ENGLAND TO BECOME THE PRIME JURISDICTION FOR INTERNATIONAL COMMERCIAL DISPUTES – ANTI-SUIT INJUNCTION AS A TOOL FOR ASSURANCE

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Abstract: *With the unprecedented occurrence of withdrawal of the United Kingdom from the European Union, the uttermost common law country positions itself to the feasibility of reclaiming the once lost opportunities. This article aspires to examine anti-suit injunctions as a measure to protect the will of the contractual parties by issuing of such in the court's supportive power to the arbitration proceedings.*

The current stance regarding the anti-suit injunction, as well as the possibility to its overcome is discussed in order to provide arguments against the UK's accession to the Lugano Convention and in favour of the accession to the Hague Convention. All this is presented to determine whether the UK's withdrawal from the EU provides for advancement in the favourability of arbitration with its seat in the UK.

Keywords: *anti-suit, arbitration, Brexit, civil law, common law, injunction*

1. INTRODUCTION

Following a referendum in June 2016, the United Kingdom's ("UK") Government formal announcement of the withdrawal in March 2017, and prolong deadlock in the UK parliament, the UK has left the European Union ("EU") on 31 January 2020 and thus finalised so-called Brexit, a portmanteau of *"Britain*" and *"exit*" for which merely 52 % of voters voted. This twice postponed withdrawal from the EU marks an 11 months long transition period in which the UK remains bound by the EU laws,[1] yet loses all its stance in EU's political bodies or institutions.[2]

While the turbulent period for the UK, main reason for the Brexit, as noted by the Prime Minister Theresa May in her letter of 29 March 2017 invoking Article 50(2) of the Treaty on European Union addressed to Donald Tusk, was to *"restore, as we see it, our national self-determination*".[3]

This paper does not address the implications of Brexit as is, nor deals with the post-transition setup in the mutual relationship between the UK and the EU per se. Instead, this article aims to evaluate how this above-mentioned self-determination might impact

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[1] EDGINGTON, T. Brexit: What is the transition period? In: *BBC News Analysis* [online]. 8. 2. 2020 [2020-02-14]. Available at: <https://www.bbc.com/news/uk-politics-50838994>.

[2] EUROPEAN COMMISSION. Questions and Answers on the United Kingdom's withdrawal from the European Union on 31 January 2020. In: *European Commission* [online]. 24. 1. 2020 [2020-02-14]. Available at: <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_104>.

[3] MAY, T. *Prime Minister's letter to Donald Tusk triggering Article 50*. In: *gov.uk*. [online]. 29. 3. 2017 [2020-02-14]. Available at: <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>.

the English law legal framework[4] of anti-suit injunctions and whether such might be in consistency with EU law.

The introductory part of this paper shall present the central thesis to which concurring arguments are ought to be presented in the following chapters. The introductory part also institutes the main frame of reference used hereto.

The second part of this paper postulates doctrinal prehension of an anti-suit injunction as practised in the English law with remark to its elementary historical development. As will be further specified, this paper intents solely on the principal measure of the anti-suit injunction and does not cover either anti-anti-suit injunction[5] nor anti-arbitration injunction,[6] unless specifically addressed in the fifth chapter.

With the existence of the anti-suit injunction measure as developed in the English law in mind, the attitude of the case-law of the Court of Justice of the European Union ("CJEU") will be elaborated, in the third part, to present the clash between common law instrument and civil law-oriented setting of the EU law. Connotations of the CJEU jurisprudence will be subjected to further analysis to establish what is the factual rule of law in the EU and by way of European Union (Withdrawal) Act 2018[7] ("Withdrawal Act") in the UK to this day as well. Czech doctrinal attitude will not be discussed following the reasoning that to the full extent applicable, the Czech Republic jurisprudence[8] follows the CJEU case-law, EU law and as a civil law country, itself has no analogy to such measure.

The fourth part of this paper presents the optional possibility to refrain from the case-law of the CJEU. Marking it to be a path to open English judicial market to greater favourability.

Fifth part of this paper elaborates on what is proposed to be the prime of English law hopes – accession to the Convention on jurisdiction and the recognition and enforcement

[4] This paper shall only discuss the connotations to the English law, acknowledging that Scottish and Northern Ireland law constitute different legal systems of the UK. Hence, some findings might not be applicable to the latter two. While stating England in this paper, such shall mean all parts of the UK where English law is practiced.

[5] Anti-anti-suit (or counter-anti-suit) injunctions are injunctions against anti-suit (or anti-arbitration injunctions), ordering a party not to enforce obtained anti-suit injunction or to withdraw the request for injunction (*ex post* injunction) or injunctions in order to enjoin a party from seeking injunctive relief in another forum (*ex ante* injunction). MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration*. The Hague: Eleven International Publishing, 2010, pp. 7, 17. See also RAPHAEL, T. *The Anti-Suit Injunction*. Oxford: Oxford University Press, 2008, pp. 149–153; SCHNEIDER, M. E. Court Actions in Defence Against Anti-Suit Injunctions. In: Emmanuel Gaillard (ed.). *Court Actions in Defence Against Anti-Suit Injunctions*. Huntington: Juris Publishing, Inc., 2005, p. 41.

[6] Anti-arbitration injunctions are orders prohibiting a party from commencing or continuing arbitral proceedings (foreign or domestic). See MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration.*, *p.* 7; BAUM, A. H. Anti-arbitration injunctions, on the other hand, are orders preventing a party from commencing or continuing arbitral proceedings. In: Emmanuel Gaillard (eds.). *Court Actions in Defence Against Anti-Suit Injunctions*. Huntington: Juris Publishing, Inc., 2005, p. 19; SCHNEIDER, M. E. Anti-Suit Injunction in International Arbitration – An Overview. In: Emmanuel Gaillard (eds.). *Court Actions in Defence Against Anti-Suit Injunctions*. Huntington: Juris Publishing, Inc., 2005, p. 9 *et seq*.

[7] UNITED KINGDOM. 2018 Chapter 16, European Union (Withdrawal) Act 2018 in line with 2020 Chapter 1, European Union (Withdrawal) Act 2020.

[8] For Czech jurisprudence on anti-suit injunction, see BĚLOHLÁVEK, A. J. Anti-Suit Injunctions in Arbitral and Judicial Procedures in the Czech Republic. *The Lawyer Quarterly*. 2018, Vol. 8, No. 4, pp. 322–331.

of judgments in civil and commercial matters ("Lugano Convention"). While deemed to provide the best outcomes to judicial determination and further enforcement, EU's hesitance to allow UK's accession, as well as the impossibility to provide much sought *"national self-determination*", thus concurrent prohibition of anti-suit measures shall be discussed.

Sixth part then establishes a framework of Convention of 30 June 2005 on Choice of Court Agreements ("Hague Convention") to be deemed best appropriate to ensure that anti-suit injunction rulings issued by England courts are not materially unenforceable in the EU, thus failing to provide the prime outcome for which they are sought – enforcement of arbitration clauses in international commercial contracts with regard to promotion of will of the contractual parties and sanctioning of *mala fides* via the abuse of jurisdiction clauses in conflict-of-law instruments.

For the purpose of this paper, hypotheses considered are that **(a)** the position of arbitration with the seat in England shall become advanced as a result of the UK withdrawal from the EU, because England courts in its supportive power to the arbitration proceeding may issue anti-suit injunctions, **(b)** such anti-suit injunctions are not in contrary to the EU public policy, and **(c)** EU member states should not refuse to recognise and enforce such anti-suit injunction due to history of civil law countries courts which have already issued analogical measure, enforced anti-suit injunction, or even issued anti-suit injunction itself. These 3 hypotheses are stipulated under condition that the UK accedes to the Hague Convention.

As aforementioned, only anti-suit injunction will be scrutinised. Many scenarios regarding court proceedings, arbitral proceedings, anti-suit injunction measures issued by either court or arbitrators could be considered. Therefore, for the sake of clarity, solely anti-suit injunction issued by England court in its supportive power to arbitration proceeding shall be examined. Consequently, the recognition and enforcement of such injunction shall be evaluated in the light of both of the possible legal instruments, Lugano Convention, Hague Convention respectively.

2. ANTI-SUIT INJUNCTION

An anti-suit injunction[9] is an order prohibiting a contractual party from commencing or continuing legal proceedings before a court of another state.[10] While it could be viewed as an infringement of other country sovereignty[11] as it *"fosters the impression that the order is addressed to and intended to bind another court,"*[12] the opposite is true as such injunction is not addressed to another court itself, rather to the other contractual party.[13] There-

[9] The term abbreviated not from the English law itself, but from the US case-law. See Decision of the Court of Appeal of England and Wales, United Kingdom of 1987, No. [1986] 3 All ER 468.

[10] MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration. p.* 7.

[11] For further elaboration on challenge based on sovereignty, see RAPHAEL, op. cit., pp. 15–21.

[12] United Kingdom House of Lords Decisions, United Kingdom of 13 December 2001, No. [2001] UKHL 65. In: *British and Irish Legal Information Institute* [online]. 13. 12. 2001 [2020-02-16]. Available at: <https://www.bailii.org/uk/cases/UKHL/2001/65.html>.

[13] RAPHAEL, T. *The Anti-Suit Injunction. p.* 4.

fore, as an order addressed to the other party, breach of such is a contempt of court and is punishable by seizure of property and in last resort by imprisonment.[14]

A measure traceable to be at first used in England as a prohibition writ against the expanding jurisdiction[15] of church courts in the 15th century,[16] in such time actually addressed to another court, not to the counterparty.[17] Later, employed by the Court of Chancery as a remedial injunction addressed to the counterparty to prohibit commencing or continuing common law courts proceeding where it would be against good conscience.[18] In the 19th century, the well-established anti-suit injunction found its way beyond England to other parts of the UK and even beyond.[19] The reasoning for the ability to refrain one party to commence court proceeding in territory other but England rests in the view of *in personam*[20] jurisdiction of such court over the party seeking to commence proceedings in another country.[21] Therefore, should a court have a jurisdiction over contractual party, it subsequently possess inherited power to order the party to abstain any legal action, even one in different sovereign territory.[22]

Nowadays, although the common law anti-suit injunction ceased to exist by virtue of section 24(5) of Supreme Court of Judicature Act 1873, it has been statutorily reinstated by section 37 of Senior Courts Act.[23] The remedy promulgated as a general principle in line with Art. 38(1)(c) of the Statute of the International Court of Justice[24] in cases of a clear breach of contract and as a last resort, is currently of sufficient prominence[25] in England, providing that it is granted in two main situations – **(i)** where foreign proceedings would be in breach of contractual prorogation of England courts or arbitration with seat in England,[26] or **(ii)** where foreign proceedings overlap with subject-matter litigated in England while being vexatious and oppressive for reasons instituted in case-law.[27] The later omitted from the scope of this paper.

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[14] E.g. Decision of High Court, United Kingdom of 10 August 2018, Mobile Telecommunications Co KSC v HRH Prince Hussam bin Abdulaziz au Saud No. [2018] EWHC 3749 (Comm) in which the court sentenced a Saudi prince to twelve months imprisonment for breach of an anti-suit injunction.

[15] BERMANN, G. A. The Use of Anti-Suit Injunctions in International Litigation. *Columbia Journal of Transnational Law*. 1990, Vol. 28, p. 594. See also generally DUMBAULT, E. Judicial Interference with Litigation in other Courts. *Dickinson Law Review*. 1970, Vol. 74, pp. 369–375.

[16] MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration*. p. 9.

[17] DUMBAULT, E. Judicial Interference with Litigation in other Courts. *Dickinson Law Review*. 1970, Vol. 74, No. 3, p. 375.

[18] HARTLEY, T. C. Comity and the Use of Antisuit Injunctions in International Litigation. *The American Journal of Comparative Law*. Vol. 35, No. 3, p. 489.

[19] Decision of the High Court of Chancery in England, England of 10 December 1833, No. [1834] 3 My & K 104, [1833] EngR 932, (1833) 6 Sim 356, (1833) 58 ER 628 (A). See also INGRAHAM, E. D. *Reports of Cases Decided in the High Court of Chancery*. Philadelphia: T. K & P. G. Collins, Printers. 1836, pp. 298–301; HARTLEY, T. C. *Comity and the Use of Antisuit Injunctions in International Litigation*. p. 490.

[20] *"The power was grounded not upon "any pretension to the exercise of judicial rights abroad" but upon the fact that the party being restrained is subject to the in personam jurisdiction of the English court."* See STORY, J. *Commentaries on Equity Jurisprudence: As Administered in England and Americas*. Boston: Charles C. Little and James Brown, 1839, p. 185.

[21] INGRAHAM, E. D. *Reports of Cases Decided in the High Court of Chancery*. p. 299; See also MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration*. p. 10.

[22] JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement*. London: Sweet & Maxwell, 2010, p. 369.

[23] MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration*. pp. 10–11.

[24] COLLINS, L. *Essays in international litigation and the conflict of laws*. Oxford: Clarendon Press, 1994, p. 169.

[25] JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement*. pp. 363–364.

[26] RAPHAEL, T. *The Anti-Suit Injunction*. pp. 169–202, 232–245.

[27] Ibid., p. 6.

Consequently, in general, England courts may grant an anti-suit injunction if **(i)** they have jurisdiction over the defendant, **(ii)** arbitration agreement is valid, **(iii)** the application is made without undue delay, and **(iv)** the foreign action is not well-advanced.[28]

3. THE STANCE OF CJEU ON AN ANTI-SUIT INJUNCTION

It has been well-observed that the EU law and judicial practice of the CJEU, mainly the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ("Brussels Convention"),[29] is greatly influenced by the civil law, rather than common law.[30] Hence it does not awe that strictly common law measure has not been genuinely welcomed.[31]

Following the doctrinal compatibility of an anti-suit injunction with English law, without any proper reasoning of its compatibility with Brussels Convention, the English courts continued to sustain the anti-suit injunction in international commercial disputes.[32] The first case in which the CJEU was invited to decide on the anti-suit injunction was *Turner v. Grovit* case[33] the CJEU held that Brussels Convention *"is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings."*[34] The reasoning behind the ruling is the concept of mutual trust[35] between contracting states and their courts.[36]

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[28] LEW, J., MISTELIS, L., KRÖLL, S. *Comparative International Commercial Arbitration*. Hague: Kluwer Law International, 2003, p. 365.

[29] The Brussels Convention has been based on legal systems of the Member States prior to UK's entry, therefore, noting that some "*special structural features*" exist in the UK's legal system, but decided not to alter the wording of the Brussels Convention. *See* SCHLOSSER, P. Report on the Convention of 9 October 1978 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. *Official Journal of the European Communities*. 1979, Vol. 59, p. 80.

[30] COOK, J. P. Pragmatism in the European Union: Recasting the Brussels I Regulation to Ensure the Effectiveness of Exclusive Choice-of-Court Agreements. In: *University of Aberdeen* [online], p. 4 [2020-02-18]. Available at: <https://www.abdn.ac.uk/law/documents/Pragmatism_in_the_European_Union.pdf>.

[31] JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement*. p. 364.

[32] See e.g. Decision of Court of Appeal (England), Civil Division, United Kingdom of 10 November 1993, No. [1994] 1 WLR 588. In: *EUR-Lex* [online]. [2020-02-18]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:81993UK1110(01)&qid=1593527809245&from=EN>.

[33] Judgement of the Court of Justice of 27 April 2004. Turner v. Grovit. Case C-159/02.

[34] Ibid., para. 31.

[35] *Contra* fact of exclusion of arbitration from Brussels Convention (or Brussels I Regulation) might be viewed as an indication of non-existence of mutual trust between Member states in arbitration. *See* MOSIMMAN, O. L. *Anti-Suit Injunction in International Commercial Arbitration*. p. 69; For more on mutual trust between EU Member States, expressed in EU law see MALACHTA, R. Mutual Trust as a Way to an Unconditional Automatic Recognition of Foreign Judgments. Universal, Regional, National – Ways of the Development of Private International Law in 21st Century. 2019, pp. 213-223. In: *MUNI Space Čítárna Masarykovy Univerzity* [online]. [2021-04-05]. Available at: <https://doi.org/10.5817/CZ.MUNI.P210-9497-2019-11>.

[36] Judgement of the Court of Justice of 27 April 2004. Turner v. Grovit. Case C-159/02, para. 24 with reference to Judgement of the Court of Justice of 9 December 2003. Erich Gasser GmbH v MISAT Srl. Case C-116/02.

Hence, no review of another Member State court's jurisdiction is allowed as an inherited feature of the Brussels Convention.[37] An argument in favour of the injunction relating to its procedural character, thus falling within the matter of national law was likewise rejected due to the possibility of impairing the effectiveness of the Brussels Convention;[38] thus limited autonomy has been exercised.[39]

CJEU, therefore, rejected the *in personam* effect of anti-suit injunction doctrine which constitutes the non-existence of either direct or indirect effect on foreign court, thus held that Member States courts do not possess the power to grant anti-suit injunctions as it, even indirectly, interferes with the foreign court.[40]

Interestingly (to the scope of this paper), *Turner v. Grovit* case does not involve arbitration proceeding and relates solely to litigation. To establish whether injunctive relief granted by a court in supportive power to the arbitration is subjected to Brussels Convention, following *Marc Rich*[41] and *Van Uden* case,[42] the question whether the subject matter of the dispute is arbitration, unless such proceeding may be classified as ancillary to arbitration,[43] must be followed. *Schlosser* also states that Brussels Convention should not apply as such would be *"divorced from reality"*[44] since the jurisdiction of other Member State court is mere *ex hypothesi,*[45] which the parties chose not to invoke by entering into an arbitration agreement.

Following the *Turner v. Grovit, Marc Rich* and *Van Uden* cases, as well as domestic case-law *Toepfer v. Société Cargill,*[46] the English courts assessed that issuing anti-suit injunctions remain in line with the EU law on reason of *"such ability to be principal subject matter of the claim to restrain such proceedings was said to be "arbitration"".*[47] *Toepfer v. Société Cargill* has been subsequently referred to the CJEU, yet amicable settlement has been reached before the CJEU ruled on the subject matter.[48]

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[37] JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement.* p. 393.

[38] Ibid., p. 394. Judgement of the Court of Justice of 15 May 1990. Kongress Agentur Hagen GmbH v Zeehaghe BV. Case C-365/88 ("Hagen"), para. 20.

[39] RAPHAEL, T. *The Anti-Suit Injunction.* pp. 268.

[40] Judgement of the Court of Justice of 27 April 2004. Turner v. Grovit. Case C-159/02, para. 28. *See also* Opinion of Advocate General Ruiz-Jarabo Colomer of 20 November 2003. Turner v. Grovit. Case C-159/02, para. 34.

[41] Judgement of the Court of Justice of 25 July 1991. Marc Rich & Co. AG v Società Italiana Impianti PA. Case C-190/89.

[42] Judgement of the Court of Justice of 17 November 1998. Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another. Case C-391/95.

[43] MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration.* p. 65.

[44] VAN DEN BERG, A. J. *Yearbook Commercial Arbitration Volume XXXIII – 2008.* Alphen aan den Rijn: Kluwer Law International, 2008, p. 711. *See also* Opinions of the Lords of Appeal, United Kingdom of 21 February 2007, No. [2007] UKHL 4, p. 5. In: *British Institute of International and Comparative Law* [online]. [2020-02-18]. Available at: <https://www.biicl.org/files/2868_hol_west_tankers.pdf>.

[45] JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement.* p. 399.

[46] Decision of Court of Appeal (England), Civil Division, United Kingdom of 25 November 1997, No. [1997] EWCA Civ 2811. In: *1958 New York Convention Guide* [online]. [2020-02-16]. Available at: <http://newyorkconvention1958.org/index.php?lvl=notice_display&id=1463&opac_view=2>.

[47] Eight reasons for such may be found in the speech of Lord Hoffmann when the House of Lords referred the *West Tanker* case to the CJEU. JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement.* pp. 398–400. *See* Judgement of the Court of Justice of 10 February 2009. Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc. Case C-185/07.

[48] MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration.* p. 64.

A gambit between two doctrinal approaches led to the final decision of the CJEU in *West Tankers*[49] case. Both doctrines follow the reasoning for exclusion of arbitration[50] as imposed by the CJEU in *Marc Rich*.[51] The common law doctrine adheres to the scope test, thus assess whether the subject-matter is governed by the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). Provided that the matter is within the scope of New York Convention, then it is out of the scope of Brussels I bis Regulation[52] and vice versa.[53] This approach has been undertaken to ensure uniform interpretation of the New York Convention. Hence no differentiation is endured by application of national procedural law.[54] Consequent argument is that the fundamental focus of the injunction is to protect the arbitration agreement, being the inherent contractual right.[55] Through such fundamental focus, whether the subject-matter is covered by the Brussels I bis Regulation becomes irrelevant.[56]

Continental doctrine,[57] contrarily, considers the proceeding for ordering anti-suit injunction to be outside the arbitration exclusion clause within the Brussels I bis Regulation, thus subject to it.[58] Continental doctrine adopted the interpretation that an arbitration agreement is merely a preliminary issue. Henceforth the proceeding arising out of it is the actual matter governed by the Brussels I bis Regulation and only such should be considered.[59] Another continental doctrine argument, one of prohibition to review another

[49] Judgement of the Court of Justice of 10 February 2009. Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc. Case C-188/07. See more BĚLOHLÁVEK, A. J. West Tankers as a Trojan Horse with Respect to the Autonomy of Arbitration Proceedings and the New York Convention 1958: On the contentious concept of the importance of the dispute subject matter in light of subsequent decisions on the fate of anti-suit injunctions from the vantage point of Brussels-Luxembourg officialdom. *ASA Bulletin*. 2009, No. 4, pp. 646–670; BĚLOHLÁVEK, A. J. *Anti-Suit Injunctions in Arbitral and Judicial Procedures in the Czech Republic*. pp. 322–331; On other effects of the *West Tanker* decision, namely whether it could be decided differently see also ŠIDLA, P. Are the days of the "Italian Torpedo" numbered? *Cofola International: 2015 Current Challenges to Resolution of International (Cross-border) Disputes*. Brno: Masaryk University, 2015, pp. 154–164.

[50] MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration*. pp. 62–63.

[51] SERIKI, H. *Injunctive Relief and International Arbitration*. New York: Informa Law from Routledge, 2015, para. 3.04.

[52] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.

[53] AMBROSE, C. Arbitration and the Free Movement of Judgments. *Arbitration International*. 2003, Vol. 19, No. 1, pp. 12. See also Decision of Court of Appeal (England), Civil Division, United Kingdom of 25 November 1997, No. [1997] EWCA Civ 2811. In: *1958 New York Convention Guide* [online]. [2020-02-16]. Available at: <http://newyorkconvention1958.org/index.php?lvl=notice_display&id=1463&opac_view=2>.

[54] AMBROSE, C. *Arbitration and the Free Movement of Judgments*. pp. 3, 11. MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration*. p. 67.

[55] JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement*. p. 397–408.

[56] MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration*. p. 68.

[57] For summary of recognition and enforcement of foreign judgments under continental doctrine (Brussels I and Brussels I bis Regulation), see ROZEHNALOVÁ, N., VALDHANS, J., KYSELOVSKÁ, T. Recognition and Enforcement of Foreign Judgments: From Brussels Convention to Regulation Brussels I Recast. In: V. Rijavec – W. Kennett – T. Keresteš – T. Ivanc (eds.). *Remedies Concerning Enforcement of Foreign Judgements. Brussels I Recast*. Hague: Kluwer Law International BV, 2018, Vol. 104, pp. 39–61.

[58] Ibid., p. 67.

[59] ILLMER, M., NAUMANN, I. Final curtain for anti-suit injunctions. Zur Vorlage des House of Lords an den EuGH in West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA and others (The Front Comor). *Internationales Handelsrecht*. 2012, Vol. 7, No. 2, p. 65. See also STACHER, M. You Don't Want to Go There – Antisuit Injunctions in International Commercial Arbitration. *ASA Bulletin*. 2005, Vol. 23, No. 4, p. 650.

courts' jurisdiction,[60] fails to reflect two paradigms, **(i)** if the subject-matter is excluded from the Brussels I bis Regulation, then provision of such on non-review do not *a priori* apply, and **(ii)** anti-suit injunction proceedings do not *per se* review jurisdiction, they merely enforce contractual clauses.

3.1 West Tankers case

Following the *Turner v. Grovit* and *Gasser,*[61] Advocate General *Kokott* upheld the preclusion of anti-suit injunction by EU law,[62] arguing that contrary to the common law doctrine, substantial question whether proceeding to which the injunction is directed falls within Brussels I Regulation. Should that be so, Brussels I Regulation ought to cover such injunction as well.[63] Secondly, the conclusion from *Hagen,*[64] which stated that national procedural rules *"may not impair the effectiveness of the Convention"*[65] has been drawn. Thirdly, the fact of the preliminary character of anti-suit issuance proceeding has been evaluated and held that subject-matter for consideration is the actual proceeding to which the injunction interferes. The injunction thus itself indirectly interferes with the Brussels I Regulation.[66] Lastly, dismissal of the economic view of law raised by the House of Lords[67] has been inferred based on non-possibility to infringe the community rule of law solely on aims of economic nature.[68]

Criticism to the Opinion AG Kokott has been observed, mainly imposing that while she states that the Brussels I Regulation should not interfere with international rules on arbitration, she concludes her opinion in contrary to such.[69] This would mean that Brussels I Regulation is to supersede the New York Convention, being undesirable result omitted by virtue of Art. 2 (d) of the Brussels I Regulation.[70] Consequently, *Opinion* of *AG Kokott* on party autonomy[71] has been rebutted by realising that *"tactical litigation"*[72] is not an act of party autonomy, rather of *in fraudem contractum* behaviour which subsequently[73] infringes on *Kompetenz-Kompetenz*[74] principle of the rightfully elected arbitral tribunal.[75] Such in-

[60] Judgement of the Court of Justice of 27 June 1991. Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company. Case C-351/89, para. 24.
[61] Judgement of the Court of Justice of 9 December 2003. Erich Gasser GmbH v MISAT Srl. Case C-116/02.
[62] Opinion of Advocate General Kokott of 4 September 2008. Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc. Case C-185/07 ("Opinion AG Kokott").
[63] Ibid., para. 33.
[64] Hagen, para. 22.
[65] Opinion AG Kokott, para. 36.
[66] Ibid., para. 62.
[67] Opinions of the Lords of Appeal, United Kingdom of 21 February 2007, No. [2007] UKHL 4, para 21. In: *British Institute of International and Comparative Law* [online]. [2020-02-18]. Available at: <https://www.biicl.org/files/2868_hol_west_tankers.pdf>.
[68] Opinion AG Kokott, para. 66.
[69] Ibid., para. 66 in reference to para. 46.
[70] MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration.* p. 73.
[71] Opinion AG Kokott, para. 67–68.
[72] MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration.* p. 74.
[73] In the light of CJEU case-law.
[74] SPARKA, F. *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis.* Hamburg: Springer, 2010, p. 81.
[75] MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration.* p. 74.

terpretation allows for delegated forum shopping, in which the breaching party seeks to discharge itself from valid arbitration agreement by submitting the dispute to a court which would be likely to commence court proceeding, disregarding the arbitration agreement.[76]

CJEU then followed with its judgement which took into consideration previous case-law and decisively followed the Opinion AG Kokott.[77] Disapproval[78] of the judgment followed the criticism of the Opinion AG Kokott, adding that issuance of an anti-suit injunction does not interfere with mutual trust prerequisites, as it merely protects the will of parties to refer a dispute to arbitration and allows the tribunal to perform its inherited right[79] to rule on its jurisdiction.[80] This decision, therefore, includes arbitration within the Brussels I Regulation, without providing any covering. Party autonomy is therefore restricted by applicable law and by discretion of a court, as the autonomy to prorogate arbitration becomes irrelevant should any Member state court seize the case and decide to rule on its merits. Consecutively, *West Tankers* raises legit defence for illegitimate court refusal to deny its jurisdiction in favour of arbitral proceeding.[81] Although some argued, that problem lies within the legal framework itself, not in the jurisprudence of the CJEU,[82] questionable is whether CJEU had not done too little to set clear boundaries.

3.2 Gazprom case

As of 10 January 2015, Brussels I Regulation has been aimed to be replaced by the Brussels I bis Regulation, which explicitly states in recital 12 that *"This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts […], when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, […] from staying or dismissing the proceedings, […].*" and *"This Regulation should not apply to an action or ancillary proceedings relating to, in particular, […] the conduct of an arbitration procedure or any other aspects of such a procedure, nor to […] the […] recognition or enforcement of an arbitral award*'."

In his opinion,[83] Advocate General *Wathelet* held that under Brussels I bis Regulation, the conclusion of *West Tanker* would no longer be applicable and it is called for such interpretation to be abandoned as being outright overcame by the legislation process.[84] Subsequently, he argued that under the Brussels I bis Regulation, the anti-suit injunction in *West Tankers* would have to be held as compatible with the EU law,[85] based primarily on its recital 12.[86]

[76] This approach negates the primary function of prorogation clauses, support and enforcement of will of the contractual parties

[77] JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement.* pp. 397–403.

[78] See e.g. FENTIMAN, R. Arbitration and Anti-Suit Injunctions in Europe. *The Cambridge Law Journal.* 2009, Vol. 68, No. 2, pp. 278–281.

[79] DIMOLITSA, A. Autonomie et "Kompetenz-Kompetenz". *Revue de l'arbitrade.* 1998, Vol. 2, p. 338.

[80] Ibid., p. 75.

[81] MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration.* pp. 76–77.

[82] JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement.* p. 402.

[83] Opinion of Advocate General Wathelet of 4 December 2014. "Gazprom" OAO v Lietuvos Respublika. Case C-536-13 ("Opinion AG Wathelet").

[84] Ibid., para. 130–132.

[85] Ibid., para. 134–135.

Therefore, an anti-suit injunction forms an *"ancillary proceedings relating to, in particular, […] the conduct of an arbitration procedure*" and if ordered in supportive power of the court to arbitration, then *"its prohibition can no longer be justified*" and reinstates exclusion interpretation[87] as pronounced in *Marc Rich*.[88]

Since the *Gazprom* case referred to an anti-suit injunction awarded by an arbitral tribunal, CJEU held that Brussels I Regulation does not preclude nor it forbids a court of a Member State from recognising and enforcing such award.[89]

Unfortunately, since the Brussels I bis Regulation has not yet come into force on the day of *Gazprom* judgement, the CJEU omitted to evaluate points raised in the Opinion AG Wathelet on the interconnection of an anti-suit injunction issued by a court of a Member State and Brussels I bis Regulation.

Even though the CJEU restrained itself from addressing on so far non-applicable instrument, the Opinion AG Wathelet sparkled discussion on future applicability of anti-suit injunction.[90]

This discussion culminated before English court in *Nori Holdings*[91] in which one party relied on recital 12 (4) of the Brussels I bis Regulation as well as on the Opinion AG Wathelet. Justice *Males* held that *West Tankers* has not ceased to be applicable and is, therefore, ought to be followed under Brussels I bis Regulation as well. Justice *Males* argued that Opinion AG Wethelet was *"far too sweeping*"[92] and alternative interpretation would create legal unpredictability and lead to jurisdictional conflicts as to which court was in fact seized first, both of which are contrary to the fundamental principles of the Recast.[93] Justice *Males* thus concluded that there is nothing in the Brussels I bis Regulation which would *"cast doubt on the continuing validity of the decision in West Tankers which remains an authoritative statement of EU law."*[94]

English court thus confirmed *West Tankers* to be the good law and therefore applicable under Brussels I bis Regulation, hence itself rejected its own power to issue an anti-suit injunction.

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[86] Ibid., para. 137.

[87] Ibid., para. 140–141.

[88] Opinion AG Wathelet also covered the topic of delaying tactics as discussed in *Turner v. Grovit*, *Gasser* and *West Tankers*. See Ibid., para. 145–152, making it his supplementary point should the Court not take Brussels I bis Regulation into consideration.

[89] Judgement of the Court of Justice of 13 May 2015. „Gazprom" OAO v Lietuvos Respublika. Case C-536-13.

[90] See e.g. NDOLO, D., LIU, M. Does the Will of the Parties Supersede the Sovereignty of the State? Anti-suit Injunctions in the UK Post-Brexit. *Global competition Litigation review*. 2017, Vol. 2, pp. 53–61.

[91] Decision of England and Wales High Court (Commercial Court), United Kingdom of 6 June 2018, No. [2018] EWHC 1343 (Comm). In: *British and Irish Legal Information Institute, England and Wales High Court (Commercial Court) Decisions* [online] 6. 6. 2018 [2020-02-27]. Available at: <https://www.bailii.org/ew/cases/EWHC/Comm/2018/1343.html>.

[92] Ibid., para. 93.

[93] NDOLO, D. Judicial Clarification on Anti-suit Injunctions: The Right Approach? In: *Kluwer Arbitration Blog* [online]. 17. 7. 2018 [2020-02-29]. Available at: <http://arbitrationblog.kluwerarbitration.com/2018/07/17/booked-tech-law/>.

[94] Ibid., para. 99.

4. MAY THE ENGLAND COUNTER THE ESTABLISHED CASE-LAW?

The English's courts, except the Supreme Court and the High Court of Justiciary,[95] are by virtue of section 6 of Withdrawal Act bound by any retained CJEU case-law, forming a part of EU law before the *"exit day."*[96] Admittedly, the section 6(4)(5) of the Withdrawal Act vests the ability to Supreme Court (or the High Court of Justiciary)[97] to depart from any retained case-law as it may from any domestic case-law.

Supreme Court thus may remove any restrictions and depart from the *West Tankers* and pronounce that anti-suit injunctions issued in supportive power of the court to the arbitration, issued to stop proceedings within the EU Member States, are legal.

While in *Nori Holdings*, the English court refused to follow *AG Wathelet's* approach, arguing fundamental flaws.[98] Despite that, English courts did not absent in granting anti-suit injunctions in cases not directed to proceedings involving EU courts. In *Hydropower Plant JSC,*[99] the Supreme Court affirmed applicable law in *West Tanker* to cover merely Brussels regime, and any other interpretation in relation to non-Brussels regime court would be inconceivable.[100] Consequently, no restrains in the form of EU law force the English jurisprudence to follow *West Tankers* any more. Nevertheless, overturned by the CJEU, following *West Tankers* and *Turner v. Grovit*, direct favourability by Supreme Court of anti-suit injunction in respect of arbitration is obvious. Once called to be an *"important and valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration,"*[101] a tool to *"preclude conflict between the arbitration award and the judgment of a national court,"*[102] and argued that by virtue of CJEU jurisprudence, an *"effective and sophisticated tool of English commercial litigation has been decommissioned,"*[103] an extension of anti-suit injunctions in regard to EU courts may be expected.

5. LUGANO CONVENTION AND ITS EFFECT ON THE ENGLISH COURTS

While it is indisputable that English law may depart from any post-Brexit retained law in lieu with the Withdrawal Act, such would become immaterial should the UK

[95] Section 6(4)(a)(b) Withdrawal Act.

[96] 31 January 2020.

[97] *See* Section 6(4)(b)(i)(ii) Withdrawal Act for limits on exclusion of binding effect on the High Court of Justiciary.

[98] Decision of England and Wales High Court (Commercial Court), United Kingdom of 6 June 2018, No. [2018] EWHC 1343 (Comm), para. 91. In: *British and Irish Legal Information Institute, England and Wales High Court (Commercial Court) Decisions* [online] 6. 6. 2018 [2020-02-27]. Available at: <https://www.bailii.org/ew/cases/EWHC/Comm/2018/1343.html>.

[99] Decision of United Kingdom Supreme Court, United Kingdom of 12 June 2013, No. [2013] UKSC 35. In: *British and Irish Legal Information Institute, United Kingdom Supreme Court* [online]. 12. 6. 2013 [2020-02-27]. Available at: <https://www.bailii.org/uk/cases/UKSC/2013/35.html>.

[100] "*[…] it is inconceivable that the 1996 Act intended or should be treated sub silentio as effectively abrogating the protection enjoyed under section 37 in respect of their negative rights under an arbitration agreement by those who stipulate for an arbitration with an English seat.*" Ibid., para. 60.

[101] Opinions of the Lords of Appeal, United Kingdom of 21 February 2007, No. [2007] UKHL 4, para. 19. In: *British Institute of International and Comparative Law* [online]. [2020-02-18]. Available at: <https://www.biicl.org/files/2868_hol_west_tankers.pdf>.

[102] *Ibid.*

[103] BRIGGS, A. Anti-suit injunctions and utopian ideals. *Law Quarterly Review*. 2004, No. 120, p. 530.

accede[104] to the Lugano Convention. In accordance with the Art. 72(3) of the Lugano Convention, unanimous agreement[105] of the contracting parties is needed to be successfully invited to accede, therefore including the EU.[106] The EU is hesitant to agree should the UK maintain its negative attitude toward a single market, either being the EFTA or the EEA.[107] Although UK's stance in this matter is beyond uncertain,[108] should UK accede to the Lugano Convention, anti-suit injunction, even if in such time departed from the retained EU case law, would not be available.

The regime of Brussels regulations[109] and the Lugano Convention is deemed to be *"closed system"*[110] based on two paradigms.

Firstly, Protocol 2 to the Lugano Convention itself promulgates substantial link to Brussel I Regulation, as well as the concurrent parallel revision of 1998 Lugano[111] and Brussels Convention, which makes both to be identical[112] in different spheres of territorial application.[113] Pocar Report explicitly states that alterations to the 1998 Lugano have been made

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[104] UK deposited an application to accede to the Lugano Convention on 8 April 2020. See Notification to the Parties of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded at Lugano on 30 October 2007. In: *Federal Department of Foreign Affairs FDFA* [online]. 14. 4. 2020 [2020-05-24]. Available at: <https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autresconventions/Lugano2/200414-LUG_en.pdf>.

[105] Alternatively, should the UK rejoin EFTA, Art. 72 of the Lugano Convention would not apply in favour of Art. 71. UK would then need not the approval of the EU to accede to the Lugano Convention. Possibility of UK rejoining the EFTA then lays solely on the EFTA members in accordance with Art. 56 of the Convention of 4 January 1960 on establishing the European Free Trade Association, as amended ("EFTA Convention"); *"They might like to welcome the UK into their organization, although this British "swing-back" might not amuse the EU, whose sympathy could be more important to the EFTA States in the long term."* UNGERER, J. Consequences of Brexit for European Private International Law. *European Papers*. 2019, Vol. 4, No. 1, p. 400.

[106] Switzerland, Norway and Iceland already promulgated their support to such. See Ministry of Justice. Support for the UK's intent to accede to the Lugano Convention 2007. In: *gov.uk*. [online]. 28. 1. 2020 [2020-02-25]. Available at: <https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007>.

[107] *"However, the Commission, noting that the other signatory countries are all part or substantially part of the EU's single market (being members of either the EU, EFTA or the EEA) will not make a positive recommendation for the UK to join Lugano while the UK maintains its determination to leave the single market. This feel like political positioning by the Commission."* See BARNARD, C, MERRETT, L. Farewell Lugano? In: *The UK in a Changing Europe* [online]. 7. 5. 2020 [2020-05-23]. Available at: <https://ukandeu.ac.uk/farewell-lugano/>.

[108] Also considering, should the EU agree for UK's accession, they deliberately might restrain the UK from enjoying any benefit of the Lugano towards the EU in lieu of Art. 72(4) of the Lugano Convention.

[109] Considering both, Brussel I Regulation and Brussel I bis Regulation, as their impact on anti-suit injunction is merely the same.

[110] RAPHAEL, T. *The Anti-Suit Injunction*. p. 272. For further understanding of Brussels-Lugano zone see MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration*. p. 61 *et seq*.

[111] Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters.

[112] POCAR, F. Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 – Explanatory report by Professor Fausto Pocar. In: *EUR-Lex* [online]. 23. 12. 2009 [2020-11-04]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XG1223(04)&from=EN>. ("Pocar Report"), para. 197, 198. See also JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement*. p. 62.

[113] *"With this objective the Convention, taking into account the development of international and Community rules that has been described above, sets out to extend to the contracting parties the principles of the Brussels I Regulation, and substantially reproduces its provisions."* Pocar Report, para. 12. See also JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement*. pp. 62–63.

to reflect Brussels I Regulation or to pay due respect to the CJEU case-law.[114] The material scope has lingered with the Brussels I Regulation, both in regard to contracting states as well to the non-contracting ones.[115]

Secondly, Protocol 2 to the Lugano Convention obliges contracting parties to *"pay due account to the principles laid down by any relevant decision […] by the courts of the States bound by this Convention and by the Court of Justice of the European Communities*"[116] in a desire to prevent divergent interpretation of those provisions of Brussels Regulations which are reproduced in the Lugano Convention[117] and *"seeks to arrive at as uniform an interpretation as possible*".[118] Hence, as the EU stands in place of all EU member states, the CJEU acquired greater role in the interpretation of the Lugano Convention. Subsequently making its jurisprudence precedential even if delivered in the context of the Brussels Regulations.[119] While the CJEU ought to take into consideration the view of the non-EU member state, that are party to the Lugano Convention, whilst ruling on matters concerning the Lugano Convention,[120] any consideration for allowance of an anti-suit injunction would be highly surprising, reflecting the CJEU dismissed the English stance on such on all points even while the UK has been part of the EU.

Therefore, should the UK be allowed to accede to the Lugano Convention, any ruling given by the CJEU on the matter of the Lugano Convention itself, or on matter regulated by the Brussels Conventions which correspond to the Lugano Convention, would be binding on English courts. Controversially, should the UK accede to the Lugano Convention, and the EU exercise its right pursuant Art. 72(4) of the Lugano Convention, the English court would be then bound by any CJEU ruling, without any proper benefit arising out of the Lugano Convention. Any departure from retained EU case law would cease to matter, as the English law would simply not pay due account to domestic law, yet it would have to pay due respect to the CJEU case law (or to the law of any other court of contracting parties).[121]

As English courts have had ought to comply with the disallowance of issuance anti-suit injunctions aiming to parties pursuing proceedings in front of the EU - member state courts,[122] in line with the Protocol 2 of the Lugano Convention, the English courts would have to do the same for all proceeding in front of the courts in Lugano zone.[123]

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[114] Ibid.
[115] Art. 1(1)(2) of the Lugano Convention. See also Pocar Report, para. 14.
[116] Protocol 2, Art. 1 of the Lugano Convention.
[117] Protocol 2, Preamble of the Lugano Convention.
[118] Pocar Report, para. 77.
[119] Ibid., para. 196-197.
[120] Ibid., para 198.
[121] Although this obligation is less stringent, as it merely promulgates to pay due respect to the "*principles*". See Pocar Report, para. 197.
[122] Decision of England and Wales High Court (Commercial Court), United Kingdom of 7 May 2009, No. [2009] EWHC 957 (Comm), para. 39. In: *British and Irish Legal Information Institute, England and Wales High Court (Commercial Court) Decisions* [online] 7. 5. 2009 [2020-03-22]. Available at: <https://www.bailii.org/ew/cases/EWHC/Comm/2009/957.html>.
[123] JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement.* p. 530.

6. HAGUE CONVENTION AS A CLOSED SYSTEM FOR ANTI-SUIT INJUNCTIONS

Should England wish to enjoy issuance of anti-suit injunctions, insofar as the international jurisdiction arising out of an exclusive prorogation, such could be achieved by the Hague Convention. Understandingly, its scope[124] is considerably narrower than the scope of the Lugano Convention, and *"shall apply to exclusive choice of court agreements in civil or commercial matters."*[125]

The UK, being in a transition period of leaving the EU, is currently party to the Hague Convention by virtue of Art. 29 of the Hague Convention. EU's accession to the Hague Convention pronounces that the UK shall be part of such.[126] Consequently, the EU declared, in accordance with Art. 30 of the Hague Convention that their decision is an exercise of its exclusive competence in matters governed by the Hague Convention,[127] refraining any EU member state to sign and accede to the Hague Convention on its own. Once the withdrawal from the EU is complete, the UK ceases to be a party to the Hague Convention.[128] Only then the UK may sign the Hague Convention, which will enter into force after 3 months period,[129] instituting gap[130] in its applicability.[131]

Provided the UK accedes to the Hague Convention,[132] any judgement given by court shall confer recognition and enforcement in other contracting states.[133] Unlike the Lugano Convention, Hague Convention explicitly authorises[134] the award of interim (temporary)[135]

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[124] Art. 1, 2 of the Hague Convention.

[125] Ibid., Art. 1(1).

[126] Council Decision of 26 February 2009 on the signing on behalf of the European Community of the Convention on Choice of Court Agreements, Recital 6.

[127] Ibid., Recital 4 and 5; Ibid., ANNEX II.

[128] FITCHEN, J. The PIL consequences of Brexit. *Nederlands Internationaal Privaatrecht (NIPR)*. 2017, p. 429 *et seq.*

[129] Art. 31(2) of the Hague Convention.

[130] LEIN, E. Unchartered territory? A few thoughts on private international law post Brexit. In: A. Bonimi – G. P. Romano (eds.). *Yearbook of Private International Law, Volume 17* (*2015/2016)*. Lausanne: Swiss Institute of Comparative Law, 2017, p. 35 *et seq.*

[131] *"This will create the risk of legal uncertainty as to whether European courts will consider choice of court agreements valid that will have been concluded after Brexit and before the Convention enters into force again in the UK."* See UNGERER, J. *Consequences of Brexit for European Private International Law.* p. 401.

[132] Considering that concurrently does not accede to the Lugano Convention.

[133] Art. 8 and 9 of the Hague Convention.

[134] By means of exclusion of governance of interim measures from the scope of the Hague Convention; In early stages of Hague Convention drafting, the Hague Convention ought to be regulating protective measures as well. See NYGH, P., POCAR, F. *Prel. Doc. No 11 of August 2000 – Report on the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, drawn up by Peter Nygh and Fausto Pocar.* Hague: Permanent Bureau of the Conference, 2000, Art. 13 and p. 70 *et seq.* ("Nygh/Pocar Report"). Should the Hague Convention be approved in form as it has had in 2000, anti-suit injunction would not be an available remedy as it would not fulfil principal purpose as specified in *Nygh/Pocar Report. Nygh/Pocar Report* unequivocally states that *"an anti-suit injunction is concerned with jurisdiction, and not with the maintenance of the status quo of the subject matter of the litigation*". See Nygh/Pocar Report, p. 72.; Opinion expressed in *Nygh/Pocar Report* have not been unforeseen, as it has been already presented by *Catherine Kessedjian* that while anti-suit injunction is protective measure, it merely *"applies in cases of contested jurisdictional competence, and does not relate to the merits of a case, so that in our opinion it cannot be regarded as falling within the definition given*". See KESSEDJIAN, C. *Prel. Doc. No 10 of October 1998 – Note on provisional and protective*

measures, including[136] the anti-suit injunction.[137] Insomuch as the CJEU has no power to refrain English courts in awarding so, English courts may issue such injunction without regard to the CJEU case law akin to the Brussels-Lugano zone. Moreover, any decision given based on proceeding contrary to the anti-suit injunction in other courts will not be enforceable in the UK on public policy grounds.[138] Whether interim anti-suit injunction is recognised and enforced[139] in other contracting states depends solely on the sought state and its national law.[140]

While the UK has been bound by the CJEU case law, the anti-suit injunction could not have been awarded to refrain proceedings in the Brussels-Lugano zone. Indisputably, neither the Brussels Regulation, Lugano Regulation nor the CJEU jurisprudence could have imposed any restriction on English courts in relation to anti-suit injunctions aimed to defendants outside the Brussels-Lugano zone.[141] The corresponding judgement thus has had then been considered to be equal judgement for the purpose of enforcement and recognition within the Brussels-Lugano zone.[142] It follows that any Brussels-Lugano zone court would be obliged to recognise and enforce said judgment, should none applicable defence[143] be achieved. It has been argued that insofar as the mutual trust between member states, on which basis is the anti-suit injunction prohibited by the CJEU, does not apply relating to the award of such measure outside the Brussels-Lugano zone, the same mutual trust must be inferred on said judgement if sought to be recognised and enforced with the Brussels-Lugano zone.[144]

measures in private international law and comparative law. Hague: Permanent Bureau of the Conference, 1998, p. 5; Historical interpretation leads to believe that restricted approach to interim protective measures (incl. anti-suit injunctions) have been considered. Thus, decision to refrain from governance of interim measures of protection in the final form of the Hague Convention must be observed as allowance of issuance of anti-suit injunction.

135 HARTLEY, T., DOGAUCHI, M. *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention*. Hague: Permanent Bureau of the Conference, 2005, p. 63 ("Hartley/Dogauchi Report").

136 Ibid., Art. 7.; See also JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement*. p. 531.

137 The anti-suit injunction has been explicitly discussed in the HARTLEY, T.; DOGAUCHI, M. *Prel. Doc. No 19 of August 2002 – Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*. Hague: Permanent Bureau of the Conference, 2004, p. 24 ("Reflection Paper"); Interestingly, in para. 102 of the Reflection Paper, non-allowance to issue anti-suit injunction to court's own jurisdiction is also presented. Both explanations are omitted in later reports to the Hague Convention in order to provide more generic approach.

138 JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement*. p. 529.

139 Interim measures of protection do not constitute *"judgment"* in line with Art. 4(1) of the Hague Convention. Thus, per se cannot be obligatory to be recognized and enforced under the Chapter III of the Hague Convention. See also Hartley/Dogauchi Report, p. 63.

140 Hartley/Dogauchi Report, p. 63

141 JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement*. p. 530.

142 Art. 36 *et seq*. of the Brussels I bis Regulation, Art. 32 *et seq*. of the Lugano Convention.

143 Art. 45 of the Brussels I bis Regulation, Art. 34 of the Lugano Convention; For application of such defences see also JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement*. pp. 48–52.

144 *"The prohibition expressed by the Court of Justice in the grant of anti-suit injunction and reposing of trust would not seem either to apply or impact upon the enforcement of an anti-suit injunction directed at a party conducting proceedings outside the European Union. Indeed logic would appear to suggest that each Member and Contracting State reposes trust in another to enforce these judgments and orders."* JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement*. p. 530.

6.1 Curial law to the arbitration agreement and its analogous character to an exclusive jurisdiction clause

Equally, as the prorogation clause is treated independently from the other terms of the contract,[145] English law provides for separability of an arbitration agreement.[146] The question of proper law to the arbitration clause is substantial, as it forms the bedrock of the arbitration jurisdiction.[147]

At first, the English courts either follow the explicit choice of law to the arbitration agreement,[148] should the parties omit *lex electa* for the arbitration agreement, then implied choice has been made[149] and ascertained by the court. In most cases, the contract and arbitration clause would be governed by the same law, the law either chosen for the underlying contract,[150] and if not chosen, then by the law of a seat,[151] as a substantive approach[152] to the arbitration process.[153]

Later, the Supreme Court of Judicature[154] altered the traditional approach and held *obiter dictum* that choice of the seat amounts to the choice of law governing the arbitration agreement as the *"curial law*",[155] following the decisions made in previous

[145] For example, Art. 25(5) of the Brussels I bis Regulation; See also Judgment of the Court (Sixth Chamber) of 3 July 1997. Francesco Benincasa v Dentalkit Srl. Case C-269/95, para. 21-32 for interpretation of the Lugano Convention.

[146] Section 7 of the English Arbitration Act 1996; See also United Kingdom House of Lords Decisions, United Kingdom of 17 October 2007, No. [2007] UKHL 40, para. 12-19, 23. In: *British and Irish Legal Information Institute* [online]. 17. 10. 2007 [2020-05-03]. Available at: <https://www.bailii.org/uk/cases/UKHL/2007/40.html>.

[147] PEARSON, S. Sulamérica v. Enesa: The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement. *Arbitration International.* London: LCIA. 2013, Vol. 29, No. 1, p. 116.

[148] England and Wales High Court (Commercial Court) Decisions, United Kingdom of 16 July 2007, No. [2007] EWHC 1713 (Comm). In: *British and Irish Legal Information Institute* [online]. 16. 7. 2007 [2020-04-23]. Available at: <https://www.bailii.org/ew/cases/EWHC/Comm/2007/1713.html>; See also England and Wales High Court (Technology and Construction Court) Decisions, United Kingdom of 13 March 2008, No. [2008] EWHC 426 (TCC). In: *British and Irish Legal Information Institute* [online]. 13. 3. 2008 [2020-04-25]. Available at: <https://www.bailii.org/ew/cases/EWHC/TCC/2008/426.html>.

[149] Either as purely implied or as the law with the closest and most real connection to the arbitration agreement. See PEARSON, S. *Sulamérica v. Enesa: The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement.* p. 117.

[150] *Ibid.*

[151] For the historical development, see COLLINS, L., MORSE, G. C. J., MCCLEAN, D., BRIGGS, A., HARRIS, J., MCLACHLAN C., HILL, J. *Dicey, Morris and Collins on the Conflict of Laws. 14th ed.* London: Sweet & Maxwell, 2008, chapter 16, para. 017-19.

[152] PEARSON, S. *Sulamérica v. Enesa: The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement.* p. 119.

[153] This approach has been exercised by the UK courts until 2007, with an *"exceptional*" case XL Insurance Ltd. v. Owens Corning. High Court of Justice, Queen's Bench Division, United Kingdom of 28 July 1999, No. [2000] 2 Lloyd's Rep. 500. In: *New York Arbitration Convention* [online]. [2020-05-01]. Available at: <http://www.newyorkconvention.org/11165/web/files/document/1/8/18551.pdf>.

[154] England and Wales Court of Appeal (Civil Division) Decisions, United Kingdom of 5 December 2007, No. [2007] EWCA Civ 1282. ("C v. D"). In: *England and Wales Court of Appeal (Civil Division) Decisions* [online]. 5. 12. 2007 [2020-04-25]. Available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2007/1282.html>.

[155] *"[…] it was clear that England was the seat of the arbitration and that English law was, therefore, the „curial law" of the arbitration, it must follow that the parties intended only attacks which were permissible by English law and not attacks permitted by other laws*" *Ibid.*, para. 15.

case law[156] which held *ratio decidendi* that *"an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration"*.[157] This approach has been reconfirmed in following judgments,[158] in the determination of *"curial law and the supervising jurisdiction of the courts of the country where the seat is located"*.[159] This approach is welcomed as being in accord with prevailing doctrinal attitude[160] as well as the *"growing awareness of the importance of the 'separability' principle"*[161] and pro-validity approach.[162]

Lastly, the High Court of Justice in *Atlas Power v National Transmission and Despatch Company*[163] confirmed[164] that the choice of arbitral seat is *"analogous to an exclusive jurisdiction clause."* Justice Phillips cited from the *C v. D.* that *"An injunction preventing suit in that court is thus not a breach of international comity preventing a court from exercising what it regards as a mandatory jurisdiction but merely restrains a party to a contract from doing something which it has promised not to do."*[165] as well as *"one of the reasons why Longmore LJ regarded a choice of seat as necessarily giving rise to exclusive supervisory jurisdiction was that the alternative would be the highly unsatisfactory situation in which more than one jurisdiction could entertain challenges to an award."*[166] Therefore, stipulating valid arbitration agreement with a seat in England to be an exclusive forum selection clause for any measure needed to be issued in the supervisory function of a court to the arbitration – anti-suit injunction included. *Atlas Power v National Transmission and Despatch Company* is pronounced to be welcomed reminder

[156] England and Wales High Court (Commercial Court) Decisions, United Kingdom of 28 July 2006, No. [2006] EWHC 2006 (Comm). ("A v. B"). In: *England and Wales High Court (Commercial Court) Decisions* [online]. 28. 6. 2006 [2020-04-27]. Available at: <https://www.bailii.org/ew/cases/EWHC/Comm/2006/2006.html>; England and Wales High Court (Commercial Court) Decisions, United Kingdom of 32 January 2007, No. [2007] EWHC 54 (Comm). In: *England and Wales High Court (Commercial Court) Decisions* [online]. 23. 1. 2007 [2020-04-27]. Available at: <https://www.bailii.org/ew/cases/EWHC/Comm/2007/54.html>.

[157] A v. B, para. 111.

[158] See e.g. England and Wales Court of Appeal (Civil Division) Decisions, United Kingdom of 16 May 2012, No. [2012] EWCA Civ 638. In: *England and Wales Court of Appeal (Civil Division) Decisions* [online]. 16. 5. 2012 [2020-04-29]. Available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2012/638.html> ("Sulamérica v. Enesa") and England and Wales High Court (Commercial Court) Decisions, United Kingdom of 26 January 2012, No. [2012] EWHC 87 (Comm). In: *England and Wales High Court (Commercial Court) Decisions* [online]. 26. 1. 2012 [2020-04-29]. Available at: <https://www.bailii.org/ew/cases/EWHC/Comm/2012/87.html>

[159] Sulamérica v. Enesa, para. 8.

[160] PEARSON, S. *Sulamérica v. Enesa: The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement.* pp. 120-122.

[161] Ibid., p. 124.

[162] High Court of Justice, Queen's Bench Division, United Kingdom of 28 July 1999, No. [2000] 2 Lloyd's Rep. 500. In: *New York Arbitration Convention* [online]. [2020-05-01]. Available at: <http://www.newyorkconvention.org/11165/web/files/document/1/8/18551.pdf>.

[163] England and Wales High Court (Commercial Court) Decisions, United Kingdom of 4 May 2018, No. [2018] EWHC 1052 (Comm). In: *England and Wales High Court (Commercial Court) Decisions* [online]. 4. 5. 2018 [2020-04-23]. Available at: <https://www.bailii.org/ew/cases/EWHC/Comm/2018/1052.html>.

[164] In the light that this judgment has been awarded after the UK's accession to the Hague Convention.

[165] *Atlas Power v National Transmission and Despatch Company*, para. 28.

[166] Ibid., para. 40.

of the robust position that the English courts take towards their supervisory powers under the Arbitration Act 1996.[167]

6.2 Stance of the EU countries on enforcement of anti-suit injunction if issued outside the Brussels-Lugano zone

As already argued, the anti-suit injunction awarded as a final award should be treated as a *"judgment"* in line with the Hague Convention, thus recognised and enforced in other contracting states. Understandably, only would the UK accede to the Hague Convention.

For an interim measure, the situation has much more ado to it. Although considered, in the eyes of the civil law, to be an alien and dubious invention of common law,[168] and in many cases recognised as such,[169] shift in the EU may be discerned. In recent years, the courts of civil law countries underwent a transformation in its practice and either **(i)** issued a similar injunction to the subject-matter of an anti-suit injunction[170] **(ii)** recognised foreign anti-suit injunction, or **(iii)** issued an anti-anti-suit injunction. Also, **(iv)** appropriation of the use of anti-suit injunction has been observed by the Institute of International Law (*"Institute"*).

In 2002, French *Cour de Cassation* prohibited creditor from taking execution proceeding against the debtor in foreign jurisdiction, although such court has had jurisdiction under other applicable regulations.[171] In 2004, the Hague Court issued a preliminary injunction against Israeli company *Medinol* from further suing other party for patent infringement under monetary penalty.[172]

In 2006, a party from the USA and party from France concluded a contract stipulating choice of law of Georgia, USA, as well as prorogation of courts of Georgia, USA. Upon termination of the contract, French party commenced proceedings in France, upon which the counterparty sought an interim measure, anti-suit injunction, from the Georgian court. An anti-suit injunction was awarded in March 2006. Consequently, the injunction has been sought to be enforced in France.

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[167] BLANSHART, E., PARKER, CH. English High Court grants an anti-suit injunction and confirms that the choice of arbitral seat is "analogous to an exclusive jurisdiction clause". In: *Herbert Smith Freehills* [online]. 5. 6. 2018 [2020-03-12]. Available at: <https://hsfnotes.com/arbitration/2018/06/05/english-high-court-grants-an-anti-suit-injunction-and-confirms-that-the-choice-of-arbitral-seat-is-analogous-to-an-exclusive-jurisdiction-clause/>.

[168] JOSEPH, D. *Jurisdiction and arbitration agreements and their enforcement*. p. 530.

[169] MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration*. pp. 88–90.

[170] RAUSCHER, T. *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR*. Cologne: Ottoschmidt, 2019, §20; See also RAPHAEL, T. *The Anti-Suit Injunction*. pp. 1–2; MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration*. p. 40.

[171] Cour de Cassation, Chambre civile 1, France of 19 November 2002, No. 00-22334. In: *Légifrance* [online]. 19. 11. 2002 [2020-05-08]. Available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007044471>; See also BERG, A. J. V. D. *Yearbook Commercial Arbitration Volume XXXIII – 2008*. Alphen aan den Rijn: Kluwer Law International, 2008, pp. 716–717.

[172] Rechtbank 's-Gravenhage, Civiel recht, Netherlands of 5 August 2004, No. KG 04/688. In: *de Rechtspraak* [online]. 6. 8. 2004 [2020-05-08]. Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2004:AQ6495>. Although in this case, the court issued such injunction against foreign party to commence proceedings in the Netherlands, thus restricted its own jurisdiction.

The French party argued that enforcement of the injunction would constitute an infringement of the French sovereignty and constitute an infringement of the right of access to court in line with Art. 6(1) of the European Convention on Human Rights.[173] The French *Cour de Cassation*[174] subsequently ruled (after lower courts upheld[175] the *exequatur*) that as long as neither EU law nor any convention prohibiting such is applicable, anti-suit injunctions are not contrary to public policy if they only aim at enforcing a preexisting contractual obligation.[176] *Cour de Cassation* thus adopted a clear position on *in personam* injunctions which have been previously only given effect to.[177] Considerably to the third point, should the EU courts be willing to issue injunction of such character, they should be willing to manifest recognition of the same. In 2019, The Munich I District Court issued an anti-anti-suit injunction, prohibiting party to further pursue their own anti-suit injunction ruling in the USA.[178] In the same year, both German and French court issued anti-anti-suit injunctions as well. In the German judgment, *Nokia v. Continental*, first instance Munich District Court issued anti-anti-suit injunctions against anti-suit injunction issued by the United States District Court – Northern District of California must be withdrawn,[179] recognising that issued injunction does not violate German constitutional law, European law and international law.[180] The Munich Court of Appeals then upheld the injunction.[181]

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[173] Needless to say, that parties excuse ourselves from the reach of this article when they waive their right to litigate in favour of arbitration. Also, court supervisory function and proceeding on setting-off the award are still available; See MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration.* pp. 58–59.

[174] Cour de Cassation, Chambre civile 1, France of 14 October 2009, No. 08-16369 08-16549. In: *Légifrance* [online]. 14. 10. 2009 [2020-05-11]. Available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021167955&fastReqId=130121229&fastPos=1>.

[175] The court held that the US proceeding was not fraudulent as the parties agreed on its jurisdiction. See PERREAU-SAUSSINE, L. Forum conveniens and anti-suit injunctions before French courts: recent developments. *International and Comparative Law Quarterly*. 2010, Vol. 59, p. 524.

[176] *"[…] que n'est pas contraire à l'ordre public international l'"anti suit injunction" dont, hors champ d'application de conventions ou du droit communautaire, l'objet consiste seulement, comme en l'espèce, à sanctionner la violation d'une obligation contractuelle préexistante ; que l'arrêt est légalement justifié*" Cour de Cassation, Chambre civile 1, France of 14 October 2009, No. 08-16369 08-16549. In: *Légifrance* [online]. 14. 10. 2009 [2020-05-11]. Available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021167955&fastReqId=130121229&fastPos=1>.

[177] PERREAU-SAUSSINE, L. *Forum conveniens and anti-suit injunctions before French courts: recent developments.* p. 524.

[178] See HOLZAPFEL, H., DÖLLING, CH. German court issues first-ever anti-suit injunction. In: *McDermott, Will & Emery* [online]. 2. 8. 2019 [2020-05-12]. Available at: <https://www.mwe.com/insights/german-court-issues-first-ever-anti-suit-injunction/>.

[179] It must also be understood that this injunction was aimed solely on the US anti-suit injunction and not on the main action brought in the USA.

[180] BERT, P. Case of the Week: Up the Anti – Munich Courts Issue Germany's First Anti-Anti-Suit Injunction in Nokia v. Continental. In: *Dispute Resolution Germany* [online]. 14. 1. 2020 [2020-05-12]. Available at: <http://www.disputeresolutiongermany.com/2020/01/case-of-the-week-up-the-anti-munich-courts-issue-germanys-first-anti-anti-suit-injunction-in-nokia-v-continental/>; See also RICHTER, K. Munich Higher Regional Court confirms Nokia's anti-anti-suit injunction against Continental. In: *JUVE Patent* [online]. 12. 12. 2019 [2020-05-12]. Available at: <https://www.juve-patent.com/news-and-stories/cases/munich-higher-regional-court-confirms-nokias-anti-anti-suit-injunction-against-continental/>.

[181] LG München I, Endurteil, Germany of 2 November 2019, No. 21 O 9333/19. In: *Bayern.Recht* [online]. 2. 10. 2019 [2020-05-09]. Available at: <https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2019-N-25536?hl=true>.

Also, in 2019, Paris court, in case *IPCom v. Lenovo*, issued an anti-anti-suit injunction ordering Lenovo to withdraw its anti-suit injunction action from United States District Court – Northern District of California. While the case involved IP rights, Paris court concluded that anti-suit injunctions *"are not only contrary to EU law (which it rules not to apply here as the parties involved are French and American), but also to French public order, unless the anti-suit injunction is intended to seek compliance with a choice of court or arbitration clause*".[182]

Lastly, in 2003, the Institute published a resolution[183] recognising transnational litigation and the arising problem of parallel proceedings. The Institute recognised that *"Courts which grant anti-suit injunctions should be sensitive to the demands of comity, and in particular should refrain from granting such injunctions in cases other than a breach of a choice of court agreement or arbitration agreement*".[184]

Arguably, while some courts based the refusal to recognise foreign anti-suit injunction on the ground of sovereignty, the difference between anti-suit injunction aimed to the prohibition of litigation for breach of prorogation clause and for breach of an arbitration agreement may be of great importance, as it does not seek to allocate the power between two courts.[185] In the later, the injunction merely enforces *"clear path*" for the final arbitral decision on its own jurisdiction.[186] Subsequently, in the later, court asked to recognise should not dismiss such, as there is no competing court seeking to establish prevailing jurisdiction.[187]

As it seems, *Turner v Grovit* and *West Tankers*, therefore, may be circumvented in regard to anti-suit injection outside the Brussels-Lugano zone.[188]

7. CONCLUSION

This paper aims to evaluate whether a direct link between the UK's withdrawal from the EU and its position as a leading jurisdiction for international commercial arbitration may be made. For such, historical connotations of anti-suit measures had to be made, in order to present the current legal framework allowing English courts to issue such measure in their supportive power to arbitration with its seat in England.

While the position of English common law is definite per statutory definition incorporated in the Senior Courts Act, EU law has contended to rejection of anti-measures

[182] POR, D., TUFFREAU, CH. First French anti-anti-suit injunction: don't tell me what I can't do! In: *Allen & Overy* [online]. 15. 11. 2019 [2020-05-17]. Available at: <https://www.allenovery.com/en-gb/global/news-and-insights/publications/first-french-anti-anti-suit-injunction-dont-tell-me-what-i-cant-do>.

[183] INSTITUT DE DROIT INTERNATIONAL. The principles for determining when the use of the doctrine of forum non conveniens and anti-suit injunctions is appropriate. In: *Institut de Droit International* [online]. 2. 9. 2003 [2020-05-06] Available at: <https://www.idi-iil.org/app/uploads/2017/06/2003_bru_01_en.pdf>.

[184] Ibid., pt. 5.

[185] MOSIMANN, O. L. *Anti-Suit Injunction in International Commercial Arbitration.* p. 89.

[186] Ibid., p. 55 et seq.

[187] Ibid., p. 89.

[188] CUNIBERTI, G. The Execution of the Anti-Suit Injunction. In: *Conflict of Laws.net* [online]. 20. 10. 2009 [2020-05-16]. Available at: <https://conflictoflaws.net/2009/the-execution-of-the-anti-suit-injunction/>.

through *Turner v. Grovit* (following *Marc Rich* and *Van Uden*), *West Tankers*, and *Gazprom* cases. Neither English judges nor Advocate Generals to the CJEU changed its view.

With the UK's withdrawal from the EU, the English law is presented with a unique opportunity to annul the EU law effect on the anti-suit injunction. For such, the UK should have to choose to refrain from accession to the Lugano Convention, which bears the highest scope of international jurisdiction determinations as well as the enforceability of judgments. Albeit Lugano Convention binds EU member states as well as non-EU countries, the CJEU exercises great interpretative power; thus, the prohibition of anti-suit injunction as stipulated under Brussels I bis Regulation applies to Lugano Convention equivalently.

Conversely, should the UK want to re-establish anti-suit injunctions to what is known to be the Brussels-Lugano zone, UK should accede to the Hague Convention. Even though being narrower in scope, it provides for greater independence of English law and its own interim measures to be awarded. In the light of English law jurisprudence, the arbitration clause should be treated as an exclusive clause. Thus, Hague Convention ought to be applicable to the judgment given by a court in supportive power to the arbitration.

While Lugano Convention prohibits the issuance of an anti-suit injunction, Hague Convention, in line with its Art. 7, allocates governance of interim measures to national law. Once issued, EU member states courts should recognize and enforce such measure unless a proper defence can be made. Whilst anti-suit injunctions are being considered to be alien to civil law, French and German courts have already met said measure with favourability. Not only that foreign anti-suit injunctions have already been recognized in the EU. German and French courts have taken their judicial discretion to such level, that itself issued either anti-anti-suit injunction to rebut foreign anti-suit injunction, or issued measure *de lege* alien to civil law jurisdiction, which in main characteristics resembled an anti-suit injunction.

Following the expressed hypotheses, while Lugano Convention does not allow for anti-suit injunctions, the position of the English law might become advanced toward other EU countries, should the UK accede to Hague Convention.

It is consequently argued that should the EU courts recognize foreign anti-suit injunction, as well as issue one on their own (outside the Brussels-Lugano zone), said measure issued by the English courts should receive the same amount of recognition.