# Anti-suit injunction: paving the way to arbitration of antitrust claims?

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**Anti-suit injunction: paving the way to arbitration of antitrust claims?**

*Nokia v Continental*, District Court of Munich. Case No. 21 O 9512/19

Higher District Court of Munich, 12 December 2 019 - Case No. 6 U 5042/19

This article argues that a significant, yet debated, way around the issuance of anti-suit injunction has resurged in the context of arbitration. Although the e) showed aversion against extraterritoriality and interference with judicial proceedings[1] abroad, German Munich Regional Court's issuance of the first anti-anti-suit injunction in 2019 in *Nokia v Continental* (*Nokia*)[2] actually indicated an inclination to reverse. Using the breakthrough case on the topic, *Nokia v Continental,* the article will show that when Munich Regional Court opened one door through granting of anti-anti-suit injunction, it closed another through CJEU recent cases ruling against anti-suit injunction in European countries. The judgment of *Nokia* helps revive the tendency of issuing anti-suit injunctions towards other European countries focusing on arbitration of antitrust claims. The landmark ruling of the US Supreme Court in *Mitsubishi Motor v Soler (Mitsubishi* )[3] confirmed antitrust claims arbitrable, stating that "an arbitration clause need not specifically mention a given statute in order to require the arbitration of claims arising under statute"[4] because a generally worded arbitration clause could in principle cover antitrust disputes. The question may arise: given that the UK is the only country in Europe that regularly orders anti-suit injunctions, has now left the EU, are anti-suit injunctions resuscitated for arbitration agreement enforcement? To what extent has the *Mitsubishi* paved the way to the arbitration of antitrust claim?

## Background

Nokia owns a portfolio of Standard Essential Patents (SEPs) relevant to the connectivity of cars. Daimler is one of the world's largest motor car manufacturers. Continental with headquarters in Germany is a supplier of Daimler. In 2019, Nokia filed a series of patent

[1] *Turner v Grovit* 2004; *West Tanker INc v Allianz SpA*, case C-185/07) [2009] AC 1138.
[2] LG Munchen I, decision of 2 October 2019, case no. 21 O 9333/19.
[3] *Mitsubishi Motor v Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985).
[4] Ibid. The "antitrust laws" include the Sharman Act, 15 U.S.C. §§ 1-7 (1982), the Wilson Tariff Act, 15 U.S.C. §§ 8-11 (1982), the Clayton Act, 15 U.S.C. §§ 12-27 (1982), and § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982).

infringement actions based on various 3G and 4G essential patents against automobile manufacturer Daimler and Continental as one of Daimler's suppliers before the District Courts of Munich in Germany based on several of its German SEPs, known as German infringement proceedings. Continental and Daimler in turn launched an anti-suit injunction plea to protect themselves from the US District Court for the Northern District of California. On 30 July 2019, the Munich court issued an injunction against Continental Germany, ordering the latter to make sure its affiliate to withdraw the US motion for anti-suit injunction.[5] Continental appealed this decision.

However, the Higher District Court of Munich upheld the Munich court's decision and dismissed the appeal of Continental by prohibiting Continental from further pursuing an anti-suit injunction request against Nokia in the US, thereby granting the first-ever anti-anti-suit injunction in German history.[6] Promptly, in line with a parallel decision by the German Munich Higher Regional Court in 2019, the French Tribunal de Grande Instance in 2020 issued another anti-anti-suit injunction in *PCom v. Lenovo*[7] case by directing Lenovo to withdraw a requested anti-suit injunction in the United States (North District of California). It might appear that these two decisions constitute a remarkable shift from European aversion against anti-suit injunction to freely use of anti-suit injunction, accelerating the way in enabling and promoting the arbitration of antitrust claims although its application varies among countries.

**Anti-suit injunctions: pave the way for arbitration of competition claims?**

Invented by England courts in the fifteen century, anti-suit injunction as a common law device granted in order to lock proceedings in a specific form, thereby preventing a risk of parallel proceedings and conflicting judgments,[8] is traditionally absent from civil law jurisdictions. The key point, for granting anti-suit injunction, is the legal proposition that anti-suit injunctions are "granted on the basis of the courts *in personam* jurisdiction over

[5] *Nokia v Continental*, District Court of Munich, Order dated 30 July 2019, Case-No. 21 O 9512/19.
[6] Nokia v Continental, Higher District Court of Munich, decision dated 12 December 2019, Case-No. 6 U 5689/19. (5042/19).
[7] *IPCom v. Lenovo*, Court of Appeal of Paris – RG19/21426. Court of Appeal of Paris judgement dated 3 March 2020, page 12, para. 1.
[8] Chukwudi Paschal Ojiegbe, "From *West Tankers* to *Gazprom*: anti-suit injunctions, arbitral anti-suit orders and the Brussels I Recast" *Journal of Private International Law*, 2015, Vol. 11, No. 2, 267-297,268.

the party enjoined"[9] and "their grant has no direct effect on the foreign proceedings, but the defendant will be personally liable for contempt of court if they breach the terms of the order".[10]

German courts have never accepted anti-suit injunctions by US courts to stop German proceedings and refused to enforce such anti-suit injunctions in Germany.[11] The recent development of German courts in *Nokia* affirmed that Nokia was entitled to an injunction against Continental Germany, in order to prevent a direct unlawful threat to its property rights.[12] The rationale is that the unimpeded enforcement of Nokia's intellectual property rights outweighed Continental's right to initiate litigation for the conclusion of a license agreement. Furthermore, Continental and Daimler still had effective remedies because the FRAND[13] defence can be raised in German proceedings which were established in *Huawei v ZTE*[14] case concerning the potential for enforcement action by holders of SEPs to infringe EU competition rules against abuse of a dominant position. "Noticeably, there is an increasing widespread use of arbitration as a means of settling competition claims".[15] The landmark decision of the US Supreme Court in *Mitsubishi*[16] is indicative of this trend, beginning the pioneering arbitration of antitrust claims.

The CJEC's decision in *Eco Swiss China Time Ltd v Benetton International N V* (*Eco Swiss*)[17] raised interesting questions about the relationship between EC competition law and private arbitration[18] at the enforcement stage of arbitral awards pursuing Article 101 of

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[9] Liu, M. 'The Impact of the UK's BREXIT on Anti-suit Injunctions' (chapter 3), 13 Oct 2020, *EU & CARICOM: DILEMMAS versus Opportunities on Development, Law and Economics*. Roberts, A. E., Hardy, S. & Huck, W., (eds.). Routledge Taylor & Francis Group, p. 24-37.
[10] Ibid.
[11] Dusseldorf Higher Regional Court case 3 VA 11/95 of January 10, 1996.
[12] Continental v Nokia, 12 December 2019. Case No. 6U5042/19.
[13] FRAND terms known as fair, reasonable, and non-discriminatory terms denote a voluntary licencing commitment that standard organisations often request from the owner of an intellectual property right (usually a patent) that is, or may become, essential to practice a technical standard. For discussion, see Layne-Farrar, Anne; Padilla, A. Jorge; Schmalensee, Richard (2007). "Pricing Patents for Licensing in Standard-Setting Organisations: Making sense of FRAND Commitments". *Antitrust Law Journal*. 74:671
[14] *Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH* (Case C-170/13). 16 July 2015 – Case No. C-170/13.
[15] E. Quoteshat and M Liu (2021), "Third party arbitration in the UK: critically assessing the applicable rules of the joinder of two different proceedings under the Brussels Recast Regulation (EU 1215/2012). 42 E.C.L.R., Issue 6, pages 303-315).
[16] *Mitsubishi Motors v Soler Chrysler-Plymouth* 473 U.S. 614 (1985).
[17] *Case C-126/97 Eco Swiss China Ltd v Benetton International BV [1999] ECR I-3079*.
[18] For discussion, see Steindorff, "Common Market Antitrust Law in Civil Proceedings Before National Courts and Arbitrators", in Hawk (Ed). *Antitrust and Trade Policy in the United States and the European*

the Treaty on the Functioning of the European Union (TFEU) (then Article 85 EC). In *Eco Swiss*, neither the parties nor the arbitrator had raised any issue under the EC competition law. The competition law argument was, however, raised at the enforcement stage that the unsuccessful party argued that arbitral award was incompatible with public policy enshrined in Article 101 of the TFEU. Article 101 is a "fundamental provision" that forms part of the "rules of public policy" in all member States. It is highlighted that public policy concerns have been chief among the reasons for arbitral awards enforcement. The CJEU thus affirmed in *Eco Swiss* that national courts should exercise on arbitral awards when Community competition law is involved, and with the question whether arbitral tribunals are under a duty to apply EC competition law *ex officio,* even if the parties have not raised such issues during the arbitral proceedings. Following *Eco Swiss*' ruling, the public interest in the enforcement of antitrust laws was much emphasised in recent years in many current or former EU member States including France, Italy, Swiss and the UK, reaffirming that EU competition law claims are arbitrable. It is argued that antitrust disputes could never properly be dealt with by "rudimentary procedures"[19] because the "unique public interest in the enforcement of the antitrust laws"[20] required arbitral tribunals to ensure that their awards were compatible with EC competition law. Justice Blackmun stated in *Mitsubishi* that national courts "at the award-enforcement stage" need to ensure that the legitimate interest in the enforcement of antitrust law has been addressed".[21]

There are other cases dealing with the question of national remedies for rights conferred by Community law and with the latter's intrusion "into the realms of national procedural prerogatives".[22] This intrusion has been hotly debated latterly in the *Van Schijindel*[23] and *Peterbrook*[24] cases.

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*Community* 1985, Annual Proceedings of the Fordham Corporate Law Institute (New York, 1986); Slot, "The Enforcement of EC Competition Law in Arbitral Proceedings", 23(1) LIEI (1996), 101; the volume published by the International Chamber of Commerce: Competition and Arbitration Law, Institute of International Business Law and Practice, ICC (Paris, 1993).

[19] *Mitsubishi Motors v Soler Chrysler-Plymouth* 473 U.S. 614 (1985), 179. https://www.law.cornell.edu/supremecourt/text/473/614. Accessed 9 June 2022.

[20] *Mitsubishi Motors v Soler Chrysler-Plymouth* 473 U.S. 614 (1985), 71.

[21] *Mitsubishi Motors v Soler Chrysler-Plymouth* 473 U.S. 614 (1985), 39.

[22] Rasmussen, The European Court of Justice (Copenhagen, 1998), p. 148.

[23] Joined cases C-430/93 and C-431/93. *Jeroen van Schijindel and Johannes Nicoloas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, [1995] ECR I-4705.5.

[24] Case C-312/93. *Peterbrook Van Campenhout & Cie SCS v Belgium State* [1995] ECR I-4599.

In *Nokio*, the court made two points. First, the court found that preventing Nokia from enforcing its patent is an illegitimate interference with Nokia's intellectual rights, which would deprived Nokia's right to enforce the exclusivity arising from its patents against Daimler in the pending German infringement proceedings.[25] Second, anti-anti-suit injunction was not regarded as inadmissible interference with Continental's proceedings in the US because the prevented anti-suit injunction in the US is only an interim measure and Continental can continue its US action for the setting of a FRAND royalty. Put it simple, US anti-suit injunction in *Nokio* found incompatible with German law for the first time as the case involved the infringement of German patent rights by a domestic entity.[26] As such the German anti-anti-suit injunction was considered as the only means of defence against an US anti-suit injunction[27] by allowing Nokia's interest to defend itself against an unlawful legal measure to prevail over the interest of Continental US to preserve its freedom to act.[28] This is because the FRAND defence can be raised in German proceedings in line with the applicable law under the rules established in *Huawei v ZTE*[29] case by the CJEU.

To understand why Munich court's approach is made, it needs to recall *Microsoft Corp*. *v Motorola Inc. (Microsoft)*[30] case. In this case, an anti-suit was issued against Motorola in the Western District of Washington in 2012 that prevented Motorola from enforcing a foreign patent infringement injunction that Motorola had obtained against Microsoft in Germany, claiming that Motorola had violated its FRAND licensing agreement to which Microsoft was a third-party beneficiary.[31] It was ruled by the district court that a company's agreement with standards organisation to provide FRAND terms of licensing to all other parties constitutes a contract that is enforceable by third parties. Motorola

[25] Nokia v Continental, Higher District Court of Munich, decision dated 12 December 2019, Case-No. 6 U 5042/19, para.55.
[26] Nokia v Continental, Higher District Court of Munich, decision dated 12 December 2019, Case-No. 6 U 5042/19. para. 74.
[27] *Nokia v Continental*, Higher District Court of Munich, decision dated 12 December 2019, Case-No. 6 U 5042/19, paras.69 and 72.
[28] Ibid., para. 69.
[29] *Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH* (Case C-170/13). 16 July 2015 – Case No. C-170/13.
[30] 696 F. 3d 872 (9th Cir. 2012).
[31] Microsoft v Motorola, 854 F.Supp. 2d 993 (United States District Court for the Western District of Washington, February 27, 2012).

responded by filing patent infringement cases against Microsoft in Germany for many products that employed the standards owned by Motorola. Motorola's FRAND contracts were directly between Motorola and a standard-setting organization; Motorola as a third party was not recognised as an involved party by German patent law.[32] Eventually, Motorola won its case in Germany and obtained an injunction against Microsoft's selling infringing products in Germany. Evidently, anti-suit injunctions have been used in the past to derail German patent infringement proceedings as demonstrated in *Microsoft* case. After Microsoft's successful use of anti-suit injunction against German SEP infringement proceedings in 2013, the first anti-anti-suit injunction in Munich provided Nokia with an effective counter-measure against Continental's attempt to repeat Microsoft's strategy.

Several subsequent cases cited *Microsoft v Motorola* as precedent that an agreement with a standard-setting organisation to provide FRAND terms to licensees constitute a contract, and that patent-infringement injunctions should be avoid in favour of negotiating a FRAND licensing agreement.[33] It is worth mentioning that the UK jurisdiction has taken a leading position to accelerate the trend of arbitration of competition disputes, which best demonstrated in recent cases of *InterDigital v Lenovo & Motorola*,[34] *Nokia v Oppo*,[35] and *Godo Kaisha IP Bridge 1 v Huawei*,[36] dealing with FRAND-related dispute claims.

It is argued that the decision of Higher Regional Court Munich in *Nokio* could put on record as to a more formal excuse that 'an anti-anti-suit injunction is a mere reflex to anti-suit injunction',[37] triggering another surge of anti-suit injunctions debate. Importantly, in order to enforce an arbitration agreement effectively, the issuance of anti-suit injunctions aims to prevent a party from commencing or continuing a suit in another forum, thereby preventing a risk of parallel proceedings and conflicting judgments. To achieve this, the arbitral tribunal needs protection mechanisms in place against risks that threaten the integrity of arbitral proceedings. One of those risks is parallel proceedings. Courts or

[32] *Microsoft v. Motorola*, 696 F.3d 872 (United States Court of Appeals for the Ninth Circuit 2012).
[33] *Microsoft v Motorola*, 696 F. 3d 872 ( United States Court of Appeals for the Ninth Circuit 2012).
[34] [2021] EWHC 2951 (Pat).
[35] [2021] EWHC 2952 (Pat).
[36] [2021] EWHC 2826 (Pat).
[37] Greta Niehaus, First Anti-Anti-Suit injunction in German: The Costs for International Arbitration, http://arbitrationblog.kluwerarbitration.com/2021/02/28/first-anti-anti-suit-injunction-in-germany-the-costs-for-international-arbitration/

arbitral tribunal can issue an anti-suit injunction to protect parties from such a risk. Conversely, an anti-anti-suit injunction prevents the other party from pursuing an anti-suit injunction in another proceeding. Since both anti-suit injunction and anti-anti-suit injunctions interfere with principles of international law and coordinative rules devised for handling parallel proceedings, it is questionable whether these remedies are appropriate in antitrust claims?

*Nokia* demonstrates why anti-suit injunctions have resurged in commercial practice in the EU countries. With the anti-anti-suit injunctions in Munich and Paris, there has been a new wave of counter injunctions from Wuhan in China[38] all the way to California.[39] The aim of anti-anti-suit injunctions is to get a court to stop the infringement proceedings of a company in an anti-suit injunction in another jurisdiction. In each instance, one jurisdiction competes against another as SEP owners and implementers go to war over FRAND licensing terms, which dismayed some commenters, arguing that "anti-suit injunctions are 'scary' FRAND trend.[40]

Interestingly, the arbitration of antitrust claims is an increasing feature of the commercial world in more recent years. In the sector of technology, the confidentiality of arbitration as a way for SEP and FRAND disputes resolution is a major attraction. The consequences of recent developments could signal the beginning of a new dawn that it is not impossible for other European courts in the future to grant anti-suit injunction.

Considering the aforementioned paradigm shift, anti-suit injunctions will most likely become more common in the EU countries as German and French courts now seem to use the same "weapons" as the Anglo-Saxon courts do. Anti-anti-suit injunction and anti-suit injunction are Siamese bedfellows as an anti-anti-suit injunction is a mere reflex to an

[38] *Huawei v Conversant,* (2019) Zui Gao Fa Zhi Min Zhong 732, 733 and 734 No 1. Xiaomi v Intel Digital (2020) E 01 Zhi Min Chu 169 No 1. For discussion, see Sophia Tang (2020). Anti-Suit Injunction Issued in China: Comity, Pragmatism and Rule of Law, https://conflictoflaws.net/2020/anti-suit-injunction-issued-in-china-comity-pragmatism-and-rule-of-law/.

[39] Rubén H. Muñoz. California Court halts Chinese – Issued Injunctions against Samsung. https://www.akingump.com/en/experience/practices/intellectual-property/ip-newsflash/california-court-halts-chinese-issued-injunction-against-samsung.html

[40] MIP International Patent Forum: Anti-suit injunctions 'scary' FRAND trend. https://www.managingip.com/article/b1qt0mgn4q1dv0/mip-international-patent-forum-anti-anti-suit-injunctions-scary-frand-trend. Accessed 24 June 2022.

anti-suit injunction. The rationale for its interrelation is "arbitration and competition are quite strange pair. They can be regarded as inherently contradictory and incompatible, but also as inherently complementary and compatible to each other".[41] Although these two anti-anti-suit injunctions have been granted by courts rather than by arbitral tribunals, it is imaginable that the latter will be affected by these developments too focusing on arbitrability of competition law issues.

**Anti-suit injunctions: a device to boost up enforcement of arbitration agreement?**

In the area of conflict law, anti-suit injunction is a procedural mechanism utilised by most common law courts to give effect to the choice of court or arbitration agreements, aiming to prohibit vexatious and abusive manipulations of forum by malicious parties.[42] Therefore, anti-suit injunctions help to prevent dilatory strategies likely to be attempted by one party in order to obstruct the use of the valid existing arbitration agreement. In this regard, anti-suit injunctions aim at preventing the party to initiate parallel proceedings before an arbitral tribunal or another court to preserve the good conduct of ongoing proceedings and ricocheting "the binding force of the contracting parties' forum-selection clause."[43]

To this end, the anti-suit injunction finds its justification in the general theory of contract – the consent agreement of private parties. As the arbitration agreement is a contact that binds two private parties, its non-performance by one of them constitutes a breach of contract.[44] *Tracomin S. A, v. Sudan Oil Seeds Co*[45] is the case in point. In this case, the litigant applied to the court in order to obtain an order of specific performance in relation to a particular contractual obligation. Given that the court was under no obligations to grant the jurisdiction owing to parties' consensual arbitration agreement. It was held in

[41] Assimakis Komninos, "Arbitration and EU Competition Law" (12 April 2009), http://ssrn.com/abstract-1520105 [accessed 11 February 2020]
[42] W Hueske, 'Rules, Britannia! A Proposed Revival of the British Antisuit Injunction in the EU Legal Framework' (2009) George Washington International Law Review 433–34.
[43] Watt, H. 'La procedure d'anti-suit injunction n'est pas contraire à l'ordre public international' [2010] RCDIP 158.
[44] José Carlos Fernández Rozas, 'Anti-suit Injunctions Issued by National Courts Measures Addressed to the Parties or to the Arbitrators', in Anti- Suit Injunctions in International Arbitration (E. Gaillard, General Editor), Berna, Staempfli Verlag AG, 2005, ISBN 1-929446- 60-8, pp. 73-85.
[45] *Tracomin S.A. v. Sudan Oil Seeds Co*. [1983] 1 W.L.R. 1026.; the adoption of the measure was increased during the last years, as it was held by *Bankers Trust Co. v. P.T. Jakarta Int'l Hotels & Dev*., [1999] 1 Lloyd's Rep. 910.

*Enka v. Chubb*[46] that there was no good policy reason not to uphold the terms of the Arbitration Agreements, which required all disputes between the parties to be determined in arbitration. Common law systems consider the breach of an anti-suit injunction granted by a Court as a "contempt of court".[47]

Clearly, the pursuance of the proceedings from the foreign court must be oppressive; the grant of the anti-suit injunctions shall not result in injustice and the English court shall be the natural and lawfully forum of the continuance of the proceedings. Before Brexit, the limitations on the powers of English courts to grant anti-suit injunctions were well established under Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation), which was repealed by Regulation (EU) 1215/2012 of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast Brussels Regulation). In line with cases beginning with *Turner v Grovit*[48] in 2004, including *West Tankers Inc Allianz SpA,*[49] and emphasizing in *Gazprom OAO v Lietuvos Respublika (Gazprom)*,[50] the CJEU has consistently ruled against anti-suit injunction which was considered inapplicable in litigation or arbitration among EU member States, declaring that such orders were an "interference with the authority of the foreign court,"[51] and that they were incompatible with the Brussels I Regulation. The *Nori Holding*[52] case reconfirmed that the CJEU's judgment in *West Tankers* remained good law, upholding that the issuance of anti-suit injunctions was no different under Recast Brussels Regulation.

The question arises as to whether anti-suit injunction applied to arbitration, being excluded from the Brussels Convention.[53] This was resolved in *Gazprom* case and the

[46] Enka Insaat Ve Sanayi v. OOO "Insurance Co Chubb" and others [2020] EWCA Civ 574.
[47] Delebecque, P. 'Anti-suit injunction et arbitrage : quels remèdes?' (2007) 12 GC 1
[48] C-159/02) EU: C:2004:228 (27 April 2004).
[49] Case C-185/07) [2009] AC 1138).
[50] Judgment of the Court of 13 May 2015, *Gazprom*, C-536/13, ECLI:EU:C:2015:316.
[51] *Turner v Grovit* [2001] UKHL 65; [2002] WLR 107.
[52] *Nori Holding Ltd v, PJSC Bank Otkritie Financial Corp* [2018] 2 Lloyd's Rep 80.
[53] Recognition and enforcement of judgments in civil and commercial cases was originally accomplished within the European Communities by the 1968 Brussels Convention: a treaty signed by the then six members of the Communities. This treaty was amended on several occasions and was almost completely superseded by a regulation adopted in 2001, the Brussels I regulation.

exclusion specifics were included in recital 12 of Brussels recast,[54] thereby affirms that anti-suit injunctions can be issued by EU arbitration tribunals and upheld by Courts of Justice of EU member States. Noticeably, Article 73(2) of the Recast Brussels Regulation states explicitly that it "shall not affect the application of the 1959 New York Convention" (NYC), reassuring the NYC will take precedence over the Brussels Regulation. Article VII (1) of the NYC provides the basic rule that NYC shall not affect the validity of multilateral or bilateral treaties concerning the recognition and enforcement of arbitral awards and agreement whenever possible, whether under domestic law or international law, indicating that anti-suit injunctions are certainly not incompatible with the NYC although it does not refer to the availability of anti-suit injunctions.

Noticeably, anti-suit injunctions fall within the scope of UNCITRAL'S recommendation regarding the interpretation of the Article VII (1) of the NYC, providing that "any interested party" should be allowed "to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement".[55] It is thus submitted that 'A Contracting State will not be in breach of the Convention by enforcing arbitral awards and arbitration agreements pursuant to more liberal regimes than the Convention itself'.[56]

The revival in anti-suit injunctions, after post Brexit, however, reiterates in *UAU v HVB* (UAU)[57] which serves as a good example of the English court's willingness to protect parties who have agreed to arbitrate disputes within their jurisdiction to support contractual arbitration agreement. The English court's decision of *UAU* manifests the

[54] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[55] United Nations Commission On International Trade law, Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006). https://uncitral.un.org/en/texts/arbitration/explanatorytexts/recommendations/foreign_arbitral_awards. Accessed 20 April 2022.
[56] UNCITRAL Secretariat's Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 2016 edition. Page 2. https://books.google.co.uk/books?id=FifGDwAAQBAJ&pg=PA2&lpg=PA2&dq=%E2%80%98a+Contracting+State+will+not+be+in+breach+of+the+Convention+by+enforcing+arbitral+awards+and+arbitration+agree. Accessed 20 April 2022.
[57] [2021] EWHC 1548 (Comm). Noticeably, UAU's appeal to the Supreme Court was still outstanding when it applied to the English High Court for an anti-suit injunction in April 2021.

potentiality of departure from the *West Tankers* case, where foreign proceedings have been brought in breach of an agreement to arbitrate and the subject matter is subject to London-seat arbitration. Such departure finds legal basis in the regulation 5 of the European Union (Withdrawal Act 2018 (Retained Court) (Retained EU Case Law) Regulations 2020[58] and Practice Statement (Judicial Precedent) 1966.[59]

Although courts and arbitral tribunals are theoretically empowered to grant anti-suit injunctions, there are different views as to their nature and legal bases for granting them. Anti-suit injunctions are characterized as a provisional form of relief, which concurs with interim measures. The authority to grant these interim measures is usually determined by the arbitration agreement, the *lex arbitri*, and the applicable procedural rules.

The English courts usually grant anti-suit injunctions where there is a breach of an arbitration agreement or a choice of court agreement.[60] The Supreme Court in *Ust-Kamenogorsk Hydroppower Plant*[61] made it clear that the source of the power of the English senior courts to grant anti-suit injunctions in support of arbitration agreements is enshrined in Section 37 of the Senior Court Act 1981. The prerequisite for anti-suit injunction to work well attributes to arbitration agreement, showing the English courts' willingness to grant anti-suit injunctions in order to safeguard an arbitration agreement.

The English High Court in *River Rock Securities Limited v. International Bank of St. Petersburg (Joint Stock Company*) (hereinafter RRSL) [62] reaffirmed English law policy of

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[58] European Union (Withdrawal Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020. https://www.legislation.gov.uk/ukdsi/2020/9780348213683. Accessed 19 April 2022.
make clear that neither the Supreme Court not the Court of Appeal are bound by any retained EU case law.

[59] Noticeably, the UK's departure from the EU on 31 January 2020 led to repeal of the European Communities Act 1972 (ECA 1972), which virtually made EU law directly applicable in the UK. The ECA 1972 was repealed by the EU Withdrawal Act 2018 (EUWA 2018), which was subsequently amended by the European Union (Withdrawal Agreement) Act 2020 (EUWAA 2020). Under Part 1 of the EUWAA 2020, a period of transition (also known as the implementation period) is adopted, which started when the UK left the EU and ended on 31 December 2020. During this period, the large bulk EU law, including decisions of the CJEU continued to have effect in the UK.

[60] C Chatterjee, 'The Legal Effect of the Exclusive Jurisdiction Clause in the Brussels Convention in Relation to Banking Matters' (1995) Journal of International Banking and Financial Law 334-40; *Continental Bank NA v Aeakos Compania Naviera SA and Others* [1994] 1 WLR 588.

[61] *Ust-Kamenogorsk Hydroppower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35; [2013] 1 WLR 1889; [2013] Bus LR 1357 at [48].

[62] [2020] EWHR 2483 (Comm),

upholding arbitration agreement for the integrity of arbitration. The impacts of issuing an anti-suit injunction in favour of arbitration is accelerating in European countries upholding the primary of the arbitration agreements and declaring that there is nothing to prevent it from granting an injunction to restrain proceedings which are (or would be) in breach of an arbitration clause.[63]

The RRSL decision underscored the importance of pro-arbitration of English law and its willingness to enforce arbitration agreement, reconfirming the ethos that parties who choose England as a seat for their arbitration seat can rest assured that their choice to arbitrate will not be easily overridden by the existence of foreign insolvency proceedings involving their counter-parties. Furthermore, the RRSL serves to highlight that the characterisation of a claim as an 'insolvency claim' is not in itself a basis to consider the claim as non-arbitrable.

Arbitability of claims in support arbitration agreement best demonstrates in the aforementioned RRSL case affirming that "Any dispute under the Agreement or in connection with it shall be referred to and finally resolved by arbitration under the LCIA Rules,[64] which Rules are deemed to be incorporated by reference into this clause" (the Arbitration Agreements).[65] It was further upheld that, "as a matter of substance, the claims in the Russian proceedings were contractual in nature and fell within the scope of the Arbitration Agreements".[66] Anti-suit injunctions in support of arbitration agreement were also affirmed in *Enka v. Chubb*[67] and *Nori Holding Ltd v. PJSC Bank Otkritie Financial Corp.* [68] It was held that the English court, as the court of agreed seat of arbitration, was necessarily an appropriate court to grant an anti-suit injunction. Foxton J emphasised in *Nori Holding Ltd v. PJSC Bank Otkritie Financial Corp*[69] that there were no strong reasons or other discretionary factors justifying refusal of interim ASI relief to enforce the parties'

[63] See, for example, the Court Appeal's judgment in *Through Mutual Insurance Association (Eursia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* (No 1) [2005] 1 Lloyd's Rep. 67).
[64] Art. 1 of the London Court of International Arbitration Rules 2014.
[65] Kyri Evagora, Gautam Bhattacharyya, Kohe Hasan, Paul Skeet and Joyce Fong, "Arbitrability of claims arising out of iinsolvency laws: the English sequel to Nori Holding". https://www.reedsmith.com/en/perspectives/2020/10/arbitrability-of-claims-arising-out-of-insolvency-laws. Accessed 28 April 2022.
[66] [2020] EWHC 2483 (Comm).
[67] *Enka Insaat Ve Sanayi v. OOO* "Insurance Co Chubb" and others [2020] EWCA Civ 574.
[68] [2018] 2 Lloyd's Rep 80.
[69] [2018] 2 Lloyd's Rep 80. Judgment, paragraphs. [88] to [109].

arbitral bargain. It is thus submitted that the English courts attaches high importance to giving effect to uphold arbitration agreements.

The post-Brexit gives finality to anti-suit injunctions that a party seeking to rely on this section in order to obtain injunction relief in respect of the commencement or continuation of court proceedings in the courts of a Member State should no longer be deprived of such right. The questions may arise as to how the recent developments will affect the European court practice and the international arbitration practice. Given the *obiter dicta o*f a well-respected German court and a French High court and the rising trend of anti-suit injunctions dealing with antitrust dispute claims, it is much more likely that anti-suit injunctions could be granted by other European courts as such the three potential consequences for European and international arbitration could materialise in the future.

Firstly, inspired by German and French legal counterparts, other European courts could start embracing first anti-anti-suit injunctions and anti-suit injunctions. Both mechanisms are anyway subject to the same principles of international law and coordinative rules, which could then lead to the situation in which the courts within the EU member States are showcasing acceptance of the so-called "anti-arbitration" injunctions that restrain arbitration proceedings.

Anti-suit injunctions are characterised as a provisional form of relief, corresponding to interim measures. The authority to grant those interim measures is usually determined by the arbitration agreement, the *lex arbitri* and the applicable procedural rules. On the contrary, the goal of an anti-anti-suit injunction is to get a court to stop the infringement proceedings of a country in an anti-suit injunction in another country, which would be dangerous in a sense that courts can exercise their jurisdiction to threaten arbitral tribunals' authority to rule on their jurisdiction of competence-competence principle, thereby confiscating contractual rights by blocking access to an agreed form.

Secondly, provided that anti-suit injunctions become more common in Europe, arbitral tribunals might feel encouraged to turn to anti-suit injunctions more frequently in order to restrain parallel court proceedings. Although this might help to realize an arbitration

agreement between parties, it could argue that it constitutes a one-sided approach to resolve conflicts of jurisdiction. Since arbitration is based on consent, this is one of the reasons why anti-suit injunctions are heavily criticized.

Thirdly, Germany and France's rulings ushered in an epoch in anti-suit injunction inclination, potentially demonstrating an anti-anti-suit injunction might not be the end of the story. The aim of the European courts to defend their jurisdiction, such as in the French and German decisions, is certainly understandable and unavoidable. With the anti-anti-suit injunctions in Paris and Munich, the global battle for the most favourable forum to determine FRAND rates between SEP holders and standard implementers is once again open and there is no guarantee that the standard implementer will be able to avoid the venue chosen by the SEP holders. The ruling of *Nokia* that made the EU countries wary of them in the first place will continue to loom large.