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First Anti-Anti-Suit Injunction in Germany: The Costs for International Arbitration

Greta Niehaus (Humboldt University of Berlin) · Sunday, February 28th, 2021

For more than a decade, it was evident that anti-suit injunctions are not permitted in the European Union. Recently, however, there have been developments that could signal the beginning of a new dawn. In late 2019, the Higher Regional Court Munich confirmed the first anti-anti-suit injunction in German history. The court prohibited Continental from further pursuing an anti-suit injunction request against Nokia in the US. Promptly, another anti-anti-suit injunction followed in 2020, issued by the French Tribunal de Grande Instance. Given that the UK – the only country in Europe that regularly orders anti-suit injunctions – has now left the EU, it is now free to grant anti-suit injunctions towards other European countries. This begs the question – will the EU countries take a U-turn when it comes to anti-suit injunctions?

Following a previously related blog post from the perspective of patent law, this post focuses on the consequences of these recent developments for international arbitration. Anti-suit injunctions will most likely become more common in the European Union, but criticism that made the EU countries wary of them in the first place will still continue to loom large.

Background: What Are (Anti-)Anti-Suit Injunctions?

An invention of English courts in the fifteenth century, anti-suit injunctions are traditionally absent from civil law jurisdictions. Today, the use of anti-suit injunctions still varies among countries, and so does their reputation.

To enforce an arbitration agreement effectively, the arbitral tribunal needs protection mechanisms in place against risks that threaten the integrity of arbitral proceedings. One of those risks is parallel proceedings. To protect parties from such a risk, a court or arbitral tribunal can issue an anti-suit injunction. This prevents a party from commencing or continuing a suit in another forum.

However, an anti-anti-suit injunction conversely prevents the other party from pursuing an anti-suit injunction in another proceeding. Since both anti-suit injunctions and anti-anti-suit injunctions interfere with principles of international law and coordinative rules, it is questionable whether these remedies are appropriate.

Although courts and arbitral tribunals theoretically have the power to order anti-suit injunctions, there are different views as to their nature and legal bases for granting them. However, anti-suit

injunctions are characterized as a provisional form of relief, which corresponds to interim measures. The authority to grant those interim measures is usually determined by the arbitration agreement, the *lex arbitri*, and the applicable procedural rules.

The Decision of the Higher Regional Court Munich Explained

In 2019, Nokia filed a series of patent infringement cases based on various 3G and 4G essential patents against automobile manufacturer Daimler and Continental as one of Daimler's suppliers. Continental and Daimler in turn hoped to protect themselves through an anti-suit injunction from the US District Court for the Northern District of California. However, the Regional Court Munich banned the parties from applying for those measures, thereby ordering the first anti-anti-suit injunction in Germany (LG München I, decision of 2 October 2019, case no. 21 O 9333/19).

Initially, it seemed like the Higher Regional Court would not uphold the first-instance decision after Continental appealed it. Continental argued that an anti-anti-suit injunction would just be as illegal as the anti-suit injunction itself since, according to German law, a party cannot be prohibited from conducting a lawsuit. This did not constitute a far-fetched argument because anti-suit injunctions have indeed never been granted in German history.

Nevertheless, the Higher Regional Court did confirm the first-instance decision: German law does not provide the courts with a mechanism that could deny a party from pursuing its claims in court (OLG München, decision of 12 December 2019, case no. 6 U 5042/19). However, a comparable constraint such as an anti-suit injunction could follow from contractual obligations or a previous tort. The anti-suit injunction in the present case would impair the rights conveyed by the blocked patents, qualifying as a tort under sec. 823(1) German Civil Code. According to sec. 1004(1) sentence 2 German Civil Code, this interference needs to be removed.

Since Continental can no longer challenge the Higher Regional Court's ruling under German law, this decision is also final.

Evaluation: Why Is This Important?

To understand why this decision is a breakthrough for court practices in Europe, one has to take a look at how reluctant European courts have been to award anti-suit injunctions.

As stated, anti-suit injunctions are usually issued in common law jurisdictions. Therefore, in Europe, they can mostly be found in the United Kingdom. However, the Court of Justice of the European Union (CJEU) has ruled against an anti-suit injunction imposed by a British court (Turner v. Grovit, 2004). The Court declared that such orders were an "interference with the authority of the foreign court," and that they were incompatible with the Brussels I Regulation (Regulation (EU) 1215/2012).

In West Tankers Inc v. Allianz SpA (Case C-185/07) [2009] AC 1138), the CJEU ruled again that an anti-suit injunction directed at an EU Member State court's proceedings, while not itself within the scope of the Regulation, undermines the effectiveness of the Regulation. Therefore, it shall be prohibited. These are the reasons why courts have been reluctant to issue any anti-suit injunctions.

However, at the beginning of 2020, the Higher Regional Court Munich was joined by the French Tribunal de Grande Instance, with the latter issuing an anti-anti-suit injunction in the case of IPCom v. Lenovo. In this case, the court directed Lenovo to withdraw a requested anti-suit injunction in the United States (Northern District of California).

These two decisions of the Higher Regional Court Munich and of the French Tribunal de Grande Instance constitute a remarkable shift from the above shown European aversion against extraterritoriality and the interference with judicial proceedings abroad. German and French courts now seem to use the same "weapons" as the Anglo-Saxon courts.

This is particularly reflected in the reasoning of the Regional Court Munich that anti-suit injunctions could not be illegal under public international law because Anglo-Saxon courts have been issuing them for years. This conclusion can be put on record even though the Higher Regional Court Munich found a more formal excuse, namely that an anti-anti-suit injunction is a mere reflex to an anti-suit injunction.

What's Next? Implications for International Arbitration

Taking into account the aforementioned paradigm shift, it remains to be seen how this will affect the European court practice and, as a next step, the international arbitration practice. Given the *obiter dicta* of a well-respected German court and a French High court, it is not an impossibility that anti-suit injunctions could be granted by other European courts in the future. As a consequence, although the anti-anti-suit injunctions have been granted by courts and not by arbitral tribunals, it is conceivable that the latter will be affected by these developments, too.

The following will lay out three possible consequences for international arbitration that, in the view of this author, could materialise in the future.

Firstly, as briefly mentioned above, other European courts could be inspired by their German and French counterparts, and somewhere down the line could start embracing first anti-anti suit injunctions, and then also anti-suit injunctions. Both mechanisms are anyway subject to the same principle. This could then lead to the situation in which the courts on the Old Continent are showcasing acceptance of the so-called "anti-arbitration" injunctions that restrain arbitration proceedings. In any case, both have been accepted by English courts in the past, while Brexit and the accompanied non-applicability of the Brussels Recast Regulation (Regulation 1215/2012) will now make those measures generally more common in Europe. This can be dangerous in a sense that this form of anti-suit injunctions constitutes a manner in which courts can exercise their jurisdiction to threaten arbitral tribunals' authority to rule on their own jurisdiction – the competence-competence principle as one of the backbones of arbitration. It would be an exercise of jurisdiction that confiscates contractual rights by blocking access to an agreed forum.

Secondly, in the case of anti-suit injunctions becoming more common in Europe, arbitral tribunals might feel encouraged to turn to anti-suit injunctions more frequently in order to restrain parallel court proceedings. Although this might help to realize an arbitration agreement between parties, it is often argued that it constitutes a radical mean and a one-sided approach to resolve conflicts of jurisdiction. Since arbitration is based on consent, this is one of the reasons why anti-suit injunctions are heavily criticized. However, this does not mean that they should always be judged with prejudice. Because arbitration is based on consent, a party that decides to disregard an

arbitration agreement by turning to a state court, would be acting in bad faith. There is no reason to deny the arbitral tribunal the right to order the appropriate remedy.

And thirdly, even an anti-anti-suit injunction might not be the end of the story. The aim of the European courts to defend their jurisdiction, such as in the French and German decisions, is certainly understandable. Yet, what stops the US court from issuing an "anti-anti-anti-suit injunction"? The exchange of anti-suit injunctions will surely have its cost, with the international arbitration incurring its fair share.

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