigenis and Kerameus Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, [[1986] OJ C298/1], para.35}
\end{align*}\]
inadmissible. However, this justification is not plausible enough. In addition, if someone observes carefully the paragraph 27 of the West Tankers judgement, it is argued that this status has, now, been altered by the second paragraph, concluding that decisions on the existence and validity of arbitration agreements are not perceptible according to the Recast. But then a counterargument can be similarly placed that, albeit procedures on the arbitration agreements are out of the width of Recast, they might have onerous repercussions on the efficacy of the instrument, obstructing the confederation of the jurisdictional rules in civil and commercial matters. West tankers was not overturned throughout the Recast with the EU being afraid by the effect of letting the whole administration of arbitration to be controlled by the national laws of Member States, and as an aftermath, the chronometer would be adjusted back again before the judgement, permitting member states to grant anti-suit injunctions in favor of arbitration process. Hence, the second paragraph does not enunciate the admissibility of the anti-suit injunctions, but it plainly exemplifies that a decision on the existence and validity of an arbitration agreement is not liable on the rules of recognition and enforcement of the Recast, and courts are no more demanded to recognize another’s court judgement regarding the arbitration agreement, inverting in this effect the Endesa case.

The third paragraph refers to the decision of the court upon the substance of the dispute being included in the scope of the Recast, though the decision of the same court upon the existence and validity of the arbitration agreements is not relied on the recognition and enforcement rules of the latter. In this paragraph is, additionally, stipulated the priority of the NYC over the Recast, as it is repeated in Article 73(2).

This provision views upon the recognition and enforcement of an arbitral award and a State’s decision on the substance of the dispute. But what would happen in the event where an anti-suit injunction is issued to restrain a party from initiating actions with

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114 Opinion of Advocate General Wathelet, delivered on 4 December 2014, “Gazprom OAO v Lietuvos Respublika”, Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas, pp.134-135

115 and it is not binding by the ECJ.

116 Paragraph 27, “It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation.”

117 but it should be remembered that the UK government strived to come to this end, proposing the prolongation of the arbitration preclusion with the aim to extract the whole arbitration procedure from the scope of the Regulation.

118 Supra n.25, pp.278-281

119 Article 73(2), “This Regulation shall not affect the application of the 1958 New York Convention.”

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the goal to question the recognition and enforcement of an arbitral award? It is ad rem to recall that the project of the Recast does not encompass the recognition and enforcement of arbitral awards, it is the NYC’s “job” to perform. Therefore, there is not an intimation in paragraph 3 that designates the permissibility of the anti-suit injunctions.

The fourth paragraph denotes that actions or ancillary procedures with respect to arbitration are barred by the Recast, such as the composition of the arbitral tribunal, the authority of the arbitrators, the administration of the process not even any decision regarding the appeal or enforcement of arbitral awards in a non-inclusive manner. There was a venture by many commentators that this provision “leaves the room” to be interpreted, as permitting the granting of anti-suit injunctions, since the latter in favor of arbitration forms ancillary actions to the arbitration. Advocate General Wathelet upheld this allegation and signified that such injunctions are well-matched with the Recast, as ancillary actions protecting the bona fide conduct of the arbitral procedure. While the Recast was not applicable, he read it as holding a “retroactive interpretative import”. Even so, this rationalization on the admissibility of anti-suit injunction under the Recast is not prudent.

As for the anti-arbitration injunctions, they are audibly embraced by the arbitration exclusion in Article 1(2)(d) of the Brussels Regulation, not regulating their recognition and enforcement. It is figured from the ECJ’s judgement in West Tankers that the interdiction does not apprehended, where the process in the Member States is an arbitral one. In simple landscape, anti-arbitration injunctions are not afflicted by West Tankers, inasmuch do not implicated in the jurisdiction’s nomination of a Member State’s court.

iv) Gazprom v. Lithuania case: the revivification of Anti-suit injunctions’ Storyline

One could consider that this long debate of the utilization of the anti-suit injunctions had been drained by the ECJ in the Turner and West Tankers cases, though a novel one revived this “fiery” subject in the field of international arbitration. The Gazprom

120 Professor Dr. Peter Schlosser, “Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice”, ([1979] OJEC CS9/71), para.65

121 Supra n.25, p.281

122 Supra n.25, p.282

123 Supra n.114, pp.137-140, 91

124 Supra n.27, p.136
case\textsuperscript{125} shows the light path on whether the member states’ courts are binding to recognize and enforce or decline the recognition and enforcement of an “arbitral” anti-suit order, as until now, anti-suit injunctions have been forbidden by the ECJ in the European union’s judicial sphere.

In Gazprom case the dispute was arose from a shareholders’ agreement regarding the ownership and function of a gas provider, Lietuvos Dujos. The latter consists of three principal shareholders and all together with Gazprom and the Ministry of Energy of Lithuania comprises “E.ON Ruhrugas”. In the year of 2004, they concluded an arbitration according to the SCC Rules. A conflict emerged, and the Ministry of Energy started research procedures before the court of Lithuania. Whilst Gazprom initiated an SCC arbitration contested that the Lithuanian Ministry of Energy was acting in violation to the arbitration clause of the shareholders’ agreement. Despite the issue was not being determined yet by the Lithuanian court, the arbitral tribunal awarded an infringement of the Ministry of Energy concerning his demands at the Lithuanian court as being incompatible with the shareholders’ agreement, ordering their revocations. Then Gazprom attempt to recognize and enforce the award at the Lithuanian court of Appeal, but the latter denied on the basis that it was not enforceable, being contrary to the public policy of the country according to Article V(2)(b) of NYC\textsuperscript{126}. The appeal brought to the Lithuanian Supreme court, which gestured a referral to the ECJ for interpretation. What was posed by the Lithuanian court was, whether the Regulation impedes national courts of member states from recognizing and enforcing an arbitral award, forbidding a party from raising particular claims before a State’s a court. The pivotal question was not the potential inadmissibility of anti-suit injunctions with the Regulation, but the inadmissibility of the recognition and enforcement of an arbitral anti-suit order\textsuperscript{127}. The court responded with a separation between the recognition and enforcement of the SCC arbitral award and the Brussels regime, which regulates the jurisdiction over judgements in civil and commercial issues.\textsuperscript{128}

Thus, the court decided that the arbitral anti-suit order does not contravene to the Brussels regime, the arbitral tribunals are not restricted by the doctrine of the “mutual trust”, and so the principal proceedings fall under the national and international law in force of the member state where recognition is pursued, and not by the Regulation. It seems that the ECJ concluded with a reasonable solution taming the principle of “mutual courtesy” merely in the intra-court jurisdiction according to the Judgements

\textsuperscript{125} Case C-536/13 “Gazprom’ OAO v Lietuvos Respublika”, ECLI:EU:C:2015:316

\textsuperscript{126} Ibid n.125, para.22

\textsuperscript{127} Ibid n.125, para.35

\textsuperscript{128} Supra n.25, pp.287-289
Regulation, endorsing that arbitral tribunals are not “courts”\textsuperscript{129,130} they can issue anti-suit orders, honoring the performance of the scheme. Seizing from an arbitration angle, the Gazprom judgement accommodates a “short” triumph for arbitration in its wise preclusion of the arbitral awards from the Brussels regime, ascending it in a higher posture in conjunction with the court-issued anti-suit injunctions vetoed under the West Tankers decision\textsuperscript{131}.

B. WHAT HAS BEEN ACCOMPLISHED SO FAR? HEARING THE HAGUE REACTIONS

It is anticipated how the ECJ will adjudicate after the adoption of the new Regulation. While the Recast is not prepared to find the appropriate equilibrium, the ECJ will have the final word, but even this is “ramshackle”, as the following suggest. Bell purports that “it is difficult to imagine that the European Court of Justice would be sympathetic to the use of a jurisdictional weapon such as the anti-suit injunction which has the potential to overpower the allocation of jurisdiction which the Brussels Convention enshrines”\textsuperscript{132}. Hartley on the other hand claims that the ECJ’s ruling is unrealizable to prognosticate and court would unquestionably esteem the political destination of institutional accord as supreme: the ECJ has not be glaring for its ardor in safeguarding the rights of individual when they collide with the institutional concerns\textsuperscript{133}.

Whilst the ECJ is dubious in finding a terminal solution on the contestable matter of anti-suit injunctions, at any moment the recommended “Hague convention on jurisdiction and foreign judgements in civil and commercial matters”, strives to cover the crack remained by the Brussels regime, containing the fiasco of the non-regulation of anti-suit injunctions. The writers of the convention have revealed that there would be a confined scope of action for anti-suit injunctions, preventing proceedings initiated in an alien forum merely to vitiate the contestant. It is evident that the discussions and deliberations would evolve into a strenuous and tough mission, however the outcome will reward the whole toil. The signatory-states would be

\begin{footnotes}
\item[129] Supra n.125, para.36-38
\item[130] Supra n.25, pp.289-290
\item[132] Supra n.83, p.223
\end{footnotes}
availed by the accepted rules concerning the anti-suit injunctions and be exonerated from a perpetual circle of non-qualified rules.\textsuperscript{134}

The fight on the matter of anti-suit injunction in the European sphere flows from the disputation between common and civil law legal philosophies and their performance in its borders. The Brussels Regime seems to be grounded chiefly on civil law archetypes with the ECJ being in its most part a civilian court. This exact feature clarifies the standpoint of the Court to a great expanse. This separation is not a plain issue, in substance is a separation on priorities; the divergence on the conflict-of-laws area, directly influences the area of the jurisdictional procedure. It is evident from the interpretation of the rules that common law promotes pliability over certainty and the adequacy of the forum over predictability.\textsuperscript{135}

IV. ANTI-SUIT/ANTI-ARBITRATION INJUNCTIONS THROUGH A COMMON AND A CIVIL LAW JURISDICTION

A. ENGLISH COURTS INSIGHTS:

i) Pivotal preconditions for acquiring an Anti-suit injunction

The authority of the English courts to issue interim measures, is expressly educed from Section 37(1) of the SCA of 1981, which proclaims that: “the High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so”. The concerted power to grant an anti-suit injunction was defined in the AES Ust-Kamenogorsk case\textsuperscript{136}. Before this decision some English courts allowed anti-suit injunctions to be imposed as an interim device, justified in Section 44(3) of the EAA of

\textsuperscript{134} Supra n.83, p.224

\textsuperscript{135} Civil counsels are concentrated on the “structure” of the law, common counsels address their attention better on its “operation”. The common law key for settlement is the forum non conveniens rule, while for civil law the principle of lis pendens, to deter concurrent proceedings and contradictory judgements, providing the essential predictability and certainty. - Trevor C. Hartley, “The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws”, 54 Int'l & Comp. L.Q. 813 (2005), p.814

\textsuperscript{136} Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP, (2013) UKSC 35, para.48
1996\textsuperscript{137}, but then the Supreme Court came to subvert this footing, underpinning as the appropriate legal basis for the High court’s jurisdiction, the \textit{Section 37(1)} of the SCA of 1981. As Lord Mance has denoted an anti-suit injunction is not for the purposes and in the interests of the arbitral procedure, but for the negative troth entailed in the arbitration agreement not to bear foreign procedures. \textit{Section 37} empowers the English courts to grant anti-suit injunctions even in the absence of a vindicated arbitration agreement, a datum that was reiterated also by the Commercial court in its decision in \textit{Southport Success S.A. case}\textsuperscript{138,139}

The legal background which regulates the jurisdiction of the English courts is enshrined in two overlaid regimes: the domestic national law according to the \textit{Section 37(1)} jointed with the “common law” ruling of jurisdiction on the performance of proceedings, and the European law jurisdictional orders addressed by the Brussels regime. Exerting from the cloak of protection of Brussels regime, the performance for the issuing of injunctions prohibiting a party from bringing actions in a foreign court have been disputed in multiple cases in front of the Court of Appeal, the House of Lords and the Privy Council. The final judgments on these cases, as was in \textit{Tonicstar}\textsuperscript{140}, were concluded that an anti-suit injunction, is a jurisdictional remedy with a sound discretionary character, being issued merely when the court finds it as suitable to do it, according to all the facts of the case, and when the “ends of justice” demand such a drastic measure. The court will appraise both inequities of the claimant and the defendant, before deciding to address an injunction.\textsuperscript{141} Other additional discretionary strands in the English courts judgment, can embrace the peril of depriving security acquired in a foreign court procedure and the danger of inequity procured by unsuitable judgements implicating a third party\textsuperscript{142}.

In UK there are two classes of injunctions: a) the “\textit{breach of contract}” injunctions, where foreign procedures are in violation by a contractual forum clause chosen by the parties, assigning the English courts the sole jurisdiction or for arbitration to deal with

\begin{footnotesize}
\begin{enumerate}
\item Section 44(3) of the EAA, “Court powers exercisable in support of arbitral proceedings: If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets”.
\item Tonicstar Ltd v. American Home Assurance Co [2004] All E.R. (D) 400 (May 2004), para.15
\item Rory Butler and Baptiste Weijburg, “Do Anti-Suit Injunctions Still Have a Role to Play?–An English Law Perspective”, University of San Francisco Maritime Law Journal (2011 / 2012), 24 U.S.F. Mar. L.J. 257, p.2
\item Supra n.139, p.512
\end{enumerate}
\end{footnotesize}
dispute in England and Wales, and b) “alternative forum” cases, where foreign procedures duplicate with issues that are deemed to be adjudicated in English courts and are additionally “vexatious and oppressive or unconscionable”. The first category of injunctions includes cases referring to an arbitration clause binding the parties to resolve their dispute at a selected arbitral tribunal. Normally, English courts will try to enforce a valid arbitration clause, operating in such a way craving to reserve the parties’ volition upon the selection of the forum. In these circumstances, it is adequate for the English courts to prove that a party was behaved in a manner provoking an infringement of contract by initiating the foreign procedures, exerting from the need to demonstrate the “vexatious and oppressive or unconscionable” conduct, but merely in the case of a non-exclusive jurisdictional agreement.143

The doctrines dominating anti-suit injunction issued by the English courts are enshrined in the Angelic Grace case. The exercise of the jurisdiction is certainly optional but influential, and forceful justifications requires to be proved why it should not be exercised in a specific case. Corresponding to the English courts, the subjacent logic is the enforcement of a contractual engagement: an anti-suit injunction is granted on the footing that the defendant pledged not to bring them.144 In this perception the deliberation of comity and veneration to the courts of an alien state do not impede the issuance of an injunction and as was inscribed in the OT Africa Line judgement “the true role of comity is to ensure that the parties’ agreement is respected”145, coming “right in the eyes” with the civil law archetypes.

An additional threshold for the effectiveness of a petition for an anti-suit injunction is that it should be readily committed and before the foreign process is too far progressed, as Millet L.J. has emphasized. It is denoted in Transfield Shipping Inc. case146, that the “delay” and the “phase” of the alien proceedings should counted as interrelated and not two separated preconditions on the admissibility test of the injunction, being the jarring on the Essar Shipping Ltd147 case presented the accumulative nature of these two components.148

But all the above are uncertain and brought “on the edge of the abyss”, attending the momentous “Leave” voting of the referendum in 23 June of 2016.

143 Supra n.141, p.6
144 Supra n.139, p.512
148 Supra n.139, pp.514-515
**ii) Brexit: the “Present” and the “Future” for Anti-suit injunctions**

The initial step for the inquiry of the eventual incident of Brexit on the present legal regime is founded in Article 50 of the TFEU. This is the article that prescribes the legal corollaries of the secession outside the EU. When Article 50 is enacted the UK will attain a two-year period to discuss upon the terms of a secession agreement. Afterwards, when the consultation era lapses, neither of the European union’s institutional concordats will continue to apply to the UK. This outcome would immediately retract Article 288 of TFEU\(^{149}\), which furnishes the straight appliance and engaged virtue of the EU Regulations, involving also the Recast Regulation, leading to its ablation from the English legal regime.\(^{150}\)

It is a strenuous process to evaluate the repercussions that the Brexit would have on anti-suit injunctions granted by the English courts in favor of arbitration procedures with the situs in London and the reputedly actions brought in a Member state’s court. It is fully dependent on the conditions that the UK is capable to discuss for its “Leave” from the EU. If the UK decides not to continue to abide the Brussels regime, Brexit would generate a legal gap resulting to an immediate and essential replacement with an alternative option with the EU, if it desires to keep being availed from the reciprocal recognition and enforcement of judgements. The contingent choices that UK might possess for the jurisdictional matters, will directly affect the application of anti-suit injunctions and be displayed in a synopsis as follows.\(^{151}\)

*Initially*, the UK could assent with the EU, to a regime like the *Denmark’s model*, according to which UK would be subscribed to the Brussels I Recast in the same way as Denmark did in 2005. In the context of this adoption, the rules of the Recast, encompassing its Recital 12, would remain untouched and applicable. Even though ECJ has declined to adhere the AG Wathelet’s interpretation in the *Gazprom* case, it is not yet precluded a possibility of withdrawal by its recent consideration, welcoming the Advocate’s General fervid support that anti-suit injunctions in favor of arbitration would be dislodged by the Brussels regime.\(^{152}\)

Furthermore, a *second* choice could be the agreement on the “*Lugano*” pattern. The Lugano Convention\(^{153}\) is in effect among the EU member states and the Iceland,

\(^{149}\) Article 288 TFEU, “To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.”


\(^{151}\) Supra n.139, p.509

\(^{152}\) Supra n.139, p.509

Switzerland and Norway. With its depart from the EU, the UK would demand to enter to the Lugano Convention, after crossing the total acceptance of all contracting states. This Convention is not synchronized with the Brussels Recast and does not accommodate, naturally, its Recital 12. According to this deliberation it is in doubt whether the English courts would adhere the ECJ’s judgements after the Brexit. But it is not also debarred that the English courts would construe and apply the Lugano Convention in a progressive way, considering the adjustments done of the Recast to endorse the injunctions in favor of arbitration. There is also an implication spotted in this insertion: the “torpedo” actions would reappear since the Lugano Convention has not been reformed to deal with these actions dissimilar to the Brussels regime.\textsuperscript{154}

A third choice can be made by certain discussions between the deputies to create and ratify a novel treaty on the recognition and enforcement of judgements, which would order or not limitations on the authority of the English courts to grant anti-suit injunctions. But in order to avoid the protracted \textit{treaty-penmanship} practice, a plausible lane is to launch an already submitted treaty status. The dominant nominee is the \textit{Hague Convention on Choice of court agreements} (“Hague convention”), which was came into force in the UK on 1 October of 2015\textsuperscript{155}. Even so, there would appear substantial prospective pitfall for the UK in selecting this Convention instead of an EU or EFTA formed settlement. The Hague Convention is characterized by a more restricted substantive sphere of protection, ruling merely the exclusive jurisdiction agreements. Provisional measures are ostracized by its circuit and its recognition and enforcement regime contains the arduous bylaw of “exequatur”. Hence, it is obvious that it does not institute a concise way-out, but it might be employed as a functional provisional device in the desideratum to shield the rectitude of the exclusive jurisdiction agreements benefiting the English courts. It is also propagated, as it is mentioned, that a new Hague Convention is being constituted under the aegis of \textit{the Hague Conference on Private International Law}, as a section of its “Judgements Project”. Albeit this planning is a significant one, the UK will not have the bargain to exploit it for some time.\textsuperscript{156}

The last choice from the “basket” for the UK, is to not access to any agreement regarding the reciprocal recognition and enforcement of judgements with the EU. The

\textsuperscript{154} Supra n.139, p.510

\textsuperscript{155} \textit{Civil Jurisdiction and Judgments Regulations (Hague Convention on Choice of Court Agreements 2005)}, 2015 (SI 2015/1644)

\textsuperscript{156} The fourth option for the UK is the Foreign Judgements Act 1933 governed the national legal ground for the mutual enforcement of specified classification of judgements (Reciprocal Enforcement) by means of discrete bipartite conventions, from which the six were contracted between the UK with the EU Member states and the Norway respectively. The 1933 Act is called upon merely to final financial decisions and so in comparison with the Brussels and Lugano contrivance, which stretch to an armor of shapes of provisional and final relief, is in a more disadvantageous position. - Supra n.150, pp.495-498
selection of this road would inevitably conclude on the \textit{ex ante} legal regime for the process in foreign non-EU courts in violation of the arbitration agreement, implementing the English law principles. Hypothesizing that Brexit comes with a total abrogation from the EU, containing all its laws, English adjudicators would not be demanded to obey the judgements provided by the ECJ, restraining their capacity to grant anti-suit injunctions in relation of court procedure in a court of an EU member state. This kind of restoration of the English courts’ authority to grant the injunctions could easily be assessed as giving back to London its “luster” as an antagonistic venue on the vigorous rivalry of the arbitration arena among prominent seats in the EU like Paris, Vienna and Stockholm, but also in a global extent;\textsuperscript{157} as Professor Janet Walker have signified with the blooming of locations such Singapore and Dubai the datum that their courts can issue anti-injunctions restraining parallel procedures by the parties of the arbitration agreement lessens London’s antagonistic whip hand\textsuperscript{158}. This total removal from the EU would also score to the inapplicability of the “torpedo tactics”, except the event that UK would access the Lugano Convention. Therefore, the English courts would not be compelled, as they practice now, on the \textit{axioms} of the Brussels regime, to postpone the process until the court of a member state, which seized first, decides on its own jurisdiction.

As it is clearly perceived, the place as to which instrument is probable to substitute the Recast Regulation in a post-Brexit legal scenery is equivocal. Each choice acquires certain drawbacks: legal, political and empirical. But for the sake of commercial certitude and of the persisting implementation of updated rules, it is prudent for the UK to be relied on the three piles of the \textit{Recast Regulation}, the \textit{Lugano Convention} and \textit{the Hague Convention}.\textsuperscript{159} Espousing these three instruments “as fast as one’s legs can carry” after its abrogation from the EU would definitely safeguard its \textit{standing}, as a dominant jurisdiction for the dispute settlement in trade and commerce.

During this legal upheaval, some mercantile parties engaging in long term dealings are opting for a “Brexit-proof” dispute settlement agreements: they mold a “\textit{conditional dispute resolution clause}”. In this clause the parties could consent to supply English courts with jurisdiction, save and until, UK departs from the EU or either of the parties is no more habituated in an EU state where disputes will be settled in a London arbitration. Otherwise, the clause might furnish jurisdiction to a different

\textsuperscript{157} Supra n.139, pp.510-511

\textsuperscript{158} Julius Melnitzer, “London Falling; ECJ decision in West Tanker minimizes advantages of private dispute resolution”, Inside Counsel (May 2009), p.1

\textsuperscript{159} Supra n.150, p.499
court, where the enforcement of a judgement rendered by the initial selection of court might be mobbed by a variation on the EU fellowship.160

**iii) Pivotal preconditions for acquiring an Anti-arbitration injunction**

English courts have the general authority to issue anti-suit injunctions with the selfsame legal basis practiced to the issuance of the second type of the research, the anti-arbitration injunctions. In harmony with the EAA of 1996, a party who has not participated in the arbitral process, encompassing its action in the composition of the competent arbitral tribunal, may despite that occasion bring a contention to the courts that the arbitral tribunal lacked jurisdiction. This demand may be satisfied with an injunction impeding the performance of the arbitral procedure. This specific potential to request such an injunction is provided merely to a party who has not joined in the arbitration. Nevertheless, in *Welex AG* case, the Court of Appeal took the stance that on the ground of *Section 37(1)* of the SCA of 1981 for England and Wales, the High Court has the wide power to issue anti-suit injunctions in all the affairs deems to be “fair” and “appropriate” to do so. The case refers to an appeal brought against the High Court’s judgement to issue an anti-suit injunction hindering Welex from continuing court procedure in Poland, invoked in contravention to an arbitration agreement. The Court of Appeal opined that even if the authority to issue an anti-arbitration injunction is not explicitly catered under the EAA of 1996, such authority can be generated on its intrinsic command fortified in *Section 37(1)* of the SCA of 1981.161,162

Espousing the Court of Appeal’s attitude, the English courts’ control to address anti-arbitration injunctions should be used scarcely. As a matter of fact, the English courts present a stern standpoint concerning the injunctions attempting to impeach the arbitral process. They exercise this remedy in unique occasions, where it is apparent that the arbitration procedure has been falsely conducted. There was a case in which the Court of Appeal ruled that anti-arbitration injunctions should not be issued in the sole ground that the equilibrium of convenience turns in favoring the injunction. As Sellers LJ signified the tenets for issuing such injunctions are twofold that: a) they should not challenge the inequity to the claimant in the arbitration and b) the petitioner for a stay should prove the vexation of the subsequent performance of the arbitral process or the malversation of the procedure on behalf of the court. In its final

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160 Vanessa Naish and Hannah Ambrose, “Brexit: implications for dispute resolution and governing law clauses”, Inside Arbitration - Perspectives on Cross-border Disputes (July 2016), Herbert Smith Freehills, p.7


162 Supra n.3, p.190
adjudication the Court of Appeal concluded that these premises were not qualified and declined the issuance of the anti-arbitration injunction.163

But these injunctions “shenanigans” are far from merely a legal implication, they are poured in the British’s “persona”.

**B. A CAPTURE AT THE BRITISH’S “PERSONA”**

Some descant that the UK merely fabricates redundant intricacies with its anti-suit “egoistic paternalism”164 and must convinced to befit authentically in the EU’s pact or not. The British nonetheless appear very gratified in sustaining their unwelcomed attitude by persisting to execute anti-suit injunctions. Professedly, it is a labored task to fully exile anti-suit injunctions from a legal ethos habituated to them. The capital hitch is that Britain does not have to play a “fair game” if it does not crave to do so. It feels uncertain about the vision of a joined Europe and it endure to its stance to cross the bar that the geography, its chronicles and the force of the political potential concedes to them. Whilst the road to the advance of European completion appears unavoidable, many nationals retain their status as “Eurosceptics” and UK’s perpetual employment of anti-suit injunctions against Convention signatories institutes an instant revelation of that cynicism. Still regardless of the British ambiguity and even enmity for the further completion with Europe, Britain **de facto** bestowed a substantial degree of its nationhood to the EU and of their common law canons to the Brussels regime. Hence, the conservation of the orders can be observed as a properly modulated legal equilibrium between the prerequisites of European completion and national sovereignty. The deal of the injunctions by Britain does not menace the Brussels regime in total, but it accouters a channel for the British to exhibit their *sui generis* values.165

The bestowal of these common law “values”, is further enmeshed by the fact that in civil law countries these orders are, as a rule, not disposable and groundless in their legal systems. In fact, this type of common law injunctions is “clashing” to their legal regime, being “from another legal cosmos”166. The innate court *imperium* in addressing injunctions does not inhabit in the civil law scene, depressing this kind of discretion and cursive revamping that common law occupies167.

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163 Supra n.3, p.191

164 Star Reefers Pool Inc. v. JFC Group Co. Ltd., [2012] EWCA Civ 14, para.39

165 Supra n.83, pp.224-226

166 Supra n.85, p.259

167 Supra n.83, p.219
C. GREEK COURTS INSIGHTS:

i) Contesting Interim measures and Arbitration clauses

With the ratification of Law 2735/2009 (“LICA”), Greece was equipped with a novel contrivance for international commercial arbitration. In reality, this enactment was in line with the adoption of the UNCITRAL Model Law, remodeling Greece in the shape of a “Model Law country”. By this gesture, Greece was not merely accessed the relevant group of Model Law states, but it also consented on a dichotomy of the Greek law between international and domestic commercial arbitration, with the latter confined in Articles 867-903 of GCCP. Until the 18 August 1999, Greece did not deposit any distinct legal regime on international commercial arbitration, although there were certain provisions applied in this regard, but they did not acquire any inner consistency. Adhering the lex fori doctrine of its civil process, the novel enactment “volens nolens” accepted the requirement of a dualistic system ruling on arbitration under the auspices of the Greek law. Nonetheless, the new modifications of 2006 have not so far been embodied into the greek statute.168

In the greek judicial awareness, punctuating that an arbitration agreement is a fortiori consented in the view of debarring the jurisdiction of domestic courts for the sake of a private jurisdictional mechanism (Article 3(1) of GCCP), the Piraeus court of Appeal have signified that “the jurisdiction of the civil courts (national and international) is abolished when the parties have included in the contract an agreement to submit to arbitration the disputes which may arise from the agreement (arbitration clause)” in their judgement 77/1985169. According to the greek principle, an arbitration clause is a completely separated contractual agreement between the parties, veiled with a procedural carver, evaluated not according to the Rome Convention of 1980, but Article 25 of the GCC, reporting that the contractual duties “...shall be governed by the law chosen by the parties. Failing this, shall be applicable the law which considering all relevant special circumstances is appropriate with regard to the contract”170. The legal classification of the arbitration agreement as a procedural agreement does not preclude the application of substantive law provisions on the configuration of the substance nor converts its nature, diverting it into a “mixed or sui generis” contract171.


171 Καϊσης Αθανάσιος, “Ακύρωση διαιτητικών αποφάσεων - Δοματική θεμελίωση των λόγων ακύρωσεως που αφορούν στη συμφωνία περί διαιτησίας και στο διαιτητικό δικαστήριο, συμβολή στην ερμηνεία των άρθρων 872-875, 877-879, 883-885 και 897 αριθ. 1-4 ΚΠολΔ”, Β’ έκδοση (1989), σελ.75
However, the Greek courts have the authority to assess the pleas on the validity of the arbitration agreement. In domestic arbitration, under the words of Article 685 of the GCCP, an arbitration agreement is not valid in cases covering interim (provisional) measures, and in partnership with Article 889 of the GCCP, the court is the sole adjudicator in this regard; the arbitral tribunal is not authorized to rectify these remedies. In international commercial arbitration this ruling alters with Article 17 of LICA\textsuperscript{172} expressly identifying the arbitrators’ command to grant interim measures after a party’s application. Albeit this gesture, the courts preserve their jurisdiction to grant provisional relief regarding the subject-matter of the arbitration ex ante or in the course of the arbitral process, building a coeval jurisdiction among courts and arbitral tribunals, prescribed in Article 9 of LICA\textsuperscript{173}. However, the ascendancy of the civil court’s above the arbitral tribunal’s jurisdiction is counted on the firm greek inner jurisprudence afforded that the arbitral tribunal does not have the power to rectify a measure issued by a civil court, and further accruing to the inadmissibility of a protest, on the absence of the court’s jurisdiction included in the arbitration agreement. It is admitted that this mandate in greek reality is so sharp that it does not left any space for a different construction. Therefore, Greek courts, presuming that they possess international jurisdiction, may professedly grant provision measures, although there might subsists an arbitration agreement.\textsuperscript{174}

Despite this valorization, the defendant has the concession to raise a declaration on the deficiency of Greek courts’ jurisdiction on the ground of a valid arbitration agreement, which should be implemented. Article 8(1) of LICA\textsuperscript{175}, accompanied with Article 263 of the GCCP, declares that the said protest should be brought at the first hearing of the case. If the defendant deducts from succeeding this precondition, it is automatically created a “silent waiver” from the agreement to arbitrate, and eventually the court would avowedly contemplate that it has jurisdiction and determine upon the substance of the dispute.\textsuperscript{176} In a positive fulfilment of this

\textsuperscript{172} Article 17(1) LICA, “Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.”

\textsuperscript{173} Article 9 LICA, “It is not incompatible with an arbitration agreement for [ ...] a court to grant an interim measure of protection pertaining to the subject-matter of the arbitration before or during arbitral proceedings.”

\textsuperscript{174} Supra n.170, p.66

\textsuperscript{175} Article 8(1) of LICA, “A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.”

\textsuperscript{176} Supra n.170, p.66
prerequisite, the Greek court will decline to attend the lawsuit and will resort the parties to arbitration, except it infers that the agreement is voidable (Article 264 of GCCP and Article 8(1) of LICA). However, the second paragraph of this article allows the arbitral process to proceed with a potential award, albeit the court action of paragraph 1 is pending.

It is pertinent to mention that the Greek courts’ baggage of dossiers is overburdened and each lawsuit with a commercial nuance is going to be heard after at minimum of eighteen months from the time of the first filing to the Secretariat of the competent court. It is apparent that throughout this period, with addition to the period until the decision will be issued, any arbitral procedures could not be advanced as a lis pendens method is ordinarily established. The Greek civil process is conducted in a sole hearing, where procedural and substantive topics are estimated. So, a manifest peremptory lawsuit cannot be adjudicated earlier from the timetable of the hearing and any dispute settlement per the arbitration mechanism would be stunted for a protracted time. It is unambiguous that these deliberations evidence the bargain furnished to either of the parties to move with a defiant strategy in order not to search for the real equity, but mainly to guide on the coercion for a resolution. There is an oration of an erudite greek Professor, which assembles to these situations challenged by recalcitrant parties, that: “the party who is wrong may hope, the party who is right must be concerned”.177

**ii) The semantic “Ordre public” for the Greek legal reality**

It is contemplated that greek law, revering to the parties’ volition, employs as its head standard, the legal rather that the regional yardstick, to the applicability of a procedural law unhooked by the greek procedural “ordre public”, boosting the modern trend on the utter delocalization of the arbitral process178. But, under the framework of the procedural international law, the public policy operates differently, aiming to obstruct the validity of the foreign judgement when the latter combats with the greek public policy. In this demand, the infinite scope of the public policy as a ratio of non-recognition should be reduced in a minimal scale (“effet attenue”), safeguarding the jurisdiction merely in its manipulation by a litigant turning in his

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177 Supra n.170, p.67

178 Supra n.169, p.497
favor\textsuperscript{179}, with the succor of the proportionality test, as Areios Pagos has signified\textsuperscript{180}. The Greek courts have been confronted with cases of anti-suit injunctions and have downturned the possibility of their recognition with the justification of being contrary to the Greek public policy. The violated provisions are found in Article 33 of GCC and 323 (5) of the GCCP, escorted with the constitutional and vital right of judicial protection (Article 20 Greek Constitution of 1975/1986/2001) and covers the “provisional judicial protection”\textsuperscript{181}. The Greek courts endorse the jurisprudence of ECJ and especially the German’s theory in this regard (“Grundgesetz”\textsuperscript{182}).

An illustrative exemplar of this confrontation presented when a Greek and a German company, in the context of their business dealings, accessed into an arbitration agreement for arbitration in England. Notwithstanding the agreement, the Greek company commenced legal recourse in the year of 2006 against the German company before the First Instance court of Lamia in Greece, demanding the amount of circa 3 million Euros on certain matters, included in the scope of the arbitration agreement. Then, the German company brought an action before the Commercial Court in London, invoking the granting of an anti-suit injunction in favor of the arbitration agreement. In July of the year 2009, the Commercial Court issued the injunction, commanding the Greek company to reimburse the German one to its legal expenses\textsuperscript{183}. The German company brought an action for the recognition and enforcement of the final arbitral award and the anti-suit injunction in Greece. The First Instance court of Piraeus issued both petitions and this decision was appealed.

\textsuperscript{179} Χρήστος Δ. Τριανταφυλλίδης, Διδακτορική Διατριβή: “Διεθνής δικαιοδοσία, αναγνώριση και εκτέλεση αλλοδαπών δικαστικών και διαιτητικών αποφάσεων ασφαλιστικών μέτρων”, Αριστοτέλειο Πανεπιστήμιο Θεσσαλονίκης, Τμήμα Νομικής (2006), σελ.269


\textsuperscript{181} Supra n.179, σελ.272

\textsuperscript{182} “Anti-suit injunctions constitute an infringement of the jurisdiction of Germany, and thus the sovereignty of that state, 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 foreign court.” – Supra n.27, pp.121,128

\textsuperscript{183} in the amount of 33,000 in this process. In success, the Greek company resigned from its petition to the Greek courts formerly to the pre-hearing stage of the defenses’ submission by the parties. However, the German company had already remunerated its counsels for the sake of implementation of the Greek procedures. Searching to retrieve these expenses the German company started an arbitral process in England requiring these expenses as indemnity for the infringement of the arbitration agreement. In April of 2009 a triplex tribunal constituted and awarded the German company with the sum demanded and a supplementary amount of 20,000 attributed to the arbitration expenses. - Antonios D. Tsavdaridis, “Is a fully paid award still enforceable under the New York Convention?”- Arbitration Greece, IK Rokas & Partners Law Firm, September 27 (2012)
Greek company endured the recognition of the anti-suit injunction, building its argument on the ground of the EU Brussels Regulation by registering a discrete appeal according to Article 43 of the Brussels Regulation 44/2001\(^{184}\). The Admiralty Division of the Piraeus court of Appeal by enacting Article 34(1)\(^{185}\) upheld the appeal in its decision of 31/2012, opining that the anti-suit injunction should not be recognized as being “crushing” with the Greek public policy in which recognition is requested. The court justified its judgement contending that the enforcement of such a measure is evidently opposed to its state’s policy, because it contravenes both to the greek sovereignty by disrobing the “competence-competence” of its national courts and the right to resort to the courts for legal protection. In this judgement the court obedient to the previous greek jurisprudence on the idem matter, as was illustrated in the Piraeus court of Appeal decision of 110/2004\(^{186}\), contend that an anti-suit injunction is not congruent with Brussels regime, strengthened its ruling by citing the West Tankers judgement of the ECJ\(^ {187}\).

Regarding the anti-arbitration injunctions, there is no legal basis or an intra-court report for their issuance in Greece. Article 16(1) of LICA\(^ {188}\) sustains the “competence-competence” doctrine for the arbitrators to rule on their own jurisdiction, denoting that if the arbitral process has already commenced, the greek courts must abstain from determining their jurisdiction, until the final award has been issued\(^ {189}\).

**PRE-CONCLUSION - The “Symposium” of National courts and Arbitral tribunals**

Responding to the bewilderment of whether national court interference threatens the performance of the arbitral procedure, it should be spelled that it is hinged on the tenor and conditions of the insertion. It is evident from the above analysis that national

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\(^{184}\) Article 43(1) Brussels Regulation 44/2001, “The decision on the application for a declaration of enforceability may be appealed against by either party.”

\(^{185}\) Article 34(1), “A judgment shall not be recognised: if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.”

\(^{186}\) A, B v. C, D, Court of Appeal (Maritime Cases Section), 110/2004, [2004] PIRAIKI NOMOLOGIA 92

\(^{187}\) Supra n.183

\(^{188}\) Article 16(1) LICA, “The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”

\(^{189}\) Supra n.180, p.25
courts maneuver in varicolored legal and cultural backgrounds: there co-exist civil and common law jurisdictions induced with certain regional and political impacts. The viewpoint of each national court afforded to international commercial arbitration is inescapably painted with these magnets.\textsuperscript{190}

The scheme of segregating completely arbitration from the European procedural legislature emerges to a forged depiction. With the denial of the EU Commission’s Proposal by its correspondents regarding the coeval court and arbitral procedures, I credit that the only denouement is erected in international contribution: \textit{a robust harmonization of arbitration laws within the EU palestra is demanded}. Concomitantly, the EU has to achieve the proper equilibrium in shielding the sovereignty of its members to rule arbitration, while defending the party autonomy and the competence-competence doctrine, shaping the essence of international arbitration\textsuperscript{191}. In order to find the solution, it is vital to search into the \textit{deep watercourse} of notional comprehension.

Emmanuel Gaillard conceptualizes international commercial arbitration as an “\textit{autonomous}” transnational order, validated by the state’s readiness to enforce the final awards of the arbitrators, while Jan Paulsson proposes the perception of international arbitration as a legal norm subsisted in a pluralistic universe of social orders. These orders would alternatively collaborate in a \textit{“horizontal”} magnitude or distribute dominion in the context of the \textit{idem} normative sector in a \textit{“vertical”} magnitude; in due course this would guide to a sheathing of these orders creating a magnitude \textit{“of depth”}\textsuperscript{192}. While this conceiving of “social-legal” rules can elucidate the inmost operation, it is not lucrative enough to expose the outermost interplay between national courts and arbitral tribunals. Laboring on this task, the first solution is found in substituting the Paulsson’s definition of legal norm with one of the \textit{“normative agent”}, connotating that each individual person, is an \textit{“agent”}, with the ability to create or amend norms. Espousing this logic, the arbitrators and national courts can be depicted not acquiring any hierarchical scale between them. The second solution inhabits in the significance of the word \textit{“normative”}, which permit the perception of standards other than those vented by the rules. In specific, this transition centers on the significance of principles in the arbitration arena, acquiring a more authoritative appearance of \textit{an utter right} of contract legislation. All the \textit{“agents”} will attribute a feeling of credibility serving their normative face and respect these principles. It is descrived that the management of the interplay among the

\textsuperscript{190} Supra n.21, p.535

\textsuperscript{191} John Gaffney, “Do We Need Separate European Regulation of Arbitration?”, The European Branch of the Chartered Institute of Arbitrators Conference (April 2014), in Warsaw, p.13

normative agents is collected on the employment of these principles in the jurisdictional queries. The impeccable doctrine of “competence-competence” results to the anteriority to the arbitrators on jurisdictional matters among with those on the arbitration agreement, the principle that such accords must be construed widely observing the sterling volition of the parties. Within the context of this c ohabitation on the dispensation of jurisdiction between national courts and arbitral tribunals, it peers that the two normative agents “stand on an equal footing”, adhering the conventional-akin principles. This interplay infused by a joint virtue has invited the “idea of arbitration”, aiding in the varying environment on international arbitration where new models would fateful come across. It is veritable that justice does not stagnate, and novel solutions have to be advanced to novel complications.

CONCLUSION - Which conquers the “battle”

Civil law courts have generally declined granting or recognizing anti-suit injunctions to enforce the parties’ genuine accord to resolve their disputes under the shelter of arbitration. A recent evolution is interposed by the French Supreme court, upholding an anti-suit injunction addressed by a U.S. court to restrain the violation of a forum selection clause, attending to sight whether French courts will exercise the identical modus operandi over the anti-suit injunctions in support of arbitration. A contrario, common law English courts have shored their legal philosophy on granting anti-suit injunctions in vigorously supporting a parties’ consented arbitration agreement. In the meantime, the ECJ’s sharp judgements “took the life” of the English legal ethos, embargoing anti-suit injunctions tete-a-tete with an EU adjudicator. Exerting the confines of the EU Brussels regime, English courts are not quailed in continuing their storyline in granting anti-suit injunctions in favor of an arbitration agreement, originated from their own legal history. “Arbitral” anti-suit orders in encroachment of an arbitration agreement are increasingly employed superseding the demolished intra-court ones, without catering a feasible surrogate, lacking on the enforcement phase and unavoidable interfacing with the EU statutes.

The identical stance is superposed by civil courts in the admittance of injunctions addressed in the arbitral process; civil law jurisdictions does not grant or recognize anti-arbitration injunctions. However, from the civil law genus, Brazil, Ethiopia and


194 Supra n.27, p.141
Indonesia recently granted such injunctions\textsuperscript{195}. For the English courts anti-arbitration injunctions are also tenable, but in a higher grade of caution in relation to anti-suit injunctions ex post an adequate weighting of coefficients. However, anti-arbitration orders are not yet afflicted by the ECJ’s jurisprudence. Thence, in a civil law country, like Greece, none of these injunctions “prevail”, while in a common law country, like UK, the evaluation scale sags at the wing of anti-suit injunctions in favor of arbitration, as the dominating ones. Regrettably, the grand bisection in international commercial arbitration is not a dichotomy of the legal cultures of common and civil law, it is between jurisdictions that befriend arbitration and those that are incredulous of arbitration\textsuperscript{196}.

It is concluded that anti-suit and anti-arbitration injunctions are rather contestable and should be employed scarcely in a judicious way. Each choice demonstrates its own peril, as Odysseus had to float between Scylla and Charybdis. However, it appears to be an unanimity when such injunctions combat with opprobrious strategies targeted at counterfeiting the arbitral process, where arbitral and court procedure is audibly initiated with a provocative comportment. In choosing the most “proper” one, I turn my belief in the Jan Paulsson’s conception of a self-sufficient nature of international arbitration. The mining of an arbitration agreement id est a solemn hurdle; predestined to be adjudicated by a private, neutral and confidential forum, the party is entrapped in a cognizance filled with “corruption and xenophobia, everything is suddenly stacked in favor of the other side: language, procedure, practical convenience, ability to use one’s own lawyers, cultural affinities with the decisionmaker … and the list goes on\textsuperscript{197}”. So, anti-suit injunctions in the international commercial arbitration arena, can be advanced in a robust remedy as an invaluable attendant for arbitration agreements, if they are used in an evenhanded way.

To operate effectively, international commercial arbitration genuinely demands the “rule of law” and not the “rule by law”\textsuperscript{198}. As Aristotle cited in the ancient Greece: “To be willing to go to arbitration rather than to a dikasterion; because the arbitrator looks to the equity but the dikast to the legal rule. It was for this reason that an arbitrator was chosen, so that equity should prevail\textsuperscript{199}”. Altogether, judges, arbitrators and

\textsuperscript{195} Supra n.27, p.141


\textsuperscript{198} Supra n.196, p.63

\textsuperscript{199} Aristotle, “The Art of Rhetoric”, Book 1 Chapter 13, para.19
counsels are betrothed in a joint practice to hold the role of justice “in their hands”, they are not combatants, they are allies for the vantage of the materfamilias Justice. A material grade of inter-pendency is absolutely indispensable and covetable in succeeding this practice to be waged effectively and economically in the forthcoming trade globalization.
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