ANTI-SUIT INJUNCTION IN THE CONTEXT OF ARBITRATION AGREEMENT

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DEDICATION

This thesis is dedicated to my mother, who taught me that even the most difficult task can be achieved if the task is made every step of the way until completed. It is also dedicated to my late father, even he is not here with me, but I still can sense his inspiration and encouragement as he used to provide me. Definitively, to my husband for your ultimate support, understanding and reassurance to ensure that I can complete this thesis. Last but not least I dedicate this thesis to my first baby in the womb.

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ABSTRACT

Anti-suit injunction is one of an important solution when dealing with parallel proceeding in between litigation and arbitration proceedings and demanded the parties to return to agreed arbitration forum. The parallel proceedings are undesirable for both parties in the contract and may cause conflict to the jurisdiction and dispute of judgement. Although, this injunction may be applied as one of powerful remedies to return to agreed proceeding, the order by the court may cause interference with another foreign court. Thus, anti-suit injunctions may be granted with caution but not carelessly. Courts will consider any exceptional circumstances that make it appropriate for the case to be determined. Therefore, it is important to examine and identify the grounds by the courts in granting and refusing an anti-suit injunction in arbitration civil law proceedings. Globally, legal systems are usually based on either common law or civil law, or in certain situation, a hybrid of the two. As the application of anti-suit injunctions could be applied internationally, the application is governed by UNCITRAL Model Law and the enforcement of anti-suit injunctions, particularly in international arbitration, will be based on the New York Convention, but is it to be noted that there are various restrictions of application and enforcement of anti-suit injunction in civil law legal system especially in Recast Brussels Regulations (amended from the Brussels I Regulation). In arbitration context, the existence and validity of arbitration agreement are crucial to determine that one of the parties had violated the arbitration agreement and pursue the case in the wrong forum, thus, the anti-suit injunction will take the position to prevent the proceedings to be continued. An arbitration agreement to be written in simple and plain terms to eliminate confusion, risk of time and expense, as it may litigated in wrong forum. Moreover, lack of consideration during drafting might result in inconsistency, confusion, and inoperability of the arbitration agreement, which can be unfavorable to the parties at later stage. Again, there are two research objectives; (i) to identify grounds by the court in granting an anti-suit injunction in civil law proceeding in the context of arbitration agreement, (ii) to identify grounds by the court in refusing an anti-suit injunction in civil law proceeding in the context of arbitration agreement. To achieve the objectives of the research, 20 cases had been analysed to obtain the grounds that court considers when granting and refusing an anti-suit injunction in the arbitration context. There are four (4) grounds that court consider when granting anti-suit injunctions in arbitration agreement context which are, the foreign proceeding will contravene the arbitration agreement, the jurisdiction of the court in the correct seat to grant injunction, the validity of the arbitration agreement and the rules of interpretation applicable to the arbitration clause. There are also four (4) grounds that court consider when refusing anti-suit injunction in arbitration agreement context such as non-existence of the arbitration agreement, the injunction will contravene the Brussel regime, offending international mutual trust and respect (comity), and the stage of the foreign proceedings is too far advanced. Therefore, it is essential to understand the underlying principles of approaches as well as circumstances and consideration by the Court when a party is considered for the application of anti-suit injunctions, especially in the context of arbitration agreements as the application of anti-suit injunction is to protect arbitration agreement.

ABSTRAK

Injunksi anti-saman adalah salah satu penyelesaian penting apabila berurusan dengan prosiding selari di antara prosiding litigasi dan timbang tara dan menuntut pihak-pihak untuk kembali ke forum timbang tara yang dipersetujui. Prosiding selari adalah tidak diingini untuk kedua-dua pihak dalam kontrak dan boleh menyebabkan konflik kepada bidang kuasa dan pertikaian penghakiman. Walaupum injunksi ini boleh digunakan sebagai salah satu remedi untuk kembali kepada prosiding yang dipersetujui, perintah mahkamah boleh menyebabkan campur tangan dengan mahkamah asing yang lain. Oleh itu, injunksi anti-saman perlu diberikan dengan berhati-hati. Mahkamah akan mempertimbangkan sebarang keadaan luar biasa yang menjadikannya ianya sesuai untuk kes itu ditentukan. Oleh itu, mengenal pasti alasan oleh mahkamah dalam memberikan dan menolak injunksi anti-saman dalam prosiding undang-undang sivil timbang tara adalah penting. Di peringkat global, sistem undang-undang berdasarkan sama ada undang-undang am atau undang-undang sivil, atau dalam situasi tertentu, gabungan kedua-duanya. Memandangkan permohonan injunksi anti-saman boleh digunakan di peringkat antarabangsa, permohonan itu dikawal oleh Undang-undang Model UNCITRAL dan penguatkuasaan injunksi anti-saman, khasnya dalam timbang tara antarabangsa, akan berdasarkan Konvensyen New York, namun ia perlu diberi perhatian bahawa terdapat pelbagai sekatan permohonan dan penguatkuasaan injunksi anti-saman dalam sistem perundangan sivil terutamanya dalam *Recast Brussels Regulations* (pindaan daripada Peraturan Brussels I). Kewujudan dan kesahihan perjanjian timbang tara adalah penting untuk menentukan bahawa salah satu pihak telah melanggar perjanjian timbang tara dan meneruskan tuntutan dalam forum yang salah, justeru, injunksi anti-saman akan mengambil pendirian untuk menghalang prosiding yang telah dimulakan. Perjanjian timbang tara harus digubal dalam istilah yang mudah dan jelas untuk mengelakkan kekeliruan, risiko masa dan perbelanjaan, di mana jika tidak di atasi, ianya boleh merugikan pihak-pihak pada peringkat akan datang. Terdapat dua objektif penyelidikan; (i) untuk mengenal pasti alasan oleh mahkamah dalam memberikan injunksi anti-saman dalam prosiding undang-undang sivil dalam konteks perjanjian timbang tara (ii) untuk mengenal pasti alasan oleh mahkamah dalam menolak injunksi anti-saman dalam prosiding undang-undang sivil dalam konteks perjanjian timbang tara.Untuk mencapai objektif penyelidikan, 20 kes telah dianalisis untuk mendapatkan alasan yang dipertimbangkan oleh mahkamah apabila memberikan dan menolak injunksi anti-saman dalam konteks timbang tara. Terdapat empat (4) alasan yang dipertimbangkan oleh mahkamah apabila memberikan injunksi anti-saman dalam konteks perjanjian timbang tara iaitu, prosiding mahkamah adalah melanggar perjanjian timbang tara, bidang kuasa mahkamah di kerusi yang betul untuk memberikan injunksi, kesahihan perjanjian timbang tara dan peraturan tafsiran klausa timbang tara. Terdapat juga empat (4) alasan yang dipertimbangkan oleh mahkamah apabila menolak injunksi anti-saman dalam konteks perjanjian timbang tara seperti tidak wujudnya perjanjian timbang tara, injunksi ini akan bercanggah dengan rejim Brussels, menyinggung kepercayaan dan penghormatan bersama antarabangsa (*comity*), dan peringkat prosiding asing terlalu jauh maju. Oleh itu, adalah penting untuk memahami prinsip asas pendekatan serta keadaan dan pertimbangan oleh Mahkamah pihak kerana ianya adalah untuk melindungi perjanjian timbang tara.

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LIST OF ABBREVIATIONS

ASI	-	Anti-suit injunction
ECJ	-	European Court of Justice
AC	-	Appeal Cases
All ER	-	All English Law Reports
IL Pr	-	International Litigation Procedure
EWHC	-	High Court of England and Wales
UKSC	-	The Supreme Court of the United Kingdom
FED App.	-	The Federal Appendix
SGCA	-	Singapore Court of Appeal
Art.	-	Article
Cl.	-	Clause
O.	-	Order
r.	-	Rule
s.	-	Section
Act 646	-	Malaysia Arbitration Act 2005
Act 137	-	Specific Relief Act 1950
Act 91	-	Courts of Judicature Act 1964
UNCITRAL	-	United Nations Commissions on International Trade Law
KLRCA	-	Kuala Lumpur Regional Centre for Arbitration
LCIA	-	London Court of International Arbitration
ICC	-	International Chamber of Commerce Court of Arbitration

CHAPTER 1

INTRODUCTION

1.1 Background

International construction and commercial parties increasingly choose arbitration rather than litigation when it comes to any disputes and conflicts. As a matter of law, a binding arbitration agreement supersedes the jurisdiction of any national court to decide the content of the dispute. Despite this, parties are constantly being served with foreign court procedures that contravene with their arbitration agreements. Numerous parties are conducting forum shopping in order to determine which jurisdiction is most favourable for settling their issues. Nevertheless, an anti-suit injunction may be used to prevent such plans and return the case to arbitration.

An anti-suit injunction is a restraining order issued against a party *in personam*, restricting it from initiating or prosecuting a legal action. The meaning of *in personam* (derived from Latin word) is the injunction is directed against a particular person. It is a remedy that is frequently considered. Court actions have been launched or are threatened in a foreign court. When a court or tribunal orders an anti-suit injunction, it prevents one party from commencing legal action in any jurisdiction or venue other than the one agreed upon in the contract. Failure to obey the order may be construed as contempt of court, with substantial legal ramifications for the violating party. These consequences may include monetary fines and asset forfeiture, and imprisonment. Anti-suit injunctions are an appropriate tool for restraining legal action conducted in violation of an agreement. For instance, if a contract requires arbitration in London but one party sues in the New York courts, the counterparty or innocent party may seek an injunction to restraint the New York actions in the English courts as the national court of arbitral seat.

1.2 Problem Background

Anti-suit injunctions are generally used when one party sues another in a foreign or incorrect forum or when concurrent procedures occur. Parallel proceedings raise a number of concerns as following: (Tan, 2021):

(a) Inefficiency and squandered money result from the requirement to test the same or essentially identical concerns in multiple forums.

(b) Multiple recoveries are also a real concern when various claimants in the same corporate structure but with separate legitimate identities seek remedies for essentially the same damage (i.e., what is recognised as profound deficiency in several authorities) or when the same claimant sues in various forums.

(c) There are possibly contradictory judgements from multiple fora, as demonstrated by the contradictory verdicts on the State's obligation in *CME Czech Republic B.V. v. The Czech Republic* and *Ronald S. Lauder v. The Czech Republic*. These are examples of such cases in international law, where there is no doctrine of *stare decisis*, the legitimate basis for deciding positions in a legal action that establishes point of reference, there are questions about the credibility and legitimacy of such rulings.

Thus, the anti-suit injunction is essential when the infringement action is brought or threatens to be brought in a foreign or inappropriate forum for dispute settlement. This injunction is also applicable in parallel procedures in which two or more disputes concerning the similar or related parties, contractual agreements, or disputed topics are litigated in more than one jurisdiction.

Briefly, the concept of anti-suit injunctions and stay of court proceedings may look similar, however the effect between the two are not similar. In fact, Justice Gopal Sri Ram in case *Sugumar Balaskrishnan v Pengarah Immigresen Negeri Sabah & Anor & Anor Appeal* [1998] has made a good attempt to draw a line when he said:

> "An injunction, on the other hand, is directed at a party to a proceeding, prohibiting him from doing something or ordering him to perform something specific in the course of the procedure. To put it in other words, an injunction has the power to act in *personam*, whereas a stay does not."

The different in between anti-suit injunction and stay of court proceeding is the stay operates *in rem* (against a thing which is a court) since it stays the proceedings before the Court, meanwhile anti-suit injunction works *in personam* (against a person) to restraint a person from issuing and continuing in foreign proceeding/court. Proceedings taken in contravention of a stay order are null and void, whereas those taken in contravention of an injunction are not null and void but are liable to punishment. An injunction takes effect as soon as it is issued, whereas a stay order takes effect only when it is conveyed to the court to which it is issued.

1.3 Problem Statement

Although an anti-suit injunction is regarded as an effective cure for resolving a jurisdictional conflict in court, it is undoubtedly the most contentious for the reason that the court is intervening with proceedings in another jurisdiction. Numerous jurisdictions either do not authorise or are seldom receptive to such applications. For instance, the aforementioned conditions are governed by the civil law system. As a result of European Court of Justice (ECJ) case law, such as *Allianz v West Tankers* [2009], the application of anti-suit injunctions has been severely questioned, and parties have been forced to pursue alternative remedies in order to gain relief.

Contrary with civil law system, common law system is more comfortable on issuing anti-suit injunctions. In fact, English courts have awarded anti-suit injunctions traces its history back to the fifteenth century in circumstances where a party had the right not to be litigated in foreign courts pursuant to an agreement conferring rights on English courts. Thus, anti-suit injunctions could be awarded liberally but not unreasonably. Courts will examine any exceptional circumstances that make it appropriate for the matter to be determined by the court. For instance, in *Modi*

Entertainment Network v. W.S.G. Cricket Pte. Ltd [2003], the Supreme Court of India made the following enlightening observations:

> "10. ... Anti-suit injunction is when a court prohibits a party to a lawsuit or case before it from initiating or commencing a legal action in another court, inclusive a foreign court. In an appropriate circumstance, Indian courts have the power to impose an anti-suit injunction to a party over whom they have personal jurisdiction. This is due to the fact that equity courts have *personam* jurisdiction. However, because such an injunction, while aimed against a person, effectively interferes with the exercise of jurisdiction by another court, it will be used sparingly."

Although the order is intended at the party, when a court imposes an injunction, certain conditions and considerations must be taken into account, since the order has a direct and indirect impact on the jurisdiction of foreign court and thus, it should be executed with discretion.

The application of anti-suit injunctions has evolved together with the law. In the context of arbitration, the application is regularly used as remedial tool to suspend foreign proceedings rather than arbitrating the issue according to the terms of agreement. To elaborate further, when a claim is pursued in court in violation of an arbitration agreement, the primary remedy by defendant is to acquire an anti-suit injunction against the counterparty in the national courts of the arbitration's seat. While this application appears straightforward, as the Supreme Court of India stated in *Modi*, the Court should exercise caution when issuing anti-suit injunctions because, while directed against a specific individual, such an injunction effectively interferes with another court's exercise of jurisdiction. Additionally, the court may intervene by issuing anti-suit injunctions if foreign actions are initiated in violation of the arbitration agreement, unless there is a compelling reason not to do so. [*Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* (1995)]

Subsequently, the main questions arise – what are the grounds that the court consider when granting and refusing an anti-suit injunction in the context of arbitration? Therefore, the researcher in the view that any parties possibly will encounter with parallel proceedings or foreign court proceedings, in contravention of their arbitration agreements, and anti-suit injunction may become one of persuasive

remedies of the situation. The grounds by the Court in granting or refusing an anti-suit injunction in the context of arbitration agreement need to be examined further to provide some basis for the applicant when encounter such situations.

1.4 Research Objectives

The following objectives have been established to achieve this research:

(a) To identify grounds by the court in granting an anti-suit injunction in civil law proceeding in the context of arbitration agreement.

(b) To identify grounds by the court in refusing an anti-suit injunction in civil law proceeding in the context of arbitration agreement.

1.5 Scope and Limitation

This research is focused on court cases related to anti-suit injunctions, which concentrate on the grounds that court consider in granting or refusing for an anti-suit injunction in the context of an arbitration agreement. In addition, the court cases selected would include the decision by the courts from Common Laws countries, namely United Kindom (UK), United States of America (US), United Arab Emirates (UAE), and Singapore. In the international Arbitration context, the anti-suit injunction could be applied from one country to another country.

1.6 Research Significance and Contribution

This research contributes to a better understanding of the application for an anti-suit injunction that is accessible to the disputing parties in an arbitration agreement, which is beneficial to both parties. The readers will be informed about the grounds that Court should be considered when granting and refusing an anti-suit

injunction within the context of an arbitration agreement. These grounds have been examined in order to avoid offensive intrusion and risk for the parties involved in these agreements. Identifying the grounds that the court examines when ruling whether or not to grant an anti-suit injunction might also help them avoid having the application for an anti-suit injunction denied by the court in the future. It will be addressed which applications for injunctions have been successful and which applications have been unsuccessful in order to give suggestions for the parties when they resort to an anti-suit injunction in order to compel the enforcement of an arbitration agreement.

1.7 Chapters Organization

The following are the chapters of the dissertation:

1.7.1 Chapter 1 (Introduction)

Chapter one provides an outline of the study, beginning with its background and progressing through the problem statement, aim and objectives of the research, significance of the study, research methodology, expected findings, the scope and limitation of the study, importance of the study and the chapter organisation.

1.7.2 Chapter 2 (Literature Review – Anti-Suit Injunctions)

In chapter 2, a discussion on anti-suit injunctions will be covered. First, an overview of anti-suit injunctions in arbitration will be discussed, followed by an examination of both the common law and civil law approaches to this issue, intending to outline the general circumstances in which parties should favour each system. Different countries across the world have legal systems that are based on either common law or civil law. Subsequently, the author will briefly discuss in concept on integration of anti-suit injunction with international arbitration by understanding the

application and enforcement of the anti-suit order. The author also discusses on limitation of application and enforcement in the context of international arbitration in Recast Brussels Regulations, which these enforceability and unenforceability will become the basis and guidance to analyse the case law in Chapter 5.

1.7.3 Chapter 3 (Literature Review – Arbitration Agreement)

Following that, Chapter 3 will examine Arbitration Agreements, specifically the definition of arbitration, international arbitration, arbitration agreements and requirements as to form, substance requirements for arbitration agreements, and the impact of arbitration agreements when resorting to anti-suit injunctions application, among other things. For this research, the author will concentrate on the Arbitration Act 2005 (the Act), which is broadly similar to UNCITRAL Model Law on International Commercial Arbitration 1985. (Model Law). Many other modern arbitral legislations, such as the English Arbitration Act 1996 and the Singapore International Arbitration Act 1994, are also models for the UNCITRAL Model Law. Subsequently, the enforcement of anti-suit injunction in the context of arbitration agreement via New York Conventions.

1.7.4 Chapter 4 (Research Methodology)

Chapter 4 describes the research methodology used in this study and how it will aid in answering the research question. This research has been prepared so that it can be carried out in a systematic manner via various stages. Each step has specific objectives that must be met in order for the process to be successful. In this research, the author will implement the Doctrinal legal research by analysing case law, organising, arranging, and systematising legal concepts, and studying legal institutions using legal justification or logical inference to identify the grounds that contribute to court decision to grant and to refuse anti-suit injunction in the context of arbitration agreements. For the aim and objective of this research, it was separated into five stages, each of which was completed in turn. First stage will discuss on identification of

research that consist of problem statement, objectives of study and scope of research. Second stage will contain of literature review that divided into two section which are primary data and secondary data. Third stage will consist of data collection which the author will collect cases of successful application of anti-suit injunction in the context of arbitration agreement and unsuccessful application of anti-suit injunction in the context of arbitration agreement. Fourth stage will analyse the case law by extracting the grounds that court consider when granting and refusing anti-suit injunction in the context of arbitration agreement and to provide important findings and outcome of research. Fifth and final stage will discuss on conclusion, limitation of research and to provide recommendation.

1.7.5 Chapter 5 (Case Law Analysis)

In this chapter, the legal case analysis conducted in this chapter is a component of the research methodology used to determine the grounds that court consider in granting and refusing anti-suit injunctions in the context of arbitration agreement. A total of ten (10) successful application of anti-suit injunction in the arbitration context and another ten (10) cases of unsuccessful application of anti-suit injunction in the arbitration context. There will be total of twenty (20) cases will be gathered as primary data for anti-suit injunction in the context of arbitration agreement and these case law to be discussed in detail.

1.7.6 Chapter 6 (Discussion and Findings)

The findings and results of the study are discussed in Chapter 6. The findings and results will be presented and discussed in further detail. The research will describe anti-suit injunctions in a contractual context, particularly those favouring arbitration agreements. Additionally, it contributes to a better understanding of the cases to show the grounds that the court consider when granting or refusing an anti-suit injunction.

1.7.7 Chapter 7 (Conclusion and Recommendation)

The dissertation comes to a close with Chapter 7, the summary of the research findings and conclusion will be established in this chapter from this study in order to achieve the objective of the research. At the same time, the author will include the limitation of this research and the problem encountered during carrying out this research including recommendation for future research.

1.8 Conclusion

Chapter 1 is an introductory chapter to the whole research whereby it consists of background of the study, problem statement, research objectives, scope and limitation, research significance and contribution, research structure and chapter organisation. In the next chapter, Chapter 2 will include a discussion on the concept of anti-suit injunction, the global application of anti-suit injunction in the common law system and civil law system, followed by enforcement of anti-suit injunction in the context of arbitration agreement.

CHAPTER 2

ANTI-SUIT INJUNCTIONS

2.1 Introduction

Anti-suit injunctions are a type of interim remedy that extends all the way back to the fifteenth century in England when they were applied to resolve conflicts between equity and common law courts (Koursopoulos, 2017). For instance, in *Pinnel*'s Case, an injunction was obtained to prohibit one party from repeatedly pursuing legal cases against the other. In the 1970s, this perception developed reputation in the United States of America. *Love v Baker* was the first case in the United States to grant anti-suit injunctions in restraining foreign proceedings, and the anti-suit injunctions was given for a violation of equity standards.

In Malaysia, anti-suit injunction is one of the injunctive reliefs obtainable under the Malaysian legal system. The other injunctive reliefs listed are *Mareva*, *Anton Piller*, *Quia timet* prohibitory, Fortuna, Erinford and Mandatory injunction orders (Zainun Ali, 2018). The ability of High Court's jurisdiction to grant injunctions, either temporary or permanent, is derived from Chapter IX of the Specific Relief Act 1950 (Act 137) and paragraph 6 of the Schedule to the Courts of Judicature Act 1964 (Act 91). Only the High Courts and above have the authority to award any type of injunction.

This chapter discusses on anti-suit injunctions by understanding the definition and concept of anti-suit injunction, followed by an examination of the common law and civil law perspectives to the subject, with the intention of defining the situations in which parties should favour each system. Globally, legal systems are usually based on either common law or civil law, or in certain situation, a hybrid of the two. The enforcement of anti-suit injunctions, particularly in international arbitration, will be governed on the New York Convention, although there are various limits of anti-suit

application in the context of international arbitration in Recast Brussels Regulations (amended from the Brussels I Regulation). The below examination would establish the basis for and limitations on the application and implementation of anti-suit injunctions in the context of arbitration agreement.

2.2 Definition and Concept of Anti-suit Injunctions

Application of Anti-suit Injunction is novel and unusual due to its nature, but the application is necessary, subject to the unavoidable situation. So, it is essential to grasp the meaning of an anti-suit injunction as well as its application. Since there is no definition of anti-suit, the author combined the definition of "anti" and "suit" based on Oxford Dictionary that contribute to the definition of "anti-suit" as below:

> "A party against a claim or dispute brought to a court by a person(s) or an organization(s)."

According to Sharma (2019), an injunction may be defined as:

> "An injunction is a legal procedure in which a party is ordered to abstain from performing or to perform a specific act or thing."

The definition of anti-suit injunction is an official Court order requiring a person to stop pursuing a claim or dispute that brought to another court. Another definition for anti-suit injunction is an order by the Court issued to a particular person preventing the party from initiating, ceasing to pursue, or advancing particular claims within, or taking measures to discontinue or defer litigation or arbitral process in a overseas or different nation, or these both processes elsewhere within its own provincial authority (Raphael, 2019). Fisher (2010) defined anti-suit injunction as the capacity of a Court to restrict a person or an organisation from initiating or resuming proceedings in a foreign Court by issuing an order.

The definition to the word of "foreign court" in this context is the proceedings that not limited in another foreign country, but also procedures in a different State or Province that is a constituent component of the same (typically federal) country (Fisher, 2010).

According to Katherine Proctor (2020), the pursuit of anti-suit injunctions might be motivated by a variety of factors, such as:

a) To ensure that the contractual forum is preserved.

b) The purpose of proceeding in a foreign jurisdiction is to gain from substantive or procedural benefits of proceedings in a foreign country, as well as to avoid substantive or procedural drawbacks of proceedings in a foreign jurisdiction.

c) For the purpose of preventing perceived injustice in a foreign jurisdiction.

d) To save time and/or money.

e) To take a defence position in order to avoid the implementation of a foreign decision.

Thus, an anti-suit injunction is a solution (either temporary or permanent) sought by the National Court to restore and return the disagreement to the exclusive jurisdiction clause of the contract. In the perspective of arbitration, parties that have consented to submit claim to arbitration can impose their agreement by an anti-suit injunction in the same manner that an exclusive jurisdiction clause is imposed. Only if there is a compelling reason not to provide the requested remedy, this remedy will usually be granted.

2.3 Application of Anti-Suit Injunctions in Civil Law and Common Law

In general, anti-suit injunctions are often associated with common law regimes whereby the injunction is applied as a remedial tool, however as for civil law system, some cases viewed the applications of anti-suit injunction is not suitable and workable

in their country which the enforcement is not effective to its law system. The application and perspectives of Anti-Suit Injunction in common law system and civil law system are further explained as below.

2.3.1 Common Law System

Anti-suit injunctions are well-established tools of international litigation environment, goes all the way back to the 15th century since these injunctions devised by the English common law courts to instruct parallel or similar actions in the a court of equity in England and Wales (formerly known as Court of Chancery), and vice versa, in order to prevent a lawsuit from being filed against them simultaneously (Contreras, 2020). Anti-suit injunctions also have been connected with the common law system given that the purpose of application can be treated as Court mechanism to protect the agreements (particularly arbitration agreements) among parties in the event of a disagreement. In the event that a party to a contract initiates abroad actions in violation of an arbitration agreement with the main purpose of disrupting the arbitral process and intimidating the counterparty, this innocent party has a right to seek protection from the court and can thus request an anti-suit injunction. Anti-suit injunctions might consequently be given profusely, but they should not be granted thoughtlessly.

The United States is another country that follows the common law system. US courts appear to be at ease with the application of anti-suit injunctions to safeguard arbitration agreements against counter-suit litigation, even where the litigation is to be held outside the United States. In comparison to the UK, US courts will evaluate comity issues as portion of a broader examination that takes into account the entire convincing concerns. The concept of comity is described as the concept that political entities (such as governments, nations, or courts from various jurisdictions) shall mutually acknowledge the legislative, executive, and judicial acts of other political entities. Another meaning is mutual understanding and respect between different governments that become established rules to apply the same with collaboration, allowing each other to be at rest.

Using the example of comity concern, the case of *Ibeto Petrochemical Industries v M/T Beffen* (2005) exemplifies the US perspective to anti-suit injunctions in arbitration. In this case, an applicant who bought polluted oil filed suit the respondent, the oil's transporter, in Nigeria and New York proceedings, as well as starting arbitration in London. As a result, the claimant has decided to forego the London arbitration procedures in favour of pursuing legal action in Nigeria. Through a New York District Court judgement, the defendant was able to compel arbitration in London, and an anti-suit injunction was issued. The Second Circuit affirmed the decision in *Ibeto Petrochemical Industries v M/T Beffen* (2007), with the caveat that the District Court should have had the discretion to consider comity concerns by issuing a narrower injunction prohibiting court proceeding only until the London arbitration was completed, thereby emphasising that the decision only affected the parties and not the Nigerian courts.

2.3.2 Civil Law System

The scenario is significantly different in jurisdictions based on Civil Law. The Dusseldorf Regional Court of Appeal's ruling in *Re the Enforcement of an English Anti-Suit Injunction* (1997), this case demonstrates how German courts approach anti-suit injunctions. As in particular instance, the court declined to impose an anti-suit injunction issued by English Court, which attempted to restrict a German citizen from starting legal actions in German courts in contravention of an arbitration agreement and directing the contracting-parties to refer to arbitration in London. The ruling was established on the grounds that the said injunction could infringe the sovereignty of German State and the authority of German court.

The exemption included in Article 1(2)(d) of the Brussels Regulation is generally construed strictly by German courts. In arbitration contexts, it is interpreted as depriving courts of the authority to issue anti-suit injunctions. This interpretation is based on the argument that the issues that must be reviewed in such circumstances, such as the legitimacy and enforceability of the arbitration agreement, are not covered by the ongoing action. As a result, any proceedings based on the Brussels Regulation

are restricted because German law considers a foreign court's declaration of authority raised on a contravention of an arbitration agreement to be sufficient justification for the application of the Brussels Regulation's Article 1(2)(d) exception by merely insinuating the validity of an arbitration agreement.

2.4 Enforcement of Anti-suit Injunctions in the Arbitration context

In support from these law systems and arbitration, the enforcement of anti-suit injunction especially in foreign arbitration is recognised under New York Convention but unfortunately, there are several limitations in European Jurisdiction Regulation (The Brussels Regime). This is important to understand the basis and limitation of application and enforcement anti-suit injunctions in arbitration context and to relate to consideration applied in law cases.

2.4.1 New York Arbitration Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, frequently acknowledged to as the New York Convention. This convention was legislated on 10 June 1958 by a United Nations diplomatic convention and brought into effect on 7 June 1959.

The New York Convention establishes an internationally recognised mechanism for the enforcement of not only arbitral judgements but also arbitration agreements. The enforcement mechanism for arbitration agreements has been stipulated under Article II (3), requiring a court of a Contracting State to refer to arbitration any party who appears before it in contravention of an arbitration agreement recognised under the Convention. According to the most recent data in 2021, the Convention had been signed by 168 countries, including 165 of the 193 countries of the United Nations. The signing countries include, but are not limited to, Malaysia, United Kingdom (UK), United States of America (US), Singapore, United Arab Emirates, and India.

In the subject of arbitration, the New York Convention relates to the recognition and enforcement of foreign arbitral judgments, as well as the referral of a court to arbitration, as stated in Article II(3)(iii):

> "*A court of a Contracting State that has jurisdiction over an action arising from a matter in respect of which the parties have reached an agreement within the meaning of this article shall, upon request of one of the parties, refer the parties to arbitration unless it determines that the agreement is null and void, inoperative, or incapable of being performed".*

According to Article II (3), national courts with jurisdiction over a claim governed by an arbitration agreement must instruct the parties to arbitration "unless it judges that the said agreement is null and void, inoperative, or incapable of being performed" to guarantee that arbitration agreements are followed. In the event that a legitimate arbitration agreement is presented to national courts, they should submit the contracting-parties to arbitration. This gives practical effect to the fundamental idea that any disagreement between the parties to an arbitration agreement ought to be resolved by arbitration, and the parties must respect their agreement. As a result, national courts are prohibited from litigating such issues on the merits in their jurisdiction. An arbitral tribunal would not be prevented from continuing with the arbitration proceedings if a question to the presence or legality of an arbitration agreements were brought under the kompetenz-kompetenz principle, this gives arbitrators the right to decide with their own authority.

The term "shall" in article II (3) is interpreted by courts to mean that referral to arbitration is obligatory and cannot be based on the judgment of the courts. In practise, courts have carried out their mandate to recommend the parties to arbitration in two ways. The first method, which is supported in civil law states, is to decline jurisdiction in the existence of an arbitration agreement. For example, in a number of instances, Swiss and French courts have found that the inclusion of an arbitration agreement declared national courts incapable under article II of the Convention, and thus referred the parties to arbitration. The second method, which is supported by the majority of common law states, is to stay judicial proceedings, thereby fulfilling the courts'

commitment to enforce arbitration agreements. For example, when construing Section 7(2) of the Australian International Arbitration Act in the framework of Article II (3) of the Convention, the phrase "must submit the parties to arbitration [...]" would not be construed as compelling the parties to arbitrate. As an alternative, the court emphasised that, while courts could suspend legal actions, they are unable to force parties to arbitrate if they do not choose to do so. These two procedures are acceptable with the responsibility of Contracting Parties' courts to direct parties to arbitration under the Convention.

2.4.2 Restriction under Brussels Convention

The Brussels Convention is a convention on civil jurisdiction and the enforcement of judgments signed by the European Community in Brussels in 1968. The Convention establishes a method for allocating jurisdiction and enforcing decisions amongst signatory governments. It was primarily replaced by the 2001 Brussels Regulation and later by the Recast Brussels Regulation. It governs jurisdiction, as well as the recognition and enforcement of decisions among EU member states.

In the standpoint of anti-suit injunction compliance by the Brussels Regime, with regard to the endorsement of court-choice agreements, the new revision in the Recast Brussels Regulation confirms the opinion adopted in the *Continental Bank v. Aeakos SA case*. However, the issue of arbitration agreements remains unanswered since the Recast Brussels Regulation follows the 2001 Brussels Regulation in excluding "arbitration" from its scope (Hartley, 2021). There are four paragraphs in Recital 12. The first and second paragraphs of Recital 12 as follows:

> *"Arbitration should be exempted from the application of this Regulation. If a court of a Member State becomes involved in a dispute in which the parties have entered into an arbitration agreement, nothing in this Regulation shall avert a court for directing a dispute to arbitration, suspending or discontinuing procedures, or determining if the arbitration agreement is invalid and*

unlawful, inoperative, or incapable of being performed in accordance with national law.

An arbitration agreement that is ruled invalid and void, inoperative, or incapable of being performed by a court of a Member State must not be contrary to the regulations of recognition and enforcement set forth in this Regulations, irrespective of if the court addressed this matter as a major or ancillary issues".

The reason for this is further explained in relation to feasible comments in support of Anti-Suit Injunctions under the Recast Regulation, such as the second paragraph of Recital 12 of the Recast, which intends to resolve one of the issues resulting from the explanation national courts provided to *West Tankers*, in which a judgement announcing the arbitration agreement null and void, inoperative, or incapable of being performed could spread under the Brussels I Regulation. Such issues cannot arise under the Recast Regulation, as the court's decision on the presence and legality of the arbitration agreement is not depend to circulation, irrespective of if the court addressed this matter as a major or ancillary issues. Take into consideration of this, one may argue that the Recast broadens the scope of the arbitration exclusion by requiring a complete separation of the determination of the presence of a valid arbitration provision and the Brussels I system. To put it another way, one might argue that, because the Member State court judgement enforcing the arbitration agreement is not recognised and enforced under the Recast, an anti-suit injunction cannot probably hinder the efficacy of Brussels I, as it seeks to prevent a court judgement that is already protected by the new, strengthened arbitration exclusion (Raphael, 2019).

In conclusion, the preceding evaluation indicates to a decision that the provisions of Recital 12 of the Recast Regulation provide a starting point for determining that anti-suit injunctions issued in favour of arbitration are contradictory with the Brussels I system. Even under the Recast, the purpose of consolidating rules of jurisdictional dispute is hindered by a provision depriving Member State courts of the authority to assess whether they have authority under the Regulations. Whereas an anti-suit injunction is aimed to preserve the effectiveness of an arbitration agreement in this situation, it can be contended that Recital 4 also expands the range of the

arbitration exclusion, hence preclude the relevancy of *West Tankers* to the Recast Regulation.

2.5 Conclusion

The topic of anti-suit injunctions has been discussed in detail in Chapter 2. Following a general overview of anti-suit injunctions in arbitration, an examination of both the common law and civil law approaches to this issue has been conducted with the goal of identifying the general circumstances in which parties should favour either system. Legal systems based on common law or civil law exist in various countries around the world. Following that, the above discussion had examined the concept of incorporating an anti-suit injunction with international arbitration by examining the application and execution of an anti-suit order. The limitation of application and implementation in the context of international arbitration under the Recast Brussels Regulations, which these enforceability and unenforceability will provide as a fundamental point and guidance for the analysis of case law in Chapter 5.

REFERENCES

Abraham, T. S. D. C. and Daniel, C. W. C. (2018) 'Malaysia Arbitration', *Intl. Handbook on Comm. Arb. Suppl*, (August), pp. 100–150.

Adnan Yaakob, Arun Kasi, Ashgar Ali Ali Mohamed, Mohammad Naqib Ishan Jan, M. H. A. (2020) Alternative *Dispute Resolution*. 1st edn, *CLJ Publication*. 1st edn. Edited by M. H. A. Adnan Yaakob, Arun Kasi, Ashgar Ali Ali Mohamed, Mohammad Naqib Ishan Jan. Kuala Lumpur, Malaysia: CLJ Publication.

Ako, R. and Olawuyi, D. S. (2017) 'Methodology, theoretical framework and scholarly significance: An overview of International best practices in legal research', Journal *of Sustainable Development Law and Policy (The)*, 8(2), pp. 225–241. doi: 10.4314/jsdlp.v8i2.11.

Ali, S., Mohamed Yusoff, Z. and Ayub, Z. (2017) 'Legal Research of Doctrinal and Non-Doctrinal', *International Journal of Trend in Research and Development*, 4(1), pp. 493–495.

Contreras, J. (2020) 'It's Anti-Suit Injunctions All The Way Down – The Strange New Realities of International Litigation Over Standards-Essential Patents', *University of Utah College of Law Research Paper*, (386), pp. 1–13.

Fisher, G. (2010) 'Anti-suit Injunctions to Restrain Foreign Proceedings in Breach of an Arbitration Agreement', *Bond Law Review*, 22(1). doi: 10.53300/001c.5548.

Hartley, T. (2021) 'Arbitration and the Brussels I Regulation–Before and After Brexit', *Journal of Private International Law*, 17(1), pp. 53–73. doi: 10.1080/17441048.2021.1907942.

Katherine Proctor (2020) *Stop that litigant! The importance of English anti-suit injunctions during COVID-19*, *Kennedys*. Available at: https://kennedyslaw.com/thought-leadership/article/stop-that-litigant-the-importance-of-english-anti-suit-injunctions-during-covid-19/ (Accessed: 17 January 2022).

Kharel, A. (2018) 'Doctrinal Legal Research', *SSRN Electronic Journal*, pp. 1–16. doi: 10.2139/ssrn.3130525.

Koursopoulos, A. E. (2017) *A Global Perspective on Anti-Suit Injunctions*. Available at: http://www.keepcalmtalklaw.co.uk/a-global-perspective-on-anti-suit-injunctions/ (Accessed: 17 January 2022).

Mante, J. (2021) 'Understanding legal research in the built environment', in Akoia, J. and Emmanuel Manu (eds) *Secondary Research Methods in the Built Environment*. 1st edn. United Kingdom: Taylor & Francis (Routledge), pp. 106–116. doi: 10.1201/9781003000532-8.

Patel, M. and Patel, N. (2019) 'Exploring Research Methodology', *International Journal of Research and Review*, 6(3), pp. 48–55.

Raphael, T. Q. (2019) *The Anti-Suit Injunction (2nd Edition)*. 2nd Revise, *Oxford University Press*. 2nd Revise. Edited by B. McRae. UK: Oxford University Press (OUP). doi: 10.1093/law/9780198778936.001.0001.

Sharma, A. (2019) *Injunction and its Types, Rajiv Gandhi National University of Law, Patiala*. Available at: https://blog.ipleaders.in/concept-injuction-types/ (Accessed: 27 February 2022).

Sherlyn S. (2021) *What is Doctrinal and Non-Doctrinal Legal Research?* Available at: https://www.linkedin.com/pulse/what-doctrinal-non-doctrinal-legal-research-sherlyn-sharma/ (Accessed: 18 January 2022).

Soren, C. (2021) 'Legal Research Methodology: An Overview', *Journal of Emerging Technologies and Innovative Research (JETIR)*, 8(October), pp. 1–44. doi: 2349-5162.

Tan, D. I. (2021) *Parallel Proceedings, Jus Mundi*. Available at: https://jusmundi.com/en/document/wiki/en-parallel-proceedings (Accessed: 17 January 2022).

Tiwary, S. (2019) *Research Paper on Doctrinal and Non-Doctrinal Methods of Legal Research*. Gurgaon, India.

Vlahna, K., Krasniqi, D., Krasniqi, B., & Vlahna, D. (2020) 'Arbitration and the Importance of the Arbitration Agreement', *European Journal of Educational and Social Sciences*, 5(2), pp. 160–169.

Zainun Ali (2018) *Malaysian Judiciary Malaysian Judiciary, Journal of the Malaysian Judiciary*. Edited by Committee of Malaysian Judicial Academy. Putrajaya, Malaysia: Judicial Appointments Commission.