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Case Note

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Nori Holdings v PJSC Bank and the tale of anti-suit Injunctions

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KEY REFERENCES

- *Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) [2001] OJ L12/1.*
- *Case C-185/07 Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc [2009] EU:C:2009:69, 1 AC 1138.*
- *Council Regulation (EC) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast Regulation) [2012] OJ L 351/1.*
- *Case C-536/13 Gazprom OAO v Lietuvos Respublika [2015] EU:C:2015:31.*
- *Nori Holdings Limited et al v PJSC Bank Okritie Financial Corporation [2018] EWHC 1343 (Comm).*
- *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35.*
- *Donohue v Armco [2001] UKHL 64; [2002] 1 Lloyd's Rep 425.*
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- *UNCITRAL Model Law, Article 16(1).*
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- *Eyewonder, Inc. v Abraham (2010) WL 3528882 (SDNY).*
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- *Article 31(1), Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.*
- *Union Discount Co v Zoller [2002] 1 WLR 1517.*
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- *European Union (Withdrawal) Act 2018.*
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ABSTRACT

This article analyses the issues arising out of the recent High Court judgment of Males J in *Nori Holdings Limited et al v PJSC Bank Okritie Financial Corporation* [2018] EWHC 1343 (Comm). Traditionally, English Courts and practitioners have been steadily opposed to the ECJ driven prohibition of anti-suit injunctions under the Brussels I Regulation regime. The crack to this prohibition created by Advocate General Wathelet in Gazprom was accepted gloriously across the channel. Males J in his judgment, however, critically addressed this opinion and seems to side with the ECJ's interpretation even under the Brussels I Recast Regulation. This article considers *Nori Holdings* in the wider context of the remedies available to a court or tribunal when faced with torpedo or parallel proceedings. Finally, it considers how the situation might change and why this case could be important in a post-Brexit world.

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1. INTRODUCTION

Anti–suit injunctions have been at the centre of the Common and Civil law divide for a number of years. One the one hand, the ECJ has steadily considered court-ordered anti-suit injunctions as contrary to the regime established by Brussels I Regulation,[1] even in cases where an arbitration agreement exists.[2] On the other hand, English courts, practitioners, and academics praise this litigation tool for its effectiveness and simplicity. Especially in cases involving arbitral proceedings—excluded by virtue of Article 1(2)(d) of the Brussels I Recast Regulation[3]—English courts and practitioners have heavily criticized the approach adopted by the ECJ. These diametrically opposed paths of the two legal systems have only rarely gone astray. Advocate General Wathelet in *Gazprom*[4] considered that the inclusion of Recital 12 in Brussels I Recast Regulation changed the field and reinstated anti-suit injunctions in support of arbitration proceedings.[5] While the ECJ itself never addressed this issue, the reasoning of Advocate General Wathelet reignited the discussions on the availability of anti-suit injunctions under Brussels I Recast Regulation. *Nori Holdings v PJSC Bank*, delivered by Mr Justice Males on June 2018, is the latest act in the saga of anti-suit injunctions within the European Union (EU).

Aside for its recentness, *Nori Holdings* is interesting for a number of reasons: (i) first, it provides an overview of the jurisdictional basis and discretional considerations for granting such an injunction, (ii) secondly, Males J openly criticizes the approach of Advocate General Wathelet in *Gazprom*, and (iii) finally, the factual and legal circumstances of the case raise questions on the availability and appropriateness of alternative remedies.

2. *NORI HOLDINGS* BEFORE THE HIGH COURTS OF JUSTICE

2.1 Factual Background

The case brought before the High Court for the grant of a final anti-suit injunction involved three Claimant companies (together the 'Claimants')—two registered in Cyprus and one registered in British Virgin Islands—and the Public Joint-Stock Co Bank, Otkritie Financial Corp, a Russian Bank in temporary administration (the 'PJSB').

The Claimants, as part of a group of companies,[6] concluded three short-term loan agreements with the Bank for $500 million. These agreements were governed by

1 Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) [2001] OJ L12/1.

2 See Case C-185/07 *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc* [2009] EU:C:2009:69, 1 AC 1138.

3 Council Regulation (EC) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast Regulation) [2012] OJ L 351/1.

4 Case C-536/13 *Gazprom OAO v Lietuvos Respublika* [2015] EU:C:2015:31.

5 ibid, Opinion of AG M Wathelet.

6 The Claimants were linked to one another by way of their involvement in a group of companies known as the O1 Group. Two of the Claimants were subsidiaries of an investment holding company, which was part of the O1 Group—O1 Group Limited ('O1 GL')—and the remaining Claimant held shares in a company whose shareholders were also members of the O1 Group.

Russian law and gave exclusive jurisdiction to the Moscow Arbitrazh Court. The loans were secured by pledge agreements with the Claimants and three other companies. Unlike the underlying Loan Agreements, the Pledge Agreements were governed by the law of Cyprus. Each contained an arbitration clause—Clause 19 (the 'Arbitration Agreement')—which provided for arbitration in London under the rules of the London Court of International Arbitration (LCIA).

The existing loan agreements were restructured in August 2017, which resulted in the termination of the existing short-term loan agreements, as well as the termination of the pledge agreements. The Pledge Termination Agreements were governed by the law of Cyprus. Each contained an arbitration clause—Clause 8—referring to the Arbitration Agreement included in the Pledge Agreements.

A few weeks after the restructuring, the Bank entered into temporary administration and argued that it had been the victim of fraud as a result of the restructuring process. This was due to the fact that the $500 million secured loans with bonds were deferred until maturity in 2032. Nevertheless, the Claimants argued that the restructuring was requested by the Bank being in urgent need of liquidity.

2.2 The Proceedings

The Bank commenced proceedings in Russia and in Cyprus on the basis of their argument that the restructuring process had resulted in the defrauding of the Bank. In the Russian proceedings, the Bank claimed, among others, that the transactions were invalid under Russian insolvency law, as they had been concluded with 'unequal consideration'.

The Claimants commenced arbitrations seeking declarations that the pledge agreements had been validly terminated under pledge termination agreements, which incorporated the Pledge Agreement arbitration clause. In these LCIA arbitrations, they requested the tribunal to grant an anti-suit injunction restraining the foreign proceedings.[7]

They also applied for an anti-suit injunction to restrain the further pursuit of the Bank's Russian and Cypriot proceedings against them in breach of the arbitration clauses. The Claimants 'accept, however, that the proceedings will continue in Russia and Cyprus against the other parties sued there and that this will or may mean that the Russian and Cypriot courts have to determine the essential issue between the parties which arises also in the LCIA arbitrations [. . .]'.[8]

2.3 Holding of the Court

Males J partially accepted the claims brought forward by the Claimants. In relation to the anti-suit injunction claim, three elements of the judgment are of particular relevance.

First, Males J considered, on the basis of an objection raised by the defendant Bank, whether the application made to the LCIA arbitral tribunal to issue an anti-suit order ought to be considered as precluding the jurisdiction of the court to render an

7 *Nori Holdings Limited et al v PJSC Bank Okritie Financial Corporation* [2018] EWHC 1343 (Comm) para 24.

8 ibid, para 27.

anti-suit injunction. He rejected such argument, taking into account that there was no application of the defendant Bank to stay the anti-suit proceedings under section 9 of the Arbitration Act 1996. The Bank had not applied for such a stay and it could no longer do so, as it had denied the jurisdiction of the tribunal. Moreover, as argued by the Claimants, the Russian proceedings were in breach of the Arbitration Agreement. In fact, as Males J observed, it would be practically impossible to do otherwise as 'it is hard to see how a defendant to a claim for anti-suit relief could assert that it was entitled to a stay while at the same time denying any breach of the arbitration clause'.[9] Using the explanation provided by Lord Mance in *AES Ust-Kamenogorsk*,[10] Males J found that where no application for a stay under section 9 of the Arbitration Act 1996 has been made, the availability of injunctive relief of the same kind from an arbitral tribunal was not a reason for the court to refuse the injunction.[11]

Secondly, the Bank raised the argument that Cyprus being a Member State of the EU, the court was prohibited in granting an anti-suit injunction as contrary to the EU regime on jurisdiction. Males J agreed on this with the defendant Bank and found that *West Tankers*[12] was still to be considered good law under the Recast Brussels I Regulation. More specifically, Males J openly disagreed and criticized the arguments put forward by Advocate General Wathelet in *Gazprom*.[13] Therefore, as far as the proceedings commenced by the defendant Bank in Cyprus went, no anti-suit injunction could be granted by the court. As noted, however, by Males J, this does not mean that the proceedings in Cyprus would inevitably continue. The court referred, without further elaborating on the details, to the possibility that: (i) the Cypriot courts stay their own proceedings on the basis of Article II(3) of the New York Convention; (ii) the tribunal would grant an anti-suit order itself; or (iii) the Claimants obtain a 'declaration that they are entitled to an indemnity against (1) any costs incurred by them in connection with the Cypriot proceedings and (2) any liability they are held to owe in those proceedings'.[14]

In relation to the proceedings commenced by the Bank in Russia, the court considered whether the court should nevertheless refuse to exercise its discretion on the basis of strong reasons to the contrary or a delay on behalf of the Claimants to request the injunction. Males J considered the authority of *Donohue*[15] and accepted the Claimants' argument that the circumstances of the present case were distinguishable. Under Donohue, the primary consideration for the court was the need to achieve submission of the whole dispute to a single forum. In *Nori Holdings*, though, the existence of the arbitration agreement in the Pledge Agreements and in the Pledge Termination Agreements prohibited such submission. The fragmentation of forums was unavoidable; hence, no strong reasons could be established. In addition,

9 ibid, para 39.

10 *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, paras 58–60.

11 *Nori Holdings v PJSC Bank* (n 7) para 42.

12 *West Tankers* (n 2).

13 *Gazprom OAO* (n 4).

14 *Nori Holdings v PJSC Bank* (n 7) para 101.

15 *Donohue v Armco* [2001] UKHL 64; *Donohue v Armco* [2002] 1 Lloyd's Rep 425.

Males J considered the authorities of *Angelic Grace* and *Ecobank*,[16] but on the basis that the Russian proceedings had not advanced significantly and the Cypriot ones had only begun when the application was made by the Claimants, no delay could be established.

3. *WEST TANKERS* REIGNS SUPREME?

From the outset of the judgment, Males J established the legal framework for granting an anti-suit injunction against a breach of an arbitration agreement. The power of the court is equitable and, now, derives from section 37 of the Senior Courts Act. Considering Lord Mance's statements in *AES Ust Kamenogorsk*, granting such injunction is a separate issue to the existence or commencement of an arbitration: 'When such an injunction is sought, it is for the court to determine whether there is a binding arbitration agreement and whether the pursuit of the foreign proceedings constitutes a breach of the agreement.'[17]

Within the EU, however, after the holding of the European Court of Justice (ECJ) in *West Tankers*,[18] anti-suit injunctions were found to be antithetical to the Brussels I Regulation[19] and the principle of mutual trust between the Member States' legal systems and judicial institutions. The question that has been raised, discussed and debated at the aftermath of the *West Tankers* decision, is whether the Brussels I Recast Regulation[20] has changed the landscape with the inclusion of Recital 12, clarifying the exception of Article 1(2)(d).[21] Some support had been

16 *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309, [2016] 1 WLR 2231.

17 *Nori Holdings v PJSC Bank* (n 7) para 28.

18 *West Tankers* (n 2)

19 As it was then in force as Brussels I Regulation (n 1).

20 Brussels I Recast Regulation (n 3).

21 Recital 12 in the Brussels I Recast Regulation, as follows (with paragraph numbering added):

> 1. This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.
> 2. A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.
> 3. On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with [the New York Convention], which takes precedence over this Regulation.
> 4. This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

provided by Advocate General Wathelet in his opinion on *Gazprom*.[22] In summary, he argued that through Recital 12, the Brussels I Recast Regulation effectively reversed the judgment in *West Tankers*. The Court, however, in the same case did not address this issue and—as expected—distinguished Gazprom on the basis that anti-suit injunctions ordered by arbitral tribunals fall within the exception of Article 1(2)(d) of the Regulation and are, hence, permitted. As Males J noted 'the decision of the court [in Gazprom] is crystal clear that an anti-suit injunction ordered by a court is incompatible with the original Brussels Regulation, while an award of arbitrators to the same effect is not, even when made the object of court proceedings for recognition and enforcement of the award'.[23]

Nori Holdings is the first detailed English judicial treatment of this intricate issue. Males J confirmed the opinion of a majority of scholars and commentators by arguing that the Recast Regulation did not reverse the *West Tankers* prohibition. While doing so, he openly criticized the arguments of Advocate General Wathelet in nine paragraphs of the judgment, summarized as follows:

i. First, considering its technical aspects, Recital 12 merely clarifies how the Recast Regulation should be interpreted; it does not establish a new regime itself. In the same vein, the ECJ in *Gazprom* repeated, reaffirmed, and never contested the prohibition in *West Tankers* regarding court-ordered injunctions. Moreover, the redrafting process does not support the assumption of the Advocate General that Recital 12(2) is based on 'the second option presented by the commission in its impact assessment accompanying its proposal for a recast Regulation, which sought to exclude from the scope of the Regulation any proceedings in which the validity of an arbitration agreement was contested'.[24] The fact is that the proposal to exclude arbitration in its entirety was rejected during the redrafting process, as was the proposal to include arbitration within the Recast regulation. Hence, an argument favouring one or the other construction does not have much weight on the conclusion regarding the effect of Recital 12.
ii. Secondly, and proceeding on the basis of the conclusion above, Recital 12(2) cannot be used as a 'sweeping'[25] mechanism to exclude as a whole any proceedings, where the validity of an arbitration agreement is contested. As Males J noted, if that were to apply on the facts of *West Tankers*, it would mean that the Italian proceedings would be excluded from the Regulation by the mere involvement as a preliminary matter of the validity of the arbitration agreement. Recital 12(2) does not go that far. It merely provides that any decision on the validity of the arbitration agreement—and not any proceeding or decision where the validity of the arbitration agreement is involved—is excluded from the rules on recognition and enforcement.[26] The fact that this preliminary issue is now excluded from

22 *Gazprom OAO* (n 4).
23 *Nori Holdings v PJSC Bank* (n 7) para 83.
24 *Gazprom OAO*, Opinion of AG M Wathelet (n 5) para 125.
25 *Nori Holdings v PJSC Bank* (n 7) para 93.
26 ibid, para 94.

circulation does not take the whole set of proceedings—before the Italian courts in *West Tankers* and before the Cypriot courts in the case at hand—out of the Regulation. One also has to take into account that Recital 12(2) came to clarify the relationship between the Regulation and the New York Convention 1958 *vis-a-vis* the obligation to recognize and give effect to arbitration agreements. In *Wadi Sudr*, the Court of Appeal found that such obligation of the UK as a Member State to the Convention was insufficient to trump the duty to enforce a decision of a court from another Member State on the validity or invalidity of the arbitration agreement. Whilst the decision in *Wadi Sudr* concerned the invalidity of the arbitration agreement, under Recital 12(2) the same is applied in cases like *West Tankers* where the English Courts declared the validity of the agreement. Nevertheless, as Lord Hoffmann suggested in the House of Lords' preliminary reference in *West Tankers*, Article 1(2)(d) should be construed broadly on the basis of the parties' intention to keep the resolution of their dispute out of State Courts and, therefore, out of the system of the Regulation. Lord Hoffmann's argument is enhanced and some support to Advocate General Wathelet's opinion could be provided.

iii. Thirdly, Males J is vividly rejecting Advocate General's argument that the Italian court 'could have been seised on the substance of the case on the basis of that Regulation only from the time when it held that the arbitration agreement was null and void, inoperative or incapable of being performed (which is possible under article II (3) of the 1958 New York Convention)'.[27] Males J noted that 'it is hard to imagine a regime less likely to promote legal certainty and predictability which are among the fundamental objectives of the Regulation. It would play havoc with jurisdictional conflicts between courts which depend on knowing which court is first seised.'[28]

This, however, is exactly what is envisaged by Recital 12. The fact that Recital 12(2) excludes the circulation of a judgment on the validity of the arbitration agreement does not necessarily mean that a court of a Member State, which is also a Contracting State to the New York Convention, does not have an obligation under the latter to recognize the arbitration agreement. In fact, the opposite is true. As argued by Betancourt, Recital 12(3) in conjunction with Article 73(2) of the recast Regulation suggests that 'the New York Convention takes precedence over such a Regulation, thereby inferring that the former is hierarchically superior to the latter'.[29] It is, therefore, possible that the obligation under the New York Convention takes precedence in relation to the validity of the arbitration agreement,

27 *Gazprom OAO*, Opinion of AG M Wathelet (n 5) para 133.

28 *Nori Holdings v PJSC Bank* (n 7) para 97.

29 C Betancourt, 'How Can We Tackle the Problem of Non-binding Judgments as to the Validity of an International Arbitration Agreement Within the Context of EU Law?', Kluwer Arbitration Blog, 16th May 2018 <http://arbitrationblog.kluwerarbitration.com/2018/05/16/can-tackle-problem-non-binding-judgments-validity-international-arbitration-agreement-within-context-eu-law/> accessed 23 August 2018.

and if the State court were to find that agreement invalid, then it would seize on the substance of the case.

iv. Fourthly, he briefly referred to the argument on the basis of Recital 12(4), rejecting it altogether. In his opinion, 'paragraph (4) confirms the decision in Marc Rich (Case C-190/89) [1992] 1 Lloyd's Rep 342 that court proceedings ancillary to arbitration, for example for the appointment of an arbitrator, fall within the "arbitration" exception in Article 1.2(d) and thus outside the scope of the Regulation'. Therefore, it has nothing to do with anti-suit injunctions.

v. Finally, neither Advocate General Wathelet nor Males J referred to the argument of ECJ in *West Tankers* that one has to look further than the primary object of the proceedings to determine whether they are included or excluded.[30] Proceedings related to anti-suit injunctions are excluded from the Regulation as their primary object is arbitration related. The ECJ in *West Tankers*, however, went further than that and examined the effect of these proceedings on other proceedings, which fell within the regulation. The underlying argument is one of effective application of the Regulation—the so-called *effet utile*—which would be frustrated if there was no such examination. It has been argued that in *Gazprom*, the ECJ did not use such criterion and merely referred to the non-application of the principle of mutual trust due to the nature of the anti-suit injunction as an arbitral one. On that basis, it was deemed unnecessary to explore arguments on the basis of the *effet utile* of the Regulation. If, however, one were to take the argument in *West Tankers* at its face value, the *effet utile* of the regulation in relation to proceedings that fall within the regulation would again be frustrated. The fact that the mutual trust is not engaged because a Member State's court is not engaged is separate to the question of the effective application of the Regulation. This paradox shows that the logic of the ECJ in *West Tankers* is misplaced as it ignores the nature of an anti-suit injunction as an *in personam* order.

4. ROOM FOR ALTERNATIVE REMEDIES?

As noted above, Males J referred to some alternative solutions regarding the proceedings in Cyprus: (i) an order by the tribunal restraining the proceedings and (ii) a declaration that they are entitled to an indemnity against the costs and a possible award of the Cypriot proceedings. Each of these alternatives is considered in turn.

4.1 Arbitral Anti-suit Order

Instead of seeking an anti-suit injunction from the courts, the Claimants—according to Males J—could seek an equivalent order from the tribunal, already constituted under the auspices of the LCIA. He seems to suggest that such order would take the form of an award, which could be enforced through the New York Convention.[31] This happened in *Gazprom*, where the tribunal, operating under the rules of the

30 Case C-190/89 *Marc Rich & Co. AG v Società Italiana Impianti PA* [1991] ECR I-03855.

31 *Nori Holdings v PJSC Bank* (n 7) para 100.

Arbitration Institute of the Stockholm Chamber of Commerce (SCC), issued a partial award ordering Lithuania to withdraw certain of its court claims.[32] This is not, however, the only path a tribunal can take. In light of the jurisdictional power to intervene and protect its own jurisdiction, two possible paths can be envisaged.[33]

First, a tribunal could grant the order as an interim measure on the basis the *lex arbitri* and the arbitration rules to be applicable. This is an expression of the tribunal's general power to regulate the proceedings in the manner it deems most appropriate. The purpose of such orders is to regulate the adverse effects of parallel proceedings up to the point that the tribunal renders a final award.[34] Under section 39 of the English Arbitration Act, if the parties have so agreed—expressly or by way of reference to the rules of an institution—the tribunal shall have 'the power to order on a provisional basis any relief which it would have power to grant in a final award'. The advantage of granting such orders as interim measures is that they provide an immediate response to the realized or threatened aggravation of the tribunal's jurisdiction. Their nature is preventive rather that corrective, aiming to ensure that the tribunal will be able to carry out its function. Their real effectiveness, however, hinges upon the ways that they can be enforced, either directly—as partial awards—or indirectly—with the assistance of the courts of the seat.[35] If the order is issued in the form of an award, *Gazprom* clarifies the situation and the order can be directly enforced, even within the EU. If, however, the order granted by the tribunal is not considered as a partial award, the only way to enforce it is to seek the assistance of the courts of the seat of arbitration. In this context, section 41(5) English Arbitration Act 1996 allows the tribunal to grant a peremptory—also called an 'unless'—order setting a final deadline for the defaulting party to comply with the original direction of the tribunal, including not commencing litigation proceedings. If that party fails to comply, then sections 41(6)–(7) set out a number of sanctions which the tribunal is entitled to apply, including adverse inferences, a cost allocation order, and an award in default. Following such order, section 42(1) empowers the courts to enforce it, namely to use their powers of imperium against a possible further breach of the order by the defaulting party. The significance here is that the result of such continuing breach is that the defaulting party will be found in contempt of court.[36] Such power

32 SCC Arbitration No V (125/2011), *Gazprom OAO v Ministry of Energy of the Republic of Lithuania*; *Gazprom OAO v Ministry of Energy of the Republic of Lithuania*, SCC Case No 125/2011 (Final Award), 31 July 2012 <http://arbitrations.ru/files/articles/uploaded/Gazprom_v_Lithuania_Final_Award_SCC.pdf> accessed 29 July 2019.

33 OL Mosimann, *Anti-Suit Injunctions in International Commercial Arbitration* (Eleven International Publishing 2010) 153.

34 O Vishnevskaya, 'Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?' (2015) 32 J Int'l Arb 173; E Gaillard and J Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 395.

35 See generally N Blackaby and others, *Redfern & Hunter on International Commercial Arbitration* (6th edn, OUP 2015) 316; G Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2441; Berti S and others, *International Arbitration in Switzerland: An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute* (Kluwer Law International 2000) art 183.

36 English Arbitration Act 1996, s 42(1); *Emmott v Michael Wilson & Partners* [2009] EWHC 1 (Comm) (court should not 'act as a rubber stamp' for peremptory orders made by tribunal; however, court should not 'review the decision made by the tribunal and consider whether the tribunal ought to have made the

is linked with procedural matters. It is submitted, though, that an order of the kind discussed can be granted exactly on the basis of the tribunal's powers to regulate the arbitral procedure.

Secondly, leaving aside the procedural framework of interim measures and focusing on the nature of the obligation under the arbitration agreement, the arbitral tribunal can grant relief against a substantive wrong, ie a breach of contract. The literature on the topic vaguely refers to the arbitration agreement itself and the doctrine of competence-competence as a legal basis.[37] To make this reference more specific, the legal basis is the negative obligation undertaken by the parties in their arbitration agreement.[38] In the words of Lord Mance in *AES*, 'the (often silent) concomitant is that neither party will seek such relief in any other forum'.[39] Such obligation is a contractual one, and, if breached, it can be remedied like any other contractual provision. Even though the arbitration agreement is separable from the main contract, it is not completely detached from it.[40] Conceptually, an anti-suit order by the tribunal is nothing more than a remedy against the breach of this negative covenant of the parties. The injunctive order in this instance comes into form of an order 'not to do' or 'not to continue doing' something, ie in the form of a prohibitory injunction. Under section 48 of the English Arbitration Act, the tribunal expressly has the remedial power to order an injunction in the form of ordering 'a party to do or refrain from doing anything'. Such an order under English law is a stand-alone equitable remedy for negative obligations 'not to do something'[41] and it is available even if damages are adequate and available for the innocent party.[42] In similar circumstances of contractual obligations 'not to do something', Civil law jurisdictions consider the remedy of specific performance as the primary one in case of a contractual breach.[43] It is only when this primary remedy is unavailable, in law or in fact, that damages are granted.[44] For civil law traditions, an anti-suit order by the tribunal should be

order in question'); DSJ Sutton and others, *Russell on Arbitration* (24th edn, Sweet & Maxwell 2015); MJ Mustill and SC Boyd, *Commercial Arbitration* (2nd edn, Butterworths 1989) and MJ Mustill and SC Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition* (Butterworths 2001).

37 E Gaillard, 'Anti-suit Injunctions Issued by Arbitrators', in A Van den Berg (ed), *International Arbitration 2006: Back to Basics?* (Kluwer Law International 2007) 229; F Bachand, 'The UNCITRAL Model Law's Take on Anti-suit Injunctions, in Anti-suit Injunctions in International Arbitration' in E Gaillard (ed), *Anti-suit Injunctions in International Arbitration: IAI Seminar, Paris, November 21, 2003* (IAI Series on International Arbitration, Juris Publishing 2005) 102.

38 The construction here does not refer to the power of the courts in certain jurisdictions (ie the USA under the s 4 of the Federal Arbitration Act) to compel performance of the positive obligation of the arbitration agreement by ordering the party to appear before the tribunal.

39 *AES Ust-Kamenogorsk* (n 10).

40 *Fiona Trust and Holding Corporation v Privalov* (also known as *Premium Nafta Products Ltd v Fili Shipping Co Ltd*) [2007] UKHL 40, [2007] 4 All ER 951, paras 17–18 (Lord Hoffmann); UNCITRAL Model Law, art 16(1); Born (n 35) 354; Blackaby and others (n 35) 104.

41 See *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, [1997] 2 WLR 898; *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] 3 All ER 297, para 11 (Lord Hoffmann); A Burrows, 'Judicial Remedies' in A Burrows (ed), *English Private Law* (3rd edn, OUP 2013) paras 21.202–21.203.

42 HG Beale, AS Burrows and J Chitty, *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) [26-065].

43 B Markesinis, H Unberath and A Johnston, *The German Law of Contract: A Comparative Treatise* (2nd edn, Hart Publishing 2006) 388.

44 ibid 398.

nothing more than a remedy of specific performance of the arbitration agreement that has been breached by a recalcitrant party. [45]

Enforcing a remedy of the second type is relatively easier, as it will be encompassed in the final or partial award of the tribunal. As such, it will be entitled to recognition and enforcement via the New York Convention. Under Article V of that Convention, there is a list of grounds on which to refuse the enforcement of the award. There are two grounds that could be utilized in this context: (i) first, under Article V(1)(d) NYC 1958[46] that the tribunal exceeding its mandate by ordering the defendant to stop foreign proceedings. The argument behind this proposition is that the tribunal is not authorized to sanction the party. Courts, however, have repeatedly upheld that tribunals have an inherent authority to issue interim or provisional measures,[47] as well as to grant injunctive or declaratory relief[48]; (ii) secondly, under Article V(2)(b) that the enforcement of a partial award incorporating an anti-suit order is contrary to the public policy of the recognition forum.[49] Although this is a matter of each recognizing state, analysing the issue under the overriding objective of the NYC 1958—the facilitation of cross-border recognition and enforcement of arbitral awards—provides the context of the argument against such objection. The meaning of 'public policy' should be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[50] Although not expressly stated in the black letter of this article, having regard to the purpose of the Convention, 'public policy' should be confined only to flagrant violations of the core notions of the social, political, and economic structure of a given state. The argument against anti-suit orders is that they impede the jurisdiction of the foreign courts that have seized the dispute for which an arbitration has commenced. It is submitted that even in the context of court-ordered anti-suit injunctions, courts have found that they do not impede the notion of public policy.[51] If one takes into account the private nature of arbitral tribunals and the *in personam* effects against the recalcitrant party, the argument against

45 For example, according to s 890 I ZPO, execution in such cases is by court decree issuing fines or ordering the imprisonment of the debtor. See also Gaillard (n 37) 229.

46 The text provides for non-recognition or non-enforcement of an award where '[. . .] the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place'.

47 Born (n 35) 3305; *CE Int'l Res Holdings v SA Minerals Ltd P'ship* (2013) WL 2661037 (SDNY); *First Option Mortg., LLC v S & S Fin. Mortg. Corp.* (2013), 743 SE2d 574; *Pukuafu Indad v Newmont Indonesia Ltd* [2012] SGHC 187 (Singapore High Court) (recognizing arbitrators' power to issue interim relief).

48 *Totes Isotoner Corp. v Int'l Chem Workers Union Council* (2008) 532 F3d 405, 410 (6th Cir) (Recognizing arbitrators' authority to grant quasi-injunctive relief in the form of cease and desist orders); *Eyewonder, Inc. v Abraham* (2010) WL 3528882 (SDNY) (arbitrator's award of injunctive relief was not excess of authority; parties' agreement authorized such relief); RM Merkin and L Flannery, *Arbitration Act 1996* (4th edn, Informa 2009) 121–22.

49 *Re the Enforcement of an English Anti-Suit Injunction Case* [1997] ILPr 320 (Dusseldorf Regional Court of Appeal).

50 art 31(1), Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

51 *Zone Brands International INC v In Zone Brands Europe* (2009) Cass Civ 1re, n 08-16.369 et 08-16.549; *Rintin Corp., S.A. v. Domar, Ltd.* (2005) 374 F Supp 2d 1165 (SD Fla), affirmed 476 F 3d 1254 (11th Cir 2007); *Telenor Mobile Communications AS v. Storm LLC* (2007) 524 F Supp 2d 332 (SDNY 2007), affirmed 584 F 3d 396 (2d Cir 2009); J Bédard, 'Chapter 14: Anti-suit Injunctions in International

their enforcement becomes weaker. Furthermore, even if one were to consider the conclusions of the ECJ in *West Tankers*[52] in the context of the EU Jurisdiction regime,[53] the same Court in *Gazprom*[54] distinguished the case of arbitral anti-suit orders since arbitral tribunals and courts are not of the same standing in this regard, hence there is no room for applying a mutual trust exclusion.

4.2 Damages

The second alternative solution contemplated by Male J is a 'declaration that they are entitled to an indemnity against (1) any costs incurred by them in connection with the Cypriot proceedings and (2) any liability they are held to owe in those proceedings'.[55] That raises the issue of damages as a remedy against the breach of an arbitration agreement. The jurisdictional basis for such a solution is the same as above. As any other contractual breach, the breach of the arbitration agreement can be remedied by an award of damages. Under English law, this is now uncontested and courts have accepted this right in multiple occasions in the context of exclusive jurisdiction[56] and arbitration agreements.[57]

Even if the court or tribunal has jurisdiction to grant such remedy, one has to examine the various heads and the issue of quantifying the damages. Males J suggests that the Claimants could easily obtain a declaration for an indemnity covering both the legal costs and a possible award on damages that the foreign court might render. He also refers to the authority of the *Alexandros T*. In that case, the Court of Appeal held that the damages can amount to the extent necessary to reverse the adverse effects of having to litigate in a non-chosen forum, including sums that the foreign court would oblige the party to pay.[58] The objection usually raised against such damages is that in reality, they constitute a clawback of the judgment of the foreign court. It is important that the English judgment was delivered before the Greek courts decided on jurisdiction, hence being a pre-emptive strike against the recalcitrant party.[59] Had the reverse been the case, the issue would be one of recognizing the judgment under the Brussels I Regulation.

In the present case, as was the case in *Alexandros T*,[60] it seems that the parties have entered into a contractual indemnity clause, which can be used as a basis for

Arbitration' in L Shore, TH Cheng and others (eds), *International Arbitration in the United States* (Kluwer Law International 2018) 310–11.

52 *West Tankers* (n 2).

53 As it was then in force as Brussels I Regulation (n 1). The situation has not yet arisen under Brussels I Recast Regulation (n 3).

54 *Gazprom OAO* (n 4).

55 *Nori Holdings v PJSC Bank* (n 7) para 101.

56 *Union Discount Co v Zoller* [2002] 1 WLR 1517; *Donohue* (n 15); Despite an initial hostility against the remedy—Steyn LJ in *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588 (EWCA) held that damages are an inherently ineffective remedy in cases of breach of an exclusive jurisdiction agreement—courts have readily awarded damages for such breaches.

57 *West Tankers Inc v Allianz SpA & Anor* [2012] EWHC 854 (Comm).

58 *Starlight Shipping Co v Allianz Marine and Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 101 delivered after the case returned to the Court of Appeal from the Supreme Court; *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2013] UKSC 70, [2014] 1 All ER 590.

59 R Fentiman, *International Commercial Litigation* (2nd edn, OUP 2015) 116.

60 *Starlight Shipping* (n 58). It is clearly established that the party in breach of an exclusive jurisdiction agreement is liable to provide damages for the costs incurred and any other monies the non-chosen court

the Claimants to receive both the costs and any possible awards related to the state court proceedings. However, in the case that no such indemnity clause existed, at least two objections could be raised. First, that the amount of realized damages is nominal and, secondly, that the examination of such damages as being incidental or prospective involves a high degree of speculation.

5. POST-BREXIT CONSIDERATIONS

Considering the post-Brexit ramifications on international commercial litigation in the UK, one has to examine the effect of the interpretation given by Males J on the scope of the Brussels I Recast Regulation. Could *Nori Holdings* be of any importance depending on the post-Brexit legal framework and Brexit option followed?

Despite the highly speculative nature of the inquiry—as the Brexit negotiations scene changes rapidly and the options are still in open—there are at least some observations to be made. This inquiry is based on two separate but interconnected issues: (i) the nature of the relationship between the EU and the UK after Brexit in relation to the matters now regulated by the Brussels I Recast Regulation, and (ii) the effect of the existing or new case law from the ECJ, as well as from English courts on the Brussels I Regulations.

First, on a 'hard Brexit' scenario—that is, if no agreement is reached by October 2019 or the end of the transition period[61]—both issues are attractively simple to be dealt with at first sight. The relationship would be one of separation and lack of reciprocity. EU Regulations—including the Brussels I Recast Regulation—would no longer be applicable reciprocally in the UK[62] and the existing case law on these instruments would not play any role.

One, however, should start from an opposite point of departure. Section 3(1) of the European Union (Withdrawal) Act 2018 provides that 'Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day'. In addition, under Section 6(7), '[. . .] "retained EU case law" means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before exit day'. Such pre-exit day ECJ case law would continue to be a binding precedent as a matter of domestic law, and the principle of supremacy will still apply to that law (section 5(2)). The government, however, retains the right to negate this domestication by simply revoking any particular EU law instruments.[63] This is scheduled to take place along with the unilateral adoption of the 2005 Hague Convention[64] via the Civil Jurisdiction and Judgments

awards in this regard. See also S Dutson, 'Breach of an Arbitration or Exclusive Jurisdiction Clause: The Legal Remedies If It Continues' (2000) 16 Arbitration International 89.

61 The EU and the UK Government are in the process of negotiating a transition period after the lapse of that deadline. In the Commission's Draft Withdrawal Agreement, published on February 2018, the transition period is to last until 31 December 2020 and until that time, the Recast Brussels Regulation shall apply in respect of the recognition and/or enforcement of judgments given.

62 See European Union Committee, *Brexit: Justice for Families, Individuals and Businesses?* (2016–17, HL 134) paras 46–48.

63 See European Union (Withdrawal) Act 2018, s 7(2)(a) providing that 'Retained direct principal EU legislation cannot be modified by any primary or subordinate legislation other than: (a) an Act of Parliament.'

64 The Hague Convention of 30 June 2005 on Choice of Court Agreements. The UK is now part of the 2005 Hague Convention as a Member State of the EU, but the Convention is not applicable to the extent

(Amendment) (EU Exit) Regulations 2019.[65] This Statutory Instrument fully implements the international treaty obligations under the 2005 Hague Convention as an independent contracting party and provides in paragraph 89 that the 'Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) is revoked'.

This means that the UK will return to the application of common law principles applicable now in relation to third, non-EU Member States in addition to the 2005 Hague Convention obligations. The common law rules will apply for all parallel proceedings regardless of whether they are commenced within or outside of the EU.[66] The retraction of the EU regime on cross-border litigation also means that the ECJ driven prohibition on anti-suit injunctions will belong to the past. English Courts will be able to grant anti-suit injunctions despite the existence of the so-called torpedo proceedings within the EU. Such injunctions rendered by English courts would no longer be able to be stopped by EU Member State courts due to their *in personam* nature. Each State, however, will determine the enforceability of such injunctions—as well as English judgments on the merits to the extent that the 2005 Hague Convention does not apply—on the basis of its own domestic rules; most importantly, ones of public policy.

In relation to the second issue, since the Brussels I Recast Regulation is revoked, any case law would not be retained. It is, however, conceivable and support can be given on the basis of section 6(2) of the European Union (Withdrawal) Act 2018[67] that the UK Courts would still have regard to what the ECJ or possible recast Regulations might say on the matter after the exit day. This regard is merely an expression of pragmatism in recognizing the effect that these instruments had for a number of years. In this context, *Norri Holdings* and the interpretation of Males J would not be of importance but for the obiter references to the alternative remedies analysed above.

Secondly, in case of an agreement-based solution, the actual scope of availability for anti-suit injunctions, either in support of litigation or in support of arbitration proceedings, would depend on the nature and terms of the solution adopted. One of these

that the Brussels I Recast Regulation applies. The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005 (EU Exit) Regulations 2018 (SI 2018/1124) provides for the implementation in the UK of the Convention.

See also European Union Committee (n 62) para 12; R Wessels, 'Consequences of Brexit for International Agreements Concluded by the EU and Its Member States' para 3.1 <https://www.utwente.nl/en/bms/pa/research/wessel/wessel133.pdf> accessed 24 June 2019.

65 Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479). See on the amendments the detailed analysis of A Dickinson, 'A View from the Edge' (2019) 25 Oxford Legal Studies Research Paper <https://ssrn.com/abstract=3356549 or http://dx.doi.org/10.2139/ssrn.3356549>.

66 European Union Committee (n 62) para 102;
P Rogerson, 'After BREXIT: Is International Commercial Litigation in London Doomed?' (*New Law Journal*, 16 December 2016) <https://www.newlawjournal.co.uk/content/litigation-post-brexit-0 accessed 29 July 2019.

67 European Union (Withdrawal) Act 2018, s 6(2) provides that '[. . .] a court or tribunal may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal'.

solutions would be for the UK to enter into a separate treaty with the EU, essentially, remaining bound by the Recast Brussels Regulation, similar to that agreed by Denmark. Such separate agreement would need to be negotiated and agreed upon by the UK and the EU, something which not only is time consuming but also seems unrealistic given that the matters addressed are not a priority for either side in the 'break-up' negotiations. This would mean that the UK would be bound by a piece of secondary EU legislation that should be interpreted by the ECJ. The UK, however, would no longer have the ability to submit a preliminary reference for the interpretation. In addition, such dependence on the ECJ would be contrary to the primary aims of the European Union (Withdrawal) Act 2018 as announced by the government.[68] Another solution would be for the UK to enter into a reciprocal arrangement for the civil and commercial jurisdiction issues in a similar format as the Lugano Convention. In this scenario, this new regime will also regulate the issue of anti-suit injunctions and, most likely, in a similar manner as the Brussels I Regulation. *Norri Holdings* could prove important in such a situation; not only by providing arguments from either side at the negotiating table, but also for the actual availability of anti-suit injunctions in relation to proceedings involving EU Member States.

Painting the post-Brexit landscape of civil and commercial cross-border litigation can only be done in broad brush strokes. The preparation for a unilateral—and possibly interim—solution with the adoption of the 2005 Hague Convention shows that the UK is willing to proceed in a way that foregoes the advantages of reciprocal recognition and enforcement of judgments but also retains some of the procedural benefits and characteristics of English commercial litigation that were curtailed as a result of the EU regulatory regime.

6. CONCLUDING REMARKS

Nori Holdings's relevance is not limited to its being one of the most recent cases from the High Court of Justice of England and Wales involving the grant of an anti-suit injunction in support of arbitration proceedings. Its interest, as highlighted above, is much broader. First, it is the first judgment with a direct and extensive consideration of Recital 12 of the Brussels I Recast Regulation and the opinion of Advocate General Wathelet in *Gazprom.* Males J openly criticized the approach taken by the Advocate General, and although he did not express an opinion as to the merits of the EU prohibition on anti-suit injunctions, he found that *West Tankers* remains good law under the Brussels I Recast Regulation. Secondly, in his consideration of the availability of an anti-suit in the present case, Males J referred—albeit briefly—to the possibility of the alternative remedies of an arbitral anti-suit order and an order on damages. Indeed, and as analysed above, these remedies are available and their proper combination from the parties and/or the tribunal itself can prove a useful alternative to court-ordered anti-suit injunctions. Finally, *Nori Holdings* could have an impact in a post-Brexit world.

The tale of anti-suit injunctions as a legal method to regulate parallel or torpedo proceedings has not reached its end; rather, it is about to enter into a new chapter.

68 European Union (Withdrawal) Act 2018, s 6(1) provides that 'A court or tribunal: (a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and (b) cannot refer any matter to the European Court on or after exit day'.