

2009

Does National Court Involvement Undermine the International Arbitration Processes?

Julian D M Lew

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Lew, Julian D M. "Does National Court Involvement Undermine the International Arbitration Processes?" American University International Law Review 24, no. 3 (2009): 489-537.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

DOES NATIONAL COURT INVOLVEMENT UNDERMINE THE INTERNATIONAL ARBITRATION PROCESS? *

PROFESSOR JULIAN D M LEW QC**

INTRODUCTION	490
I. FUNDAMENTAL CHARACTERISTICS OF INTERNATIONAL ARBITRATION.....	490
II. FORMS OF COURT INVOLVEMENT	493
III. THE STAGES AT WHICH COURTS CAN AND DO BECOME INVOLVED	496
A. PRIOR TO THE ESTABLISHMENT OF A TRIBUNAL	496
B. AT THE COMMENCEMENT OF THE ARBITRATION.....	497
C. DURING THE ARBITRATION PROCESS	497
D. DURING THE ENFORCEMENT STAGE	498
IV. INJUNCTIONS INVOLVING ARBITRATION	498
A. ANTI-ARBITRATION INJUNCTIONS	499
1. England.....	500
2. The United States.....	506
3. Switzerland	507
4. France	508
5. Sweden.....	509
6. Should National Courts Grant Anti-Arbitration Injunctions?	509
V. ANTI-SUIT INJUNCTIONS.....	514
A. SHOULD ARBITRATION CLAUSES BE TREATED DIFFERENTLY FROM JURISDICTION CLAUSES?	519
B. PRO-ARBITRATION ORDERS	526

* This Article is based on Professor Lew's remarks in the Thelen Reid Lecture at American University, Washington College of Law (Oct. 15, 2007).

** Arbitrator and Barrister, 20 Essex Street, Head of School of International Arbitration, Centre for Commercial Law Studies, Queen Mary, University of London. I am grateful to Dr Harris Bor, Barrister, SJ Berwin LLP, London, for his assistance with the preparation of this paper.

1. When Should Courts Compel Parties to Arbitrate?.....	526
2. How Far Should Such Orders Reach: To Include Third Parties Allegedly Covered by the Arbitration Agreement?.....	531
3. What Other Options are There to Compel Arbitration Other than by Injunction?.....	534
CONCLUSIONS	535

INTRODUCTION

National court involvement in international arbitration is a fact of life as prevalent as the weather. National courts become involved in arbitration for a whole host of reasons, but do so primarily because national laws are permissive and parties invite or encourage them to do so.¹ But what is the nature of such involvement? Does it complement or impede the arbitration process? Is there a place for any court involvement at all in the system referred to as international arbitration?

The aim of this Article is to discuss these issues. First, this Article will discuss the fundamental characteristics of international arbitration as it co-exists with national courts. Next, this Article will survey the different stages of national court involvement in the international arbitration process and the forms of court involvement. Further, this Article will analyze court awarded injunctions that act to support of the international arbitration process. Lastly, this Article will conclude with an assessment of whether court involvement is helpful to the international arbitration process.

I. FUNDAMENTAL CHARACTERISTICS OF INTERNATIONAL ARBITRATION

There are four essential characteristics of international arbitration. First, international arbitration has an autonomous character and exists in a domain independent of and separate from national laws

1. See Richard Allan Horning, *Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules (in Toto): Article 46*, 9 AM. REV. INT'L ARB. 155, 156 (1998) (supporting the use of arbitration by contracting parties because of the simplicity, lower cost, stability, and binding nature of the process).

and jurisdictions.² Arbitration does not, as some have suggested, operate solely on the basis of contract, or from the relinquishment of jurisdictional control by states, or even a combination of these two things. Instead, arbitration is an autonomous system with a life of its own that inhabits a domain wholly outside any system of national law.³ Access to the autonomous domain of international arbitration is obtained through contract and the relinquishment of rights by national courts. However, once entered, and subject to controls as discussed later, arbitration exists in its own rarefied domain.

Secondly, by their choice of arbitration parties have expressed a positive selection of an alternative dispute resolution system.⁴ This is so even when national law has been chosen as the substantive law of the contract or the curial law of the arbitration. More specifically, the parties have intentionally and expressly rejected the jurisdiction of those courts. Parties make this choice for various reasons, such as the national courts' being unacceptable, unsuitable, or inappropriate in the circumstances of the case.⁵ Regardless of their reasons, the parties have agreed the courts should take a back seat. The question is how far back the courts should be and when the courts should come forward.

Third, except in rare circumstances, the arbitral tribunal has primary responsibility for resolving all matters relating to the settlement of the dispute between the parties.⁶ Through the principle of "separability," the agreement to arbitrate can survive even where

2. See generally Julian D M Lew QC, *Achieving the Dream: Autonomous Arbitration?* in ARBITRATION INSIGHTS, 455, 455-85 (Julian D.M. Lew & Loukas A. Mistelis eds., 2007) [hereinafter Lew, *Achieving the Dream*] (discussing the "dream" of international arbitration as its existence in its own private non-national sphere, and the "nightmare" as anti-arbitration injunctions, which are designed to protect the nationals of the issuing court).

3. See Lew, *supra* note 2, at 457.

4. See Horning, *supra* note 1, at 156.

5. See *id.* at 156-57 (listing reasons why parties choose arbitration over national courts, which include the avoidance of arbitrary jury decisions, the ability to command the attention of knowledgeable decision makers, and the final and binding character of any decision).

6. Cf. Stephen M. Ferguson, *Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results*, CURRENTS: INT'L TRADE L.J., Winter 2003, at 55, 59 (stating that the support for ordering *ex parte* interim measures is derived from the fact that resolving disputes is a necessary component of arbitration).

the underlying agreement may be in doubt or found to be invalid or illegal.⁷ Through the principle of “competence-competence,” the arbitral tribunal is entitled, if not duty bound, to determine its own jurisdiction.⁸ These principles are by and large now widely recognized.

Fourth, despite the autonomous nature of arbitration, it must be recognized that just as no man or woman is an island, so no system of dispute resolution can exist in a vacuum. Without prejudice to autonomy, international arbitration does regularly interact with national jurisdictions for its existence to be legitimate and for support, help, and effectiveness.⁹ This assistance of the national courts takes on different forms at different stages of the arbitration process because: (1) national laws are required to recognize and enforce the agreement to arbitrate and enforce any award;¹⁰ (2) national laws are required to support the arbitration process during the arbitration;¹¹ and (3) international arbitration has established certain fundamental standards that require policing at the national level.¹² These standards are recognized by the international community and reflected in international instruments, international public policy and due process.¹³

7. See Tanya J. Monestier, “*Nothing Comes of Nothing*”... Or does It??? A Critical Re-Examination of the Doctrine of Separability in American Arbitration, 12 AM. REV. INT'L ARB. 223, 224 (2001) (discussing the Supreme Court decision in *Prima Paint v. Flood & Conklin*, 388 U.S. 395 (1967), where the Court recognized that arbitration clauses are separable from the contract in which they are contained).

8. See Monestier, *supra* note 7, at 243-44 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995)).

9. See William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21, 30 (1983).

10. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. III, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter *New York Convention*] (requiring all contracting states to recognize arbitral awards as binding).

11. See *id.* art. II, § 3 (stating that the court of the contracting state shall, in the case of parties who have signed an agreement and at the request of one of the parties, refer disputes to arbitration).

12. See Park, *supra* note 9, at 23 (explaining that an arbitrator must bow to some of the “mandatory norms of the country in which he sits”).

13. See, e.g., *id.* at 28 (discussing the nature of enforcement and the effect that the *New York Convention* has on the relationship of arbitration to the nation in which it occurs).

In this overall scheme international arbitration can be envisaged as a giant squid which seeks nourishment from the murky oceanic world where the domain of international arbitration and national jurisdiction meet. One might therefore speak of the international arbitration process as stretching its tentacles down from the domain of international arbitration to the national legal systems to forage for legitimacy, support, recognition, and effectiveness.

II. FORMS OF COURT INVOLVEMENT

With these four characteristics as the backdrop, this Section will discuss the most common forms of court involvement with international arbitration. Before doing that, however, it is appropriate to remember the requirements under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), which has now been ratified by 144 countries.¹⁴ The Convention provides that: (1) each contracting state must “recognize an agreement in writing under which the parties undertake to submit to arbitration . . . concerning a subject matter capable of settlement by arbitration”;¹⁵ (2) courts of contracting states, when dealing with a case in which there is a valid arbitration agreement, must “at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed”;¹⁶ (3) each Contracting State, when dealing with a case in which there is a valid arbitration agreement, must “recognize arbitral awards as binding and enforce them in accordance with the rules of . . . the territory where the award is relied upon, under the conditions laid down in” the Convention;¹⁷ and (4) the court at the place where enforcement of an award is sought can refuse recognition and/or enforcement of such an award only in specified limited circumstances. These limited circumstances include the invalidity of the arbitration agreement, lack of notice of the arbitration, that the subject matter of the award

14. See Status: 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Mar. 16, 2009) (listing the names and ratification dates of all 143 States Parties).

15. New York Convention, *supra* note 10, art. II, § 1.

16. *Id.* art. II, § 3.

17. *Id.* art. III.

is not a difference contemplated by the arbitration agreement, or that the composition of the tribunal or the procedure followed was contrary to that agreed by the parties.¹⁸

A close reading of Articles II, III and V of the New York Convention reveals two crucial principles of international arbitration. First, court involvement is required as support for the arbitral process and for recognition and enforcement of arbitration agreements and awards but nothing else.¹⁹ In this context, any other national court involvement in the international arbitration process is arguably illegitimate, including actions to protect nationals of a particular country, to intimidate arbitrators, to protect national commercial or jurisdictional interests, or simply because the court thinks that it is better suited than an arbitral tribunal to decide on an issue.

Second, the only courts that should become involved in the arbitration process are those at the seat of arbitration or the place of enforcement.²⁰ It is here, as will be seen later in the context of the use of anti-suit or anti-arbitration injunctions, that the intervention of the courts conflicts with these accepted international rules. In addition to these two principles, it is also widely accepted that there is a hierarchy between the court of the seat of arbitration and the court of enforcement. The U.S. Court of Appeals for the Fifth Circuit recently expressed this in the following terms: “Under the [New York] Convention, ‘the country in which, or under the [arbitration] law of which, [an] award was made’ is said to have primary jurisdiction over the arbitration award. All other signatory States are secondary jurisdictions, in which parties can only contest whether that State should enforce the arbitral award.”²¹

18. *Id.* art. V (adding that courts may refuse to recognize arbitral awards that are not yet binding or suspended by the competent authority in the country where the award was granted).

19. *Cf.* James A. Gaitis, *The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations*, 16 AM. REV. INT'L ARB. 1, 54-55 (2005) (discussing the split in U.S. circuit courts over the authority created statutorily and within the New York Convention for review of nondomestic awards).

20. *See* Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53, 55 (1983) (stating that the situs of an arbitration is chosen for its “appropriateness given the context of a particular case”).

21. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi*

The UNCITRAL Model Law, which records what are generally considered the standards and practices of international arbitration and the most appropriate national law for international arbitration,²² contains similar provisions to the New York Convention but is more expansive as to the role of the courts.²³ Its approach is clearly stated in its early provisions: Article 5 provides that “no court shall intervene except where so provided in this Law,”²⁴ and Article 6 designates just three areas for court involvement in an arbitration within its jurisdiction.²⁵ First, it provides for assistance with the appointment of a tribunal: Articles 11.3, 11.4, 13 and 14 provide for court assistance to ensure the proper appointment of a tribunal where the appointing mechanism fails, there is a challenge to the independence and impartiality of an arbitrator, or an arbitrator becomes incapable of performing his duties.²⁶ Second, it allows review of issues of fundamental jurisdiction: Article 16.3 gives the court the power to revisit issues concerning the tribunal’s jurisdiction in light of the terms of the arbitration agreement.²⁷ Third, it allows parties to challenge an award: Article 34 provides for those exceptional conditions where the court may set aside or overturn an award.²⁸ Like the New York Convention, these are limited to

Negara, 335 F.3d 357, 364 (5th Cir. 2003), *in re Karah Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 465 F. Supp. 2d 283 (S.D.N.Y. 2006).

22. See generally U.N. COMM’N ON INT’L TRADE L., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION at annex 1, U.N. Doc. A/40/17, U.N. Sales No. E.08.V.4 (2008), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [hereinafter UNCITRAL MODEL LAW]; Noah Rubins, “*Manifest Disregard of the Law*” and *Vacatur of Arbitral Awards in the United States*, 12 AM. REV. INT’L ARB. 363, 363-64 (2001) (outlining the problem with creating a clear distinction between domestic and international arbitration and suggesting that adoption of the UNCITRAL Model Law could be a solution).

23. See S. I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 VAND. J. TRANSNAT’L L. 915, 975 (1998) (stating that the Model Law was “intended to help liberalize international commercial litigation by minimizing the role of domestic courts and by giving full effect to party autonomy”).

24. UNCITRAL MODEL LAW, *supra* note 22, art. 5.

25. *Id.* art. 6.

26. *Id.* art. 11, §§ 3-4, art. 13, § 3, art. 14.

27. *Id.* art. 16, § 3.

28. *Id.* art. 34.

whether the issues determined come within the scope of the arbitration agreement or there has been some procedural irregularity in the conduct of the arbitration. There is no provision allowing the national court to review the tribunal's decision on the merits. Lastly, Articles 35 and 36 of the Model Law contain almost identical provisions for the recognition and enforcement of foreign awards as in the New York Convention.²⁹

III. THE STAGES AT WHICH COURTS CAN AND DO BECOME INVOLVED

As is evident from the thumbnail overview of the New York Convention and the UNCITRAL Model Law above, there are four stages when courts are most likely to become involved with the arbitration process: (1) prior to the establishment of a tribunal; (2) at the commencement of the arbitration; (3) during the arbitration process; and (4) during the enforcement stage.³⁰

A. PRIOR TO THE ESTABLISHMENT OF A TRIBUNAL

Prior to the establishment of the arbitral tribunal, courts become involved where a party initiates proceedings to challenge the validity of the arbitration agreement; where one party institutes court proceedings despite, and perhaps with the intention of avoiding, the agreement to arbitrate; and where one party needs urgent protection that cannot await the appointment of the tribunal.

In all cases, the court's duty is to uphold the agreement to arbitrate. In the first and second cases, the court must deal with this in accordance with the New York Convention, i.e., refer the matter to arbitration if there is a valid arbitration agreement.³¹ Differences exist between national laws as to what extent the courts can review the existence of a valid arbitration agreement before the arbitral

29. Compare *id.*, arts. 35-36, with New York Convention, *supra* note 10, arts. III, V.

30. See JULIAN D.M. LEW QC ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 367-74 (2003).

31. See New York Convention, *supra* note 10, art. II, § 1 (mandating that signatory states recognize "agreement[s] in writing under which the parties undertake to submit to arbitration all or any differences which have arisen").

tribunal has done so.³² In the third case, the court fills the gap until the tribunal is established to protect the status quo. Many national laws allow, as does the UNCITRAL Model Law by omission, for courts to grant interim relief before the tribunal has been established or where the applicable arbitration rules do not allow arbitrators to grant interim measures of protection.³³ Most would agree that, at this stage, national court intervention is not disruptive, and may be beneficial to the arbitration proceedings.³⁴ Exceptionally, this might not be the case where the requested measures can be postponed, or the court effectively has to pre-empt the decision of the tribunal.

B. AT THE COMMENCEMENT OF THE ARBITRATION

Court intervention at the commencement of an arbitration generally involves assisting with the appointment of and challenges to arbitrators. As is reflected in the UNCITRAL Model Law and in most national laws, the court here uses its authority to give effect to the parties' agreement by establishing an appropriate tribunal to take over and deal with the dispute between the parties where the prescribed appointment mechanism does not work.³⁵

C. DURING THE ARBITRATION PROCESS

Court involvement during the arbitration process comes in many forms and is rarely dealt with in arbitration statutes. Properly exercised, this involves courts' making procedural orders that cannot be ordered or enforced by arbitrators, or orders for maintaining the status quo. These measures are generally helpful.³⁶ There are also

32. See *Premium Nafta Prods. Ltd. v. Fili Shipping Co.* [2007] UKHL 40, ¶ 19 (U.K.) (holding that English courts will refrain from an overly technical approach to the determination of the validity of arbitration clauses, and seek to uphold the agreement to arbitrate wherever this is practically possible).

33. See Lew, *Achieving the Dream*, *supra* note 2, at 471-73 (providing examples of Swiss and Swedish laws that allow courts to provide interim relief, but limit most or all other forms of intervention).

34. See YVES DERAIS & ERIC A. SCHWARTZ, *A GUIDE TO THE ICC RULES OF ARBITRATION* 294-95 (2d ed. 2005).

35. See UNCITRAL MODEL LAW, *supra* note 22, art. 11, § 5 (requiring that a court appointing an arbitrator "have due regard to any qualifications required of the arbitrator by the agreement of the parties").

36. See *generally* Griffin v. Semperit of Am., Inc., 414 F. Supp. 1384, 1390-91 (S.D. Tex. 1976) (holding that when the scope of an arbitration clause is debatable,

orders for protecting and taking evidence, or otherwise protecting the integrity of the arbitration. This type of intervention is generally unobjectionable and appropriate in circumstances where the tribunal cannot (rather than has refused to) take the measures sought, and the intervention has the agreement of the tribunal.³⁷

D. DURING THE ENFORCEMENT STAGE

Finally after an award has been rendered, the courts may become involved in two places: (1) at the place of arbitration, i.e., when a party challenges and seeks to set aside the award, or lodges an appeal against the award under the applicable arbitral law or regime; or (2) at the place of enforcement, where the successful party seeks the recognition and enforcement of the award.

There is one word of caution in all this. Although the principles as outlined above are normal and desirable, one should be aware that when a national court is asked to deal with any of these issues, it is in its simplest form a negation of the arbitration agreement. More particularly, a national court will inevitably and unsurprisingly approach and determine these issues in accordance with its own national law and procedures. More controversially it may also be influenced by its parochial, legal, cultural, economic, and political system.³⁸

IV. INJUNCTIONS INVOLVING ARBITRATION

Granting injunctions is one area of court involvement which cuts across every stage of the arbitration process and gives rise to a number of practical and conceptual difficulties.³⁹ Judge Stephen

the court should hold in favor of the arbitration).

37. See LEW ET AL., *supra* note 30, at 369-70 (noting the lack of coercive power held by arbitration tribunals and the need to use courts in the compelling of witnesses and evidence).

38. See Lew, *Achieving the Dream*, *supra* note 2, at 477 (stressing that national courts should not seek to impose their “narrow national viewpoint and approach in place of . . . non-national and international process[es]”).

39. See Julian D.M. Lew, *Anti-Suit Injunctions Issued by National Courts to Prevent Arbitration Proceedings*, in ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 25, 25 (Emmanuel Gaillard ed., 2005) [hereinafter Lew, *Anti-Suit Injunctions*] (noting that anti-suit injunctions potentially destabilize the environment surrounding dispute resolution); see also Marco Stacher, *You Don't*

Schwebel described it as “one of the gravest problems of contemporary international commercial arbitration.”⁴⁰ Injunctions come in all shapes and sizes. The focus here will be on injunctions that seek to undermine or block arbitration proceedings, i.e., anti-arbitration injunctions, and those that encourage and enforce arbitration proceedings, i.e., anti-suit injunctions and pro-arbitration injunctions.

A. ANTI-ARBITRATION INJUNCTIONS

Anti-arbitration injunctions are used either before arbitration has commenced to prevent the tribunal from being established or after proceedings have begun to stop an arbitration in its tracks. Injunctions restraining the conduct of arbitration proceedings are in general—and should only be—granted where it is absolutely clear that the arbitration proceedings have been wrongly brought.⁴¹ These injunctions can be directed against the parties alone, but also against the arbitrators if the court has jurisdiction over them.

In general, there is a distinction between common law countries and civil law countries when it comes to the power to award anti-arbitration injunctions. Common law countries tend to be permissive and therefore more willing to become involved, while civil law countries tend to be restrictive and are reluctant to interfere in the process chosen by the parties.⁴² This is not surprising as—at the risk

Want to Go There – Antisuit Injunctions in International Commercial Arbitration, 23 ASA BULL. 640, 652 (2005) (arguing that injunctions imposed by domestic courts potentially interfere with international legal regimes by implying domestic skepticism towards the foreign legal scheme and its ability to undertake a treaty in good faith).

40. Stephen M. Schwebel, *Anti-Suit Injunctions in International Arbitration – An Overview*, in ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION, *supra* note 39, at 5-6.

41. *Cf.* DAVID ST. JOHN SUTTON ET AL., RUSSELL ON ARBITRATION § 7-052 (23rd ed. 2007) (noting that in the event a court refuses to stay legal proceedings, arbitration will not be undertaken in order to solve the dispute).

42. *See* Julian D M Lew QC, *Control of Jurisdiction by Injunctions Issued by National Courts*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 185, 201 (Albert Jan van den Berg ed., 2007) [hereinafter Lew, *Control of Jurisdiction*] (explaining that under the common law regimes of the United States and England, a court may only issue an anti-arbitration injunction as a means of shielding its jurisdiction against a foreign arbitration, while civil law systems, such as France and Sweden, lack a legal basis for granting anti-arbitration injunctions).

of gross exaggeration or simplification—common law systems generally deal with parallel proceedings on a case by case basis by way of *forum non conveniens*. Civil law systems however use the *lis alibi pendens* principle, i.e., first come first served, and therefore do not intervene very much.

1. England

In England, for example, courts rely on two statutory provisions to give them power to award injunctions in the arbitration context: section 72(1) of the Arbitration Act of 1996 and section 37 of the Supreme Court Act of 1981. Section 72(1) of the Arbitration Act provides in pertinent part that: “1. A person . . . who takes no part in [arbitration] proceedings may question— . . . (c) what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in the court for a declaration or injunction or other appropriate relief.”⁴³ Section 37 of the Supreme Court Act of 1981 provides:

- (1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
- (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.⁴⁴

These provisions were applied in *Welex A.G. v. Rosa Maritime Ltd.* (“*The Epsilon Rosa*”) where an anti-suit injunction was issued restraining Welex from proceeding with court proceedings in Poland brought in violation of an arbitration agreement.⁴⁵ The Court of Appeal held that even though the Arbitration Act did not give an express power to the High Court to grant the injunction, it has a general power to grant permanent anti-suit injunctions “in all cases in which it appears to the Court to be just and convenient to do so.”⁴⁶

43. Arbitration Act, 1996, c. 23, § 72 (Eng.), available at http://www.opsi.gov.uk/Acts/acts1996/plain/ukpga_19960023_en_1 (last visited Jan. 21, 2009).

44. Supreme Court Act, 1981, c. 54, § 37 (Eng.), available at http://www.opsi.gov.uk/acts/acts1981/PDF/ukpga_19810054_en.pdf (last visited Jan. 21, 2009).

45. See *Welex A.G. v. Rosa Maritime Ltd.* [2003] EWCA (Civ) 938, [34]-[40] (Eng.).

46. *Id.* [40].

This case concerned an appeal against the High Court's decision to grant an anti-suit injunction restraining Welex from proceeding with court proceedings in Poland brought in violation of an arbitration agreement. The Court of Appeal ruled that even if the Arbitration Act of 1996 did not give an express power to the High Court to grant the injunction, such power could be derived from its general power under section 37(1) of the Supreme Court Act of 1981.⁴⁷

Accordingly, it follows that English courts can award anti-arbitration injunctions but will only do so in exceptional circumstances and specifically only where it is clear that the arbitration proceedings have been wrongly brought. Anti-arbitration injunctions should not be granted simply because the balance of convenience favors the injunction.⁴⁸ In *Compagnie Nouvelle France Navigation, S.A. v. Compagnie Navale Afrique du Nord*, the Court of Appeal offered the following guidance for granting anti-arbitration injunctions: first, the order "must not cause injustice to the claimant in the arbitration;" and second, the applicant for the order "must satisfy the Court that the continuat[ion] of the arbitration would be oppressive or vexatious . . . or an abuse of the process of the Court."⁴⁹

This approach was confirmed in the 2006 case of *Weissfisch v. Julius*.⁵⁰ In this case, an action was brought before the English High Court seeking: (1) a declaration that the arbitration agreement providing for Swiss law and a Swiss arbitral seat was void; and (2) an injunction restraining the sole arbitrator under the agreement from acting as arbitrator. The only real connection with England was the fact that the arbitrator was an English lawyer within the jurisdiction of the court. The court rejected the application on several grounds but in particular because the arbitration agreement stated

47. *See id.*

48. *See id.* [44]-[45] (noting that in situations falling under the New York Convention, issues, such as *forum non conveniens*, are not of significant weight to influence an anti-arbitration decision, as the Convention does not permit discretionary application of an arbitration clause).

49. *Compagnie Nouvelle France Navigation, S.A. v. Compagnie Navale Afrique du Nord* (1966) 1 Lloyd's List L.R. 477, 487.

50. *Weissfisch v. Julius* [2006] EWCA (Civ) 218, [32]-[35] (Eng.) (recognizing that ultimately the Court should refrain from issuing an injunction, as the applicant neglected to advance any extenuating circumstances by which the previously-agreed upon arbitration clause could be deemed overly burdensome).

expressly that disputes should be resolved by the sole arbitrator, with his seat in Switzerland and governed by Swiss law,⁵¹ and consequently, any issues as to the validity of the arbitration agreement were required “to be resolved in Switzerland according to Swiss law.”⁵² This was not a matter for the English courts.

In *J. Jarvis & Sons Ltd. v. Blue Circle Dartford Estates Ltd.*, Jarvis sought a stay of arbitration proceedings on the grounds that concurrent proceedings would be in place, that existing proceedings may result in inconsistent findings, and that the arbitration proceedings serve no useful purpose.⁵³ The court found that it had jurisdiction to entertain the application but noted that an order would only be made in exceptional circumstances.⁵⁴ In reaching its decision refusing an injunction, the court noted the refusal of the Commercial Court to grant an anti-arbitration injunction in the recent cases of *Intermet FCZO v. Ansol Ltd.* and *Elektrim S.A. v. Vivendi*, and that, since January 31, 1997, there were apparently no instances of the Commercial Court’s granting an injunction to halt an arbitration.⁵⁵ The court further noted that: (1) it had jurisdiction to make an order under section 37 of the Supreme Court Act of 1991; (2) the discretion can be exercised if (a) the injunction does not cause injustice, and (b) “the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process”; (3) the discretion should be used sparingly given the principles of the Arbitration Act; and (4) delay would be material, if not fatal, to the application.⁵⁶

A major concern with the possibility of several conflicting jurisdictions is the risk of inconsistent findings. In this respect, the court stated:

51. *See id.* [33].

52. *Id.*

53. *See J. Jarvis & Sons Ltd. v. Blue Circle Dartford Estates Ltd.* [2007] EWHC (TCC) 1262, [19] (Eng.).

54. *See id.* [21] (noting that Jarvis submitted their claim at a very late stage in the proceedings, two weeks before the arbitration start date, and as such this factor would weigh heavily against Jarvis).

55. *See id.* [39] (citing *Elektrim S.A. v. Vivendi Universal S.A.* [2007] EWHC (Comm) 571 (Eng.) and *Intermet FCZO v. Ansol Ltd.* [2007] EWHC (Comm) 226 (Eng.)).

56. *Id.* [40].

Once those proceedings [i.e., court proceedings brought by a party against Jarvis] have been launched, there will be concurrent proceedings both in court and before the Arbitrator concerning the same subject matter. This carries the risk of inconsistent findings. Costs will be duplicated. Both Jarvis and Blue Circle will be fighting on two fronts before different tribunals about the same subject matter. All of those observations are true, but they do not mean that the arbitration is vexatious. It is an inevitable consequence of the mandatory language of section 9 of [the] Arbitration Act that from time to time there will be concurrent proceedings in court and before an arbitrator.⁵⁷

In *Elektrim S.A. v. Vivendi Universal S.A.*, one of the two cases addressed in *Jarvis*, the claimant sought an injunction to restrain the respondents from pursuing an arbitration being conducted before the London Court of International Arbitration (“LCIA”).⁵⁸ The claimant and the first and second respondents were shareholders in a joint venture company which controlled the Polish company which ran the largest mobile telecommunications network in Poland. A dispute had arisen between the claimant and respondent under an investment agreement to which they were parties and under which the second respondent had begun an arbitration in London under the rules of the LCIA.

There had been other arbitrations and court proceedings between the parties. A draft agreement to settle the ownership of the shares in the Polish company and all outstanding proceedings was produced. It provided for disputes to be submitted to arbitration in Geneva in accordance with the International Chamber of Commerce rules. The second respondent claimed that a legally binding settlement had been concluded and began an arbitration in Geneva claiming a declaration that the settlement agreement was binding and enforceable. To avoid the risk of several proceedings and possibly inconsistent and conflicting decisions, the claimant sought an injunction to restrain the LCIA arbitration until after the final determination of the Geneva arbitration. The London arbitrators had refused the claimant’s request that they stay the arbitration.

57. *Id.* [45]-[46].

58. *See Elektrim*, [2007] EWHC 571 (Comm) [1].

In refusing the injunction to restrain the LCIA proceedings, the court reasoned, first, that under the Arbitration Act, “the scope for the court to intervene by injunction before an award” had been “very limited.”⁵⁹ Second, neither the existence of the London arbitration nor its prosecution breached any legal or equitable right of the claimant. The parties had agreed to resolve disputes under the investment agreement by LCIA arbitration.⁶⁰ The pursuit of two arbitrations with different subject-matters was not vexatious or oppressive. Third, even if the claimant could establish that some right had been infringed or was threatened by the continuation of the London arbitration or that continuation of the arbitration was otherwise vexatious or oppressive, the court would not grant an injunction under section 37 of the 1981 Act because that would be contrary to the parties’ agreement to refer disputes under the investment agreement to LCIA arbitration.⁶¹ The arbitrators had on three occasions refused to stay the LCIA arbitration and the court had “no express power under the Arbitration Act to review or overrule those procedural decisions in advance of an award by the LCIA arbitrators.”⁶² To do so under section 37 of the Supreme Court Act “would undermine the principles of the 1996 Act.”⁶³ Fourth, in the circumstances of the case, the court thought it would be unjust to restrain the LCIA arbitration.⁶⁴ The problem was due to two arbitration agreements on two separate issues: the second respondent’s claim that the settlement agreement was valid in the Geneva arbitration and the claimant’s claim in the LCIA under the investment agreement. It was inevitable that there would be a multiplicity of proceedings.⁶⁵

In *Intermet FCZO v. Ansol Ltd.*, the other case referred to in *Jarvis*, the applicant (X) applied for an interim injunction to restrain the respondents (Y) from proceeding with arbitration.⁶⁶ Y had lent

59. *Id.* [68]-[69] (noting that only two provisions of the 1996 Arbitration Act, sections 44(2)(e) and 72, permit a court to intervene by imposing an injunction before an award is made by arbitrators).

60. *See id.* [65].

61. *See id.* [74].

62. *Id.* [75].

63. *Id.*

64. *See id.* [88].

65. *See id.* [80].

66. *Intermet FCZO v. Ansol Ltd.* [2007] EWHC (Comm) 226, [1] (Eng.).

money to X, who had defaulted on the repayments and owed a very large sum. In order to postpone repayment, X had agreed to transfer to Y the sole share in a company that allegedly owned a valuable property in Moscow. However, X failed to repay the debt and the company was said to be worthless. Y claimed that, at the time the agreement was made, X knew that the company did not own the property, so that Y was “deceived into believing that [the company] had the rights to and interest in” the property that it did not have and was “induced to enter the [agreement] on that basis.”⁶⁷ Pursuant to the arbitration clause in the agreement, Y began arbitration proceedings and claimed damages for breach of the contractual obligations set out in the agreement. Several months later, Y also began a court action to seek further damages. However, in that action they sought no damages for breach of the agreement or any claim in contract other than for the repayment of the loan, and three months afterwards, X applied for an injunction to restrain Y from continuing with the arbitration.⁶⁸ X submitted that the same contractual claims were advanced against it in the arbitration as in the court proceedings and that it would be severely unjust and prejudicial to X if the arbitration proceedings were allowed to continue, whereas no injustice would be caused to Y by a stay of the arbitration.⁶⁹

Mrs. Justice Gloster found that the application for the injunction was far too late.⁷⁰ X should have applied for it immediately after the beginning of the court proceedings. In seeking to have the tribunal determine the issues that had been raised in the arbitration proceedings, Y had not behaved in a manner that was oppressive or unconscionable. Y had never sought any finding in the arbitration that X was a party to any fraudulent conspiracy or that X had made any fraudulent misrepresentations at any time.⁷¹ In effect, the arbitral claims were contractual, whereas the court proceedings dealt with issues of fraud. Moreover, Y had not pursued any claims based upon any alleged fraud in the arbitration.⁷² It would be unjust to deprive Y of their right to arbitrate as it would rob them of the speedy

67. *See id.* [13].

68. *See id.* [15]-[17].

69. *See id.* [22].

70. *See id.* [25].

71. *See id.* [27].

72. *See id.*

enforcement of any award they might obtain and would be a waste of the enormous costs that Y had already incurred in the arbitration.⁷³ Accordingly, and in the light of the undertakings, it would be wholly inappropriate to grant any injunction.⁷⁴

2. *The United States*⁷⁵

It is well established that U.S. courts have a general power to grant anti-suit injunctions.⁷⁶ Before a court may grant an anti-suit injunction, the following three threshold requirements must be met: (1) the court issuing the injunction must have jurisdiction; (2) the parties to both proceedings must be the same; and (3) the decision in the action before the court issuing the injunction must dispose of the foreign court proceedings. These threshold requirements are sometimes referred to as the “China Trade Test.”⁷⁷ Once these requirements have been met, the standard applied for issuing an anti-suit injunction varies depending on the court before which the injunction is sought.⁷⁸

There appear to be different approaches among the U.S. Courts of Appeal to dealing with this question which are not explored here.⁷⁹

73. *See id.* [30].

74. *See id.* [32].

75. Anti-arbitration injunctions are also possible under certain circumstances in Australia, New Zealand, Malaysia, Nigeria, Israel, Indonesia and Pakistan. *See Lew, supra* note 42, at 199.

76. *See Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir. 1996).

77. *See China Trade & Dev. Corp. v. Yong*, 837 F.2d 33, 36-37 (2d Cir. 1987); *see also Compagnie Des Bauxites de Guinea v. Ins. Co. of N. Am.*, 651 F.2d 877, 879-80 (3d Cir. 1981) (requiring that a district court possess proper jurisdiction as precedent to granting an injunction).

78. *See Kaepa*, 76 F.3d at 626 (noting that although U.S. courts possess the ability to allow anti-suit injunctions, the various circuits disagree on which legal standard to apply concerning injunctive relief).

79. *Compare Kaepa*, 76 F.3d at 627 (applying a more liberal standard in the consideration of granting anti-suit injunctions, declining to require a district court to entertain “omnipotent” notions of comity), *and Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431 (7th Cir. 1993) (employing a “lax” standard of considering the effect of injunction on international comity, but requiring some empirical evidence that the issuance of an injunction would impair international comity in the particular case), *with Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 17 (1st Cir. 2004) (noting the importance of considering international comity in the calculation regarding imposition of an injunction, recognizing that the issuance of an anti-suit injunction would

Suffice it to say, in each particular case the onus is on persuading the court that in light of “the totality of the circumstances,” including the nature of the actions and the policies at stake, the case is suitable for the anti-suit injunction being sought.⁸⁰

3. Switzerland

By contrast, anti-arbitration injunctions seem to be incompatible with the Swiss legal system. Indeed, in *Air (PTY) Ltd. v. International Air Transport Ass’n*,⁸¹ the Court of First Instance of the Canton of Geneva ruled that anti-suit injunctions, including anti-arbitration injunctions, are contrary to the Swiss legal system.⁸² In particular, anti-arbitration injunctions have been found to contradict the principle of competence-competence, which is a well-established principle in Swiss law. According to the court:

[A]s a matter of Swiss law there is no such thing as a “judicial tutelage” of the courts over arbitrators; quite to the contrary, Swiss law fully implements the principle of “Kompetenz-Kompetenz” both in its positive effect . . . and its negative effect The jurisdiction of a court to determine whether an arbitration agreement is valid—which cannot in any event lead to an anti-suit injunction—exists only when the arbitration agreement is relied upon as a defence before the court.⁸³

This conclusion is consistent with the decision of the Swiss Federal Tribunal in *Fomento de Construcciones y Contratas S.A. v. Colon Container Terminal S.A.*⁸⁴ There the Federal Tribunal held that in cases of parallel proceedings, arbitral tribunals with a seat in

essentially limit the jurisdiction of a foreign sovereign’s courts), and *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) (entertaining the position that the concept of international comity requires national courts to strive to foster international legal connections in an effort to improve the rule of law between nations).

80. See *Quaak*, 361 F.3d at 19.

81. See Tribunal de Première Instance [TPI] [Court of First Instance] May 2, 2005, Case No. C/1043/2005-15SP (Switz.), translated in, 23 ASA BULL. 739, 739 (2005).

82. See *id.* at 747.

83. *Id.*

84. Tribunale federale svizzero [TF] [Federal Court] May 14, 2001, 127 Decisioni del Tribunale federale svizzero [DTF] III 279.

Switzerland must apply the principles of *lis pendens* and *res judicata* in order to avoid contradictory awards.⁸⁵ The suggestion therefore is that contradictory judgments are avoided, not by preventing the rendering of foreign judgments, but by recognizing or enforcing such judgments.⁸⁶

4. France

It seems possible for French courts to order a party to halt its proceedings before a foreign court.⁸⁷ However, Article 1458 of the French New Code of Civil Procedure (“NCPC”), which applies to both domestic and international arbitrations, provides that if a dispute pending before an arbitral tribunal on the basis of an arbitration agreement is brought before a state court, it shall declare itself incompetent unless the arbitration agreement is manifestly null and void, but this issue must be raised by the party.⁸⁸ The court will then leave it to the tribunal to determine the validity and extent of the arbitration.

The effect of Article 1458 of the NCCP is to ensure that the arbitral tribunal is the first to decide the issue of its jurisdiction prior to any court or other judicial authority.⁸⁹ The role of the courts is limited to the review of the arbitrator’s award on jurisdiction at the annulment or enforcement stage. French courts will generally not

85. See *id.* at 283 (explaining that *lis pendens* and *res judicata* avoid contrary awards by respectively paralyzing and excluding the competence of the second judge).

86. See Loi fédérale sur le droit international privé, Dec. 18, 1987, RS 291, art. 27(2)(c) (Switz.), translated in SWITZERLAND’S PRIVATE INTERNATIONAL LAW STATUTE (Pierre A. Karrer & Karl W. Arnold trans., Kluwer Law & Taxation Publishers, 1989) [hereinafter Swiss PIL Statute] (requiring that recognition of a decision must be withheld in the event that the issue has already been adjudicated in Switzerland or a third State).

87. Lew, *Control of Jurisdiction*, *supra* note 42, at 195 (citing Banque Worms v. Epoux Brachot et autres (citation omitted)).

88. See NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 1458 (Fr.), translated in THE FRENCH CODE OF CIVIL PROCEDURE IN ENGLISH (Christian Dodd trans., 2006) [hereinafter N.C.P.C.].

89. See Vera van Houtte et al., *What’s New in European Arbitration?*, DISP. RESOL. J., May-July 2008, at 10, 10 (noting that in the Cour de Cassation decision of *Prodim v. X.*, a finding by a lower court that the arbitration clause possessed limitations did not permit the court to circumvent the rule that under NCCP Article 1458, an arbitrator is the primary judge of his jurisdiction).

rule on the existence or validity of the arbitration agreement until the arbitral tribunal has reached its own decision.⁹⁰

5. Sweden

The general practice in Sweden is for courts not to interfere with the arbitration process in line with its philosophy that the basis of arbitration is, and has always been, that of freedom of contract, trust in the arbitrators, and recognition of the advantages of a single, privately administered dispute settlement mechanism.⁹¹ However, the one exception to this rule relates to the validity of the arbitration agreement, and despite recognition of the right of arbitrators to rule on their own jurisdiction, this does not preclude a Swedish court from doing so at the same time if requested by one of the parties.⁹²

6. Should National Courts Grant Anti-Arbitration Injunctions?

There will hardly ever be a justification for a national court to grant an anti-arbitration injunction of the kind discussed. The following observations can be made in support of this position. First, the principles of competence-competence, separability, and party autonomy all point to the overarching principle that a decision as to whether an arbitration should continue should be left first and foremost to the arbitration tribunal.⁹³ Second, a plain reading of Article 5 of the UNCITRAL Model Law and an assessment of its underlying intention suggest the preclusion of anti-arbitration

90. *See id.* at 10 (highlighting the fact that Article 1458 of the NCCP necessitates that a court decline jurisdiction in the event that a conflict has not yet been brought to arbitration).

91. *See New Arbitration Regime in Sweden*, 10 *WORLD ARB. & MEDIATION REP.* 154, 154-55 (1999) (recognizing that under Swedish arbitration law, contracting parties are allowed to tailor their arbitration agreements, maintaining Sweden's reputation as a premier location for international arbitrations).

92. *See id.* at 155 (underscoring that although a party's challenge of an arbitrator may be properly brought before a court, the arbitration may continue and the arbitrators may issue a judgment in anticipation of the court decision).

93. *See* Jonnette Watson Hamilton, *Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?*, 51 *MCGILL L.J.* 693, 702-03 (2006) (noting that generally, judicial deference for independent arbitration derives from the belief that the arbitrator obtains his power from the contract, as opposed to the state, and therefore the dispute resolution is regarded as solely the interest of the disputing parties, not the public at large).

injunctions. Article 5 states simply: "In matters governed by this Law, no court shall intervene except where so provided in this Law."⁹⁴

Third, only the court of the seat of arbitration has jurisdiction with respect to an arbitration and should exercise this only in very limited circumstances. There can be little justification for a court at the seat of an arbitration preventing challenge of an award by injunction.⁹⁵ Recognition and enforcement must be the preserve of the enforcing court. No court other than the court at the seat of arbitration has a right to interfere. Fourth, in light of the above, there can be no basis for any court to grant an injunction on grounds of comity, balance of convenience, or even whether an arbitration appears to be vexatious or oppressive. Instead, the only concern of the court must be the validity of the arbitration agreement itself.⁹⁶

Fifth, although it is argued that anti-arbitration injunctions do sometimes serve just ends, this may often be a lengthy and costly process leading to parallel litigation in various fora. This can be illustrated by the case of *General Electric Co. v. Deutz AG*,⁹⁷ where a U.S. court granted an anti-arbitration injunction to stop an arbitration abroad. The underlying contract provided for ICC arbitration in London and was concluded between General Electric and a third company. Deutz subsequently joined in this agreement. A dispute arose, and General Electric commenced court proceedings before a U.S. court against Deutz, alleging breach of contract. Deutz responded by requesting an order to compel General Electric to arbitration in conformity with the arbitration agreement, and it initiated an ICC arbitration. In response, General Electric requested an anti-arbitration injunction enjoining Deutz from proceeding with the ICC arbitration in London.

The court granted the anti-arbitration injunction based on its general power to grant injunctive relief. It held that to respect the international nature of the arbitration, the court should decline to

94. UNCITRAL MODEL LAW, *supra* note 24, art. 5.

95. See Lew, *Control of Jurisdiction*, *supra* note 42, at 188-89 (citing *Oil & National Gas Commission Ltd. v. W. Co. of N. Am.* (citation omitted)).

96. Lew, *Achieving the Dream*, *supra* note 2, at 477.

97. *General Elec. Co. v. Deutz AG*, 129 F. Supp. 2d 776 (W.D. Pa. 2000), *rev'd in part*, 270 F.3d 144 (3d Cir. 2001).

follow the restrictive standard applicable to cases of anti-suit injunctions against foreign court proceedings.⁹⁸ The two conditions for the granting of an anti-arbitration injunction under the restrictive standard existed: the ICC arbitration commenced by Deutz threatened the jurisdiction of the U.S. forum, and, by commencing arbitration proceedings, Deutz was evading strong U.S. public policies.⁹⁹ However, on appeal, the Third Circuit Court of Appeals reversed the order granting the injunction, finding that the district court failed to follow the more restrictive approach to granting anti-arbitration injunctions and give due regard to principles of international comity.¹⁰⁰ Thus, the parties to this dispute spent much of their time and resources on legal proceedings that did not resolve their dispute.

Sixth, abuse is most likely when a party approaches its own court for assistance, that court not being the seat of the arbitration. According to the ICC, in 2006, of the thirty-one cases where anti-arbitration injunctions were granted, twenty-five were granted by courts of the nationality of one of the parties.¹⁰¹

Matters become particularly suspicious when one party is a state or state entity, which seeks and obtains an injunction from its own state court. There have been several unfortunate cases of this kind. *Himpurna California Energy v. Republic of Indonesia* is the infamous case of an Indonesian court issuing an anti-arbitration injunction to stop an arbitral tribunal from rendering an award against an Indonesian state-owned corporation.¹⁰² The case arose from various contracts for the construction and operation of an electrical generation plant in Indonesia. The contracts provided for ad hoc arbitration with the seat in Jakarta under the UNCITRAL

98. *General Elec.*, 129 F. Supp. 2d at 787.

99. *Id.* at 790.

100. *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 162 (3d Cir. 2001).

101. Lew, *Control of Jurisdiction*, *supra* note 42, at 185 n.1.

102. See, e.g., Peter Cornell & Arwen Handley, *Himpurna and Hub: International Arbitration in Developing Countries*, MEALEY'S INT'L ARB. REP., Sept. 2000, at 39, 43-44; Jacques Werner, *When Arbitration Becomes War: Some Reflections on the Frailty of the Arbitral Process in Cases Involving Authoritarian States*, J. INT'L ARB., Aug. 2000, at 97, 99. Cf. H. Priyatna Abdurrasyid, *They Said I Was Going To Be Kidnapped*, MEALEY'S INT'L ARB. REP., June 2003, at 29, 29 (recounting his appointment by the Republic of Indonesia as its arbitrator in the dispute with Himpurna and his decision not to serve as an arbitrator).

Rules. Two different arbitration proceedings were subsequently initiated against the Republic of Indonesia. After the first arbitral tribunal rendered an award against PLN, an Indonesian state-owned electricity corporation, an Indonesian court granted two injunctions: one ordering the suspension of the enforcement of the first award, and the second preventing the second arbitration from taking place.¹⁰³

The case of *Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia* is another example where the courts of the state party obtained an injunction in order to stop arbitration proceedings which were taking an unfavorable turn against the state party.¹⁰⁴ This arbitration had its seat in Ethiopia, but the arbitrators decided for convenience to hold hearings in Paris. The Ethiopian representative argued this was an abuse of the process. To place maximum pressure to halt the arbitration, the Ethiopian courts granted two anti-arbitration injunctions, one directed against the arbitral tribunal and one against the claimant.¹⁰⁵

Hub Power Co. (HUBCO) v. Water & Power Development Authority of Pakistan (WAPDA) is yet another example where the state party to an arbitration agreement obtained from the courts of its country an order preventing an arbitration from proceeding.¹⁰⁶ The

103. Cornell & Handley, *supra* note 104, at 44.

104. See *Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia*, Addis Ababa Water and Sewerage Authority, Case No. 10623/AER/ACS, 21 ASA BULL. 82 (2003) (Int'l Ct. Arb. 2001); see also Antonio Crivellaro, *Summary of the Arbitral Proceedings – International Arbitrators and Courts of the Seat – Who Defers to Whom?*, 21 ASA BULL. 60 (2003); M. Scherer, *The Place or 'Seat' of Arbitration (Possibility, and/or Sometimes Necessity of its Transfer?) – Some Remarks on the Award in ICC Arbitration No. 10623*, 21 ASA BULL. 112, 112-19 (2003); Frédéric Bachand, *Must an ICC Tribunal Comply With an Anti-Suit Injunction Issued by the Courts of the Seat of Arbitration?*, MEALEY'S INT'L ARB. REP., Mar. 2005, at 47, 47-52.

105. Bachand, *supra* note 104, at 47.

106. See HubCo Judgment Transcript in the Supreme Court of Pakistan (Appellate Jurisdiction), Civ. App. Nos. 1398 & 1399 of 1999, *The Hub Power Co. v. Pak. WAPDA & Fed'n of Pak.*, 16 ARB. INT'L 439, 456-58 (2000) [hereinafter HUBCO v. WAPDA], reprinted in MEALEY'S INT'L ARB. REP., July 2000, at A-1; see also Louise Barrington, *HUBCO v. WAPDA: Pakistan Top Court Rejects Modern Arbitration*, 11 AM. REV. INT'L ARB., 385, 385-96 (2000); Nudrat B. Majeed, *Commentary on the Hubco Judgment*, 16 ARB. INT'L 431, 431-37 (2000); Neil Kaplan, *Arbitration in Asia—Developments and Crises*, 19 J. INT'L ARB. 245, 245-60 (2002).

dispute arose out of a Power Purchase Agreement (PPA) concluded between HUBCO, a company incorporated in Pakistan, and WAPDA, a Pakistani state-owned company. The Supreme Court of Pakistan had to decide which of two anti-suit injunctions to uphold. HUBCO had obtained an injunction restraining WAPDA from seeking resolution of the dispute through any other means except through ICC arbitration; WAPDA obtained an injunction restraining HUBCO from pursuing the arbitration.¹⁰⁷ The Supreme Court of Pakistan held that the only question to be decided was whether the dispute was arbitrable.¹⁰⁸ By majority, it decided the matters raised were not arbitrable as they involved matters of criminality.¹⁰⁹ Thus, it decided that HUBCO must desist from pursuing the London arbitration and bring its claim before the courts of Pakistan.¹¹⁰

In *Société Générale de Surveillance S.A. (SGS) v. Federation of Pakistan*, the Pakistani Supreme Court issued an anti-arbitration injunction against SGS, restraining it from “taking any step, action or measure to pursue or participate or to continue to pursue or participate in the ICSID arbitration.”¹¹¹ The dispute arose out of a contract for the assessment of all customs duties payable on goods imported into Pakistan. The contract contained an arbitration clause providing for arbitration in Islamabad under the Pakistani Arbitration Act of 1940. When the dispute arose, SGS first initiated court proceedings in Switzerland. SGS claimed it could not rely on the arbitration clause because no fair trial could be expected in Pakistan. The Swiss courts denied SGS’s request.¹¹² SGS then initiated an arbitration at the International Centre for the Settlement of Investment Disputes (“ICSID”) on the basis of the Pakistan-Switzerland bilateral investment treaty (“BIT”). On the ground that neither the ICSID Convention nor the Pakistan-Switzerland BIT had been implemented into Pakistani law, the Supreme Court granted

107. Barrington, *supra* note 106, at 439-42.

108. *Id.* at 447.

109. *Id.* at 458-59.

110. *Id.* at 459; *but see id.* at 456 (Jehangiri J., dissenting) (concluding that the ICC arbitration should have been allowed to proceed).

111. *Société Générale de Surveillance S.A. v. Fed’n of Pak.*, Supreme Court of Pakistan (Appellate Jurisdiction), Civ. App. Nos. 459 & 460 of 2002, ¶ 84, *reprinted in* 2003 Y.B. COMM. ARB. (Int’l Council for Comm. Arb.) 1312, 1341.

112. *Id.* at 1312-13.

Pakistan's request to proceed with the arbitration under the Arbitration Act of 1940 pursuant to the contract.¹¹³

It is worth noting that tribunals refused to be intimidated and continued their work in most of the cases referred to above when an anti-arbitration order was made.

Seventh, even if an award might eventually be set aside or enforcement refused by a competent court, the anti-arbitration injunction negates the process by which this is supposed to take place.¹¹⁴ These points are well illustrated in English court decision in *Albon v. Naza Motor Trading*.¹¹⁵ In that case, the claimant applied for an injunction restraining the respondent from pursuing arbitration in Malaysia on the basis that there was an oral underlying agreement that was subject to English law. Although there was a written joint venture agreement containing an arbitration clause and signed by the parties in Malaysia, and subject to Malaysian law, the claimant claimed its signature had been forged. The High Court issued an injunction to stop the proceedings in Malaysia until the matter of the authenticity of the signature had been determined by the English court. The judge claimed jurisdiction on the basis that (1) the oral contract was made under English law; (2) the respondent had applied for stay of the English court proceedings in favor of arbitration proceedings and in so doing had submitted to the English court; and (3) if the injunction was not granted, the instant proceedings would become duplicative.¹¹⁶

V. ANTI-SUIT INJUNCTIONS

Anti-suit injunctions operating *in personam* are aimed at preventing or restraining proceedings in courts in breach of an arbitration agreement. Such injunctions are typical when there are concurrent proceedings in another jurisdiction. The anti-suit injunction is not directed at the foreign court but at the defendant who has promised, through the arbitration clause, not to bring foreign proceedings.¹¹⁷

113. *Id.* at 1314.

114. *See* *Albon v. Naza Motor Trading*, [2007] EWHC (Ch) 1879 (Eng.).

115. *Id.* [1].

116. *Id.* [1], [20], [22], [27].

117. Lew, *Anti-Suit Injunctions*, *supra* note 39, at 25.

There are three important points to be made in relation to anti-suit injunctions: first, the importance of the anti-suit injunction to the supervisory role of the national courts is by and large now widely recognized.¹¹⁸ These injunctions may have a vital role to play in the hands of national courts at the seat of arbitration in its supervisory role over the arbitration process.¹¹⁹ However, the hurdles to be surmounted before awarding an anti-suit injunction differ from country to country.

For example, in England, the Court of Appeal confirmed that the jurisdiction to grant an injunction is discretionary and held that English courts should feel no diffidence in granting injunctions provided they are “sought promptly and before the foreign proceedings are too far advanced.”¹²⁰ In *Aggeliki Charis Compania Maritima S.A. v. Pagnan S.P.A.*, the Court of Appeal upheld an injunction preventing a party to an arbitration in England from proceeding with a claim before the courts in Italy.¹²¹ Similarly, in *Starlight Shipping Co. v. Tai Ping Insurance Co.*, the English court granted a ship owner an anti-suit injunction to restrain Chinese proceedings commenced in breach of an arbitration clause found in a bill of lading.¹²² The defendants claimed that they were not bound to the arbitration agreement as a matter of Chinese law.¹²³

The position of U.S. courts regarding anti-suit injunctions enforcing arbitration agreements is set out in *BHP Petroleum (Americas) Inc. v. Reinhold*.¹²⁴ In this case, BHP Petroleum requested that the U.S. District Court for the Southern District of Texas compel Baer to arbitration in Texas and enjoin him from continuing with court proceedings in Ecuador. The court decided:

118. Lew, *Control of Jurisdiction*, *supra* note 42, at 187.

119. *Id.* (stating that the court of the seat of the arbitration “may stay an arbitration or set aside an award on jurisdiction if they consider that the arbitral tribunal does not have jurisdiction”).

120. *Aggeliki Charis Compania Maritima S.A. v. Pagnan S.P.A.* (1995) 1 Lloyd’s Rep. 87, 88 (Eng.).

121. *Id.* at 96-97.

122. *Starlight Shipping Co. v. Tai Ping Ins. Co.*, [2007] EWHC (Comm) 1893 (Eng.).

123. *Id.* [14] (dismissing this claim as being irrelevant to the English courts because it is part of the dispute arising from a contract with an arbitration clause).

124. *BHP Petroleum (Americas) Inc. v. Reinhold*, Civ. No. H-97-879 (S.D. Tex. 1997), *reprinted in* 12 MEALEY’S INT’L ARB. REP., May 1997, at I-1.

that an injunction barring a foreign action was proper if the simultaneous prosecution of an action would result in “inequitable hardship” and “tend to frustrate and delay the speedy and efficient determination of the cause.” . . . The focus of the inquiry is whether there exists a need to prevent vexatious or oppressive litigation. . . . In light of the strong federal policy favoring arbitration, the court finds that Plaintiffs would be irreparably harmed if Baer were permitted to continue litigating in Ecuador while the same claims were being arbitrated. Therefore, the court [grants] Plaintiffs’ application for injunction.¹²⁵

It would appear that the approach of the U.S. courts is stricter than the English courts. An important criterion for the granting of the injunction in the United States is “irreparable harm.” This requirement was defined by the U.S. District Court for the Southern District of New York in *Empresa Generadora de Electricidad ITABO v. Corporacio Dominicana de Empresas Electricas Estatales (CDEEE)*.¹²⁶ In this case, ITABO, a private company incorporated in the Dominican Republic, requested the court to compel CDEEE, a company owned by the Dominican Republic, to ICC arbitration in New York in conformity with the arbitration agreement contained in ITABO’s bylaws. It also requested an anti-suit injunction to enjoin CDEEE from continuing with litigation in the Dominican courts. The court denied both requests. Concerning the anti-suit injunction, the court held that “ITABO [had] not met [the] heavy burden of establishing irreparable harm.”¹²⁷ It defined this notion in the following terms:

[i]njunctive relief “is an extraordinary and drastic remedy which should not be routinely granted.” . . . Where necessary

125. *Id.* at I-4 (citing *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996)); see also *Wal-Mart Stores, Inc. v. PT Multipolar Corp.*, Nos. 98-16952 & 98-17384, 1999 WL 1079625, at *2 (9th Cir. Nov. 30, 1999) (upholding an injunction based on equitable considerations and the fact that further litigation in home states would lead to delay and unnecessary expense).

126. No. 05 Civ. 5004, 2005 U.S. Dist. LEXIS 14712, at *16 (S.D.N.Y. July 18, 2005).

127. *Id.* at *24-26 (pointing out that ITABO had allowed months to go by before seeking relief in court, that any harm to ITABO is speculative, and that ITABO has not shown that it would lose arbitration rights by complying with a future Dominican court order).

to prevent irreparable harm, “a federal court may enjoin a party before it from pursuing litigation in a foreign forum.” . . . Irreparable harm is injury that “is likely and imminent, not remote or speculative, and . . . is not capable of being fully remedied by money damages.” . . . The movant is required to establish not a mere possibility of irreparable harm, but that it is “likely to suffer irreparable harm if equitable relief is denied.”¹²⁸

The courts of Singapore were initially reluctant to grant anti-suit injunctions in support of arbitration, at least when Singapore was not the seat of arbitration.¹²⁹ In 2002, however, the Singapore High Court in *WSG Nimbus Pte Ltd. v. Board of Control for Cricket in Sri Lanka* granted an anti-suit injunction against the respondent to protect the contractual right of WSG to refer its dispute with the board to arbitration in Singapore.¹³⁰ This was apparently the first reported case of an anti-suit injunction in favor of arbitration granted in Singapore.¹³¹

One vital question is whether it is appropriate for a court to award injunctions where it has not been seized *and* is not the seat of arbitration. The Bermuda Court of Appeal considered this issue in *IPOC International Growth Fund Ltd. v. OAO “CT-Mobile”* (the “IPOC case”).¹³² The parties were involved in arbitration proceedings in Europe. IPOC commenced court proceedings in New York and in Russia. The main question before the Bermuda Court of Appeal was whether it was entitled to grant an injunction to restrain a breach of an arbitration agreement on the basis that it has *in personam* jurisdiction over IPOC (as a Bermuda company), or

128. *Id.* at *16 (citations omitted).

129. *See* *Mancon (BVI) Inv. Holding Co. v. Heng Holdings SEA (Pte) Ltd. & Ors*, [2000] 3 SLR 220, [35] (Sing.) (refusing to grant an injunction because it would interfere with the jurisdiction of other courts).

130. *WSG Nimbus Pte Ltd. v. Bd. of Control for Cricket in Sri Lanka*, [2002] 3 SLR 603, [91] (Sing.).

131. On international arbitration in Singapore, *see* Andrew Chan & Tay Yong Seng, *Securing Arbitration in the Face of Litigation—A Singapore Perspective*, 2 *ASIAN INT’L ARB. J.* 113, 113-36 (2006).

132. *IPOC Int’l Growth Fund Ltd. v. OAO “CT-Mobile”*, Nos. 22 & 23 (Berm. Ct. App. Mar. 23, 2007) (on file with author); *see also* Jan Woloniecki, *Enforcement of Transnational Investment Arbitration Awards In Bermuda: Jurisdiction And Sovereign Immunity* (Apr. 13, 2007) (unpublished manuscript, on file with author).

whether, as IPOC argued, the Bermuda court must in addition have some “sufficient interest” before it can grant an anti-suit injunction. The Bermuda Court of Appeal rejected the argument that only the court at the seat of the arbitration can issue an anti-suit injunction and held personal jurisdiction to be sufficient.¹³³ While the pro-arbitration decision is welcome, it is strongly arguable that courts taking jurisdiction on similar or other grounds would be unjustifiably interfering with the arbitration process.¹³⁴ As argued above, in the normal course, only the court at the seat of arbitration should interfere with the arbitral process, and even then only rarely.

The second point is that national courts might arguably use the anti-suit injunction whenever they consider it necessary to protect the parties’ agreement to arbitrate.¹³⁵ In this regard, anti-suit injunctions in the arbitration context are inherently different from injunctions awarded in other contexts. This difference has mostly to do with the nature of arbitration itself. Other types of injunctions are issued to correct or alter otherwise wrongful or unconscionable conduct. In anti-suit injunctions, the court’s concern ought to be to restrain a party from attempting to circumvent its promise to arbitrate.¹³⁶ In this regard, the court ought not to be concerned by issues of oppressive or vexatious conduct, or be overly sensitive to questions of comity.¹³⁷ The injunction bites only because the parties have agreed to have their dispute resolved via a mechanism that transcends any individual jurisdiction.¹³⁸ Courts ought to resist muddying the waters with any other concerns.

In *Starlight Shipping Co. v. Tai Ping Insurance Co.*, the English High Court also confirmed that injunctions awarded in the arbitration context are not about wrongful or unconscionable conduct, which was central to the anti-suit injunction granted by the courts of

133. IPOC, ¶¶ 45-50.

134. See Lew, *Achieving the Dream*, *supra* note 2, at 455-56.

135. See José Carlos Fernández Rozas, *Anti-Suit Injunctions Issued by National Courts: Measures Addressed to the Parties or to the Arbitrators*, in ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION, *supra* note 41, at 73, 79-80 (noting that anti-suit injunctions can also “paralyz[e] arbitral proceedings”).

136. See Lew, *Achieving the Dream*, *supra* note 2, at 477.

137. Cf. Lew, *Control of Jurisdiction*, *supra* note 42, at 192 (suggesting that some U.S. Courts of Appeal award anti-suit injunctions based on a vexatious or oppressive standard, and some use a standard based on comity).

138. Lew, *Achieving the Dream*, *supra* note 2, at 456.

equity,¹³⁹ but more about “restraining a party to a contract from doing something [that it] has promised not to do.”¹⁴⁰ Anti-suit injunctions made other than in the context of arbitration are not subject to limitations imposed by the principles of comity.¹⁴¹ In this regard, Justice Cooke referred to the speech of Lord Justice Longmore in *O.T. Africa Line Ltd. v. Magic Sportswear Corp.*: “It goes without saying that any court should pay respect to another (foreign) court but, if the parties have actually agreed that a [forum] is to have sole jurisdiction over any dispute, the true role of comity is to ensure that the parties’ agreement is respected.”¹⁴² Lord Justice Longmore further added to these justifications some practical observations, namely that the benefit of a court’s exercising its discretion to award an injunction at an early stage of an arbitration where matters are straightforward is that it will prevent matters from being heard twice, first before arbitrators and then again later before courts.¹⁴³ Further, by ordering anti-suit injunctions, the applying party is able to benefit from contempt of court proceedings.¹⁴⁴

A. SHOULD ARBITRATION CLAUSES BE TREATED DIFFERENTLY FROM JURISDICTION CLAUSES?

One conceptual problem closely related to this area of discussion, and which has the potential for serious practical ramifications, is whether arbitration clauses ought to be treated differently from standard jurisdiction clauses. This is a matter that has recently exercised the European courts. As a general rule, regulation 44/2001 (the “Brussels Regulation”) sets out the rules of jurisdiction that apply to the European Union.¹⁴⁵ Under Article 27 of the Brussels

139. See *Starlight Shipping Co. v. Tai Ping Ins. Co.*, [2007] EWHC (Comm) 1893, [44] (Eng.).

140. *Id.*; cf. *Laker Airways Ltd. v. British Airways Bd.*, (1985) A.C. 58, ¶¶ 13-15 (H.L.).

141. See *Airbus Industries G.I.E. v. Patel*, (1999) 1 A.C. 119, 134 (H.L.) (recognizing courts should, based on notions of comity, be hesitant to grant an anti-suit injunction, but noting there is no such requirement in cases where comity is breached).

142. *Starlight*, [2007] EWHC (Comm) 1893, [44] (citing *O.T. Africa Line Ltd. v. Magic Sportswear Corp.*, [2005] EWCA (Civ) 710, [32] (Eng.)).

143. See *O.T. Africa*, [2005] EWCA (Civ) 710, [36], [40].

144. Cf. *Starlight*, [2007] EWHC (Comm) 1893, [43].

145. Council Regulation 44/2001, art. 2, 2001 O.J. (L 12) 1 (EC) *available*

Regulation, regardless of what the parties may have agreed with respect to jurisdiction, once a court within an EU Member State has been seized with an action, no other court within the EU can interfere with the matter.¹⁴⁶ This is the principle of *lis pendens*.¹⁴⁷ It makes no difference how much bad faith is displayed by a party to litigation in starting proceedings in a Member State; it is for that Member State to assume or decline jurisdiction.¹⁴⁸

It is clear from European case law that this principle applies even where there is a choice of jurisdiction clause.¹⁴⁹ However, Article 1(2)(d) expressly excludes arbitration from the scope of the Brussels Regulation. The issue, though, is whether the term arbitration includes all matters relating to arbitration, such as the validity of the arbitration agreement, or whether it relates only to procedural matters and enforcement issues. Article 1(2)(d) of the Brussels Regulation and its forerunner, Article 1(4) of the Brussels Convention, were purposely left vague in this regard.¹⁵⁰

This question has recently been considered by the European Court of Justice (“ECJ”), following a referral from the House of Lords, in *West Tankers Inc. v. RAS Riunione Adriatica di Sicurta S.P.A.*, where

at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:EN:PDF> [hereinafter Brussels Regulation] (stating persons domiciled in a member state are to be sued in that member state).

146. *See id.* art. 27.

147. *See id.* (entitling section 9, which contains article 27, “*Lis pendens*—related actions”); *see also* BLACK’S LAW DICTIONARY 950 (8th ed. 2004) (defining *lis pendens* as “a pending lawsuit” or “the jurisdiction, power, or control acquired by a court over property while a legal action is pending”).

148. *Cf.* Brussels Regulation, *supra* note 146, art. 27 (leaving it to the court first presented with the matter to establish jurisdiction, while other courts should stay proceedings in the interim).

149. *Cf.* Case C-116/02, *Gasser v. MISAT*, 2003 E.C.R. I-14693, ¶ 49 (noting “it is incumbent on the court first seized to verify the existence of the agreement and to decline jurisdiction if it is established, in accordance with Article 17, that the parties actually agreed to designate the court second seized as having exclusive jurisdiction”); Case C-159/02, *Turner v. Grovit*, 2004 E.C.R. I-3565, ¶ 26. On this whole issue, *see generally* Stavros Brekoulakis, *The Notion of the Superiority of Arbitration Agreements over Jurisdiction Agreements. Time to Abandon It?*, 24 J. INT’L ARB. 341 (2007).

150. *See* Brussels Regulation, *supra* note 146, art. 1(2)(d); Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters art. 1(4), Sept. 27, 1968, 1262 U.N.T.S. 153, available at <http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm>.

an insured commenced London arbitration to recover excess losses from a collision.¹⁵¹ During the course of the arbitration, the owners of the vessels became aware that the insurers had commenced court proceedings against them in Italy. The English High Court granted an injunction stopping the insurers from continuing with the Italian proceedings on the grounds that: (1) under English law the duty to arbitrate was an inseparable part of the subject matter transferred; (2) the insurer was bound by the arbitration clause; and (3) the attitude of the foreign court (the Italian court paid no attention to the injunction) was irrelevant where an arbitration clause was concerned. The House of Lords considered whether it is “consistent with EC Regulation 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State” where there is a valid arbitration agreement.¹⁵² The Lords considered that this was a matter that should be referred to the ECJ.¹⁵³ However, in making the reference, the Lords expressed their views, which are not binding on any court, but which indicated the way the House of Lords hoped (unsuccessfully) this issue would be resolved.¹⁵⁴ Lord Hoffman, for example, opined that an order for restraint where a party had started proceedings contrary to an arbitration clause was not contrary to the Brussels regulation:

The basic principles by which the [Brussels] regulation allocates jurisdiction, giving priority (subject to exceptions) to the domicile of the defendant, are entirely unsuited to arbitration, in which the situs and governing law are generally chosen by the parties on grounds of neutrality, availability of legal services and the unobtrusive effectiveness of the supervisory jurisdiction. There is no set of uniform Community rules which Member States can or must trust each other to apply.¹⁵⁵

151. RAS Riunione Adriatica di Sicurta SpA v. West Tankers Inc., [2007] UKHL 4, [11]-[12] (appeal taken from Eng.) (U.K.).

152. *Id.* [23].

153. *Id.* [25].

154. *Id.* [9] (restricting the basis for the opinion of Lord Hoffman solely to the Brussels Regulation).

155. *Id.* [12].

Lord Hoffman's reasoning is correct, and it would be quite wrong for the ECJ to allow arbitration agreements to be undermined by a party simply by starting proceedings in a court of the European Union. No matter what the wording of the Brussels Regulation was intended to mean, there are very good reasons for courts to treat jurisdiction clauses differently from arbitration clauses. First, jurisdiction clauses serve to allocate jurisdiction between national regimes; the national regimes therefore remain in play. In contrast, an agreement to arbitrate takes the dispute out of any national framework and places it within a self-contained regime.¹⁵⁶

Secondly, in the arbitration context, it is not a matter of a contest between rival national jurisdictions. Instead, any powers the courts have are supervisory.¹⁵⁷ Proper jurisdiction lies with the arbitral tribunal. This is vital because the arbitral tribunal is not a party to any convention or agreement relating to jurisdiction and has no need to respect comity.¹⁵⁸ In fact, the sole duty of the tribunal is to carry out the terms of the arbitration agreement. In the normal course, arbitration proceedings will not be stayed while national court proceedings are pending.¹⁵⁹

The European Court of Justice judgment was handed down on 10 February 2009.¹⁶⁰ It determined that the use of an anti-suit injunction to prevent a court of a Member State which has jurisdiction to resolve a dispute under Regulation No 44/2001 from ruling on the applicability of the regulation to the dispute brought before it seeks to deny that court of the power to rule on its own jurisdiction under Regulation No 44/2001. The Court held:

156. *But cf.* Brekoulakis, *supra* note 150, at 342 (arguing as between arbitration and jurisdiction agreements, arbitration agreements have a more favorable status because they are better regulated and more favored by the courts).

157. *Cf. id.* at 343 (finding the "legal framework" of arbitration "establishes a duty for the national courts to enforce an arbitration agreement whenever they are seized of a dispute covered by the scope of the arbitration agreement").

158. *See* UNCITRAL MODEL LAW, *supra* note 22, art. 8; *cf.* Yuval Shany, Comment, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT'L L. 835, 849-50 (2005) (noting ICSID arbitrators find judicial comity inherent in the judicial process).

159. *Cf.* UNCITRAL MODEL LAW, *supra* note 24, art. 8(2).

160. Case C-185/07, *Allianz SpA v. West Tankers, Inc.*, 2009 ECJ EUR-Lex LEXIS 24 (Feb. 10, 2009).

It is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.¹⁶¹

This decision bars English courts from granting anti-suit injunctions to restrain a party bringing proceedings in a court of a European Member State in breach of an arbitration agreement. However, this decision is not necessarily anti-arbitration. It leaves it to each national court in which proceedings are brought to decide for itself whether the arbitration agreement is valid and binding and covers the specific dispute between the parties. There is of course a risk of parallel proceedings, additional costs, the possibility for a financially stronger party to exert pressure on a weaker party by additional proceedings and even conflicting decisions. It will be for the national courts to try and keep such abuses to a minimum by applying Article II of the New York Convention strictly.

One must recognize that it is possible for national courts to misuse anti-suit injunctions, but this was not a reason for the ECJ decision.¹⁶² The greatest risk of such misuse appears to be when they are granted after the arbitration award, that is, where they are employed by courts of the seat of an arbitration to protect an arbitration award that has already been made. There are several recent examples of instances where anti-suit injunctions of this type have been sought. In *Noble Assurance Co. v. Gerling-Konzern General Insurance Co.*, the English court exercised its discretion to grant an anti-suit injunction to prevent a defendant to arbitration proceedings from continuing an action commenced in a different

161. *Id.* [35].

162. *See* *Ibeto Petrochemical Indus. Ltd. v. M/T Beffen*, 475 F.3d 56, 65 (2d Cir. 2007) (cautioning that “due regard for principles of international comity and reciprocity require a delicate touch in the issuance of anti-foreign suit injunctions, that such injunctions should be used sparingly, and that the pendency of a suit involving the same parties and same issues does not alone form the basis for such an injunction”).

jurisdiction designed to nullify the arbitration award made against it.¹⁶³

In *C v. D*, the English court held that an insured was entitled to an anti-suit injunction preventing the insurer from challenging a London arbitration award in the United States because the attempt to invoke the jurisdiction of another court was a breach of the contract to arbitrate.¹⁶⁴ The insurer threatened to apply to the New York courts on the ground that the award was “a manifest disregard of New York law.”¹⁶⁵ This constituted a threatened breach of the arbitration agreement and had to be stopped.¹⁶⁶ Mr Justice Cooke found that the agreement dealing with the seat of arbitration was “akin to an agreement to an exclusive jurisdiction clause,” and that such agreement included an agreement that the courts at the seat of arbitration had supervisory powers.¹⁶⁷ Further, by agreeing to the seat of arbitration, the parties agreed that any challenges to an award were “to be made only in the courts of the place designated as the seat of arbitration.”¹⁶⁸ In this regard, the choice of New York as the Governing Law was found to be irrelevant when it came to challenging the arbitration award. To take a step that would “negate the whole framework in which the arbitration took place” was vexatious, oppressive, unconscionable, and an abuse of process.¹⁶⁹ *C* was therefore entitled to injunctive relief.

In *KBC v. Pertamina*, the U.S. Court of Appeals for the Second Circuit upheld an injunction to prevent Pertamina from taking proceedings in the Cayman Islands to recover moneys paid out under an award against it on the pretext that the award was procured by fraud.¹⁷⁰ This infamous, longstanding, and multi-faceted litigation involved proceedings in different jurisdictions, including an arbitration which found against Pertamina. The Court of Appeals

163. See generally *Noble Assurance Co. v. Gerling-Konzern Gen. Ins. Co.*, [2006] EWHC (Comm) 253 (Eng.).

164. See generally *C v. D*, [2007] EWCA (Civ) 1282 (Eng.).

165. *Id.* [7].

166. *Id.* [29].

167. See *C v. D*, [2007] EWHC (Comm) 1541, [29] (Eng.).

168. *Id.*

169. See *id.* [58]; see also *Noble Assurance Co. v. Gerling-Konzern Gen. Ins. Co.*, [2006] EWHC (Comm) 253, [95] (Eng.).

170. See *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 125 n.17 (2d Cir. 2007).

held that in this case, an anti-suit injunction was necessary “to prevent Pertamina from engaging in litigation that would tend to undermine the regime established by the Convention for recognition and enforcement of arbitral awards.”¹⁷¹ The U.S. Court of Appeals recognized the importance of comity, the importance of respect for the capacities of foreign transnational tribunals, and the need to be sensitive to the needs of the international commercial system for predictability in the resolution of disputes. However, here there was no mere disagreement with the way the arbitral award had been enforced. This would not justify an injunction. Instead, where there was a concerted effort to undermine the arbitral process the court found that “federal courts are not obliged to sit by idly when a party engages in proceedings that undermine the regime governing enforcement of foreign arbitral awards established by the Convention.”¹⁷² The appeal against the injunction was dismissed and the injunction allowed.¹⁷³

In a recent Peruvian case, an injunction was awarded by the Civil Court of Lima to preserve an award granted under the 1996 Peruvian Arbitration Act.¹⁷⁴ The original award obliged the Peruvian mining companies to transfer the rights in a gold and silver mine to Sulliden and its Peruvian subsidiary. This injunction, however, was released as the court was persuaded that the official who signed the contract containing the arbitration lacked the required authority.¹⁷⁵

Injunctions granted by courts other than at the seat of the arbitration or the place of enforcement of an award against foreign proceedings in connection with an award, although perhaps on occasion justified on grounds of justice, will often be counter to the fundamental principles of international arbitration. First, the seat of arbitration has a supervisory role only until an award has been made.¹⁷⁶ It has no duty to offer to protect an award as a matter of

171. *Id.* at 125.

172. *Id.*

173. *Id.* at 130.

174. *See generally* Sulliden, Press Releases: December 18, 2007, http://www.sulliden.com/PressReleases_en/PR_20071218.html.

175. *See Peru Sets Aside Contract Arbitration Award*, GLOBAL ARB. REV., Sept. 2007, at 6; *see generally* Sulliden, <http://www.sulliden.com>.

176. *Cf.* Graham Dunning QC, Stop – or go? Injunctions and Arbitration, Master’s Lecture before the Worshipful Company of Arbitrators 7-8 (Mar. 13,

right. The proper way to challenge an award is at the courts of the seat of arbitration or to resist enforcement at the place of enforcement, and this is only on limited grounds.¹⁷⁷ The court at the seat of arbitration should not interfere with this process.

Secondly, the court of the place of enforcement has no duty or power to protect an arbitration award made in a foreign state.¹⁷⁸ Its duty is only to enforce an award in accordance with the New York Convention. A court seized with an action has the sole right to determine the legitimacy of that action and to decide on its own jurisdiction. Any other approach to those set out above cannot be justified in terms of the New York Convention and the autonomous nature of arbitration. It undermines trust between Convention states, raises issues of international comity and respect between nations, and opens the way to confusion and ultimately injustice.¹⁷⁹

B. PRO-ARBITRATION ORDERS

Pro-arbitration orders are orders issued by national courts for specific performance of arbitration agreements. On their face these injunctions offer powerful support for the arbitration process in that they directly compel parties to undertake what they have already agreed upon. There are two important issues relating to courts' compelling arbitration. The first is whether orders compelling arbitration accord with the underlying principles of the international arbitration regime. The second issue is that if such orders are made, how far should they reach, and in particular, should courts be entitled to make orders against parties who are not on the face of the arbitration clause party to the arbitration agreement?

1. When Should Courts Compel Parties to Arbitrate?

This question is handled differently in different jurisdictions. The United States offers courts the greatest powers in terms of ordering specific performance. In the United States, an arbitration agreement

2008), available at http://www.arbitratorscompany.com/pdfs/Master's_Lecture_2008_text.pdf.

177. *See id.*

178. *Cf. id.* at 8 (arguing under the New York Convention scheme, control of a final award is the sole responsibility of the courts where enforcement is sought).

179. *Cf. id.*

can be enforced by a court order forcing a reluctant party to go to arbitration, and a party that does not follow the court's order will be in contempt of court.¹⁸⁰ Sections 4 and 206 of the Federal Arbitration Act ("FAA") allow a party aggrieved by the failure or refusal of a contracting party to arbitrate under a written arbitration agreement to seek an order directing that such party participate in the arbitration as agreed and that a party who ignores the order will be in contempt of court.¹⁸¹ This compelling power applies even if the agreed-upon seat of the arbitration is outside the United States. It can have very important implications for default awards as too often parties decide for tactical reasons, which may assist in resisting enforcement, to refuse to participate in the arbitration despite the arbitration agreement.¹⁸²

This power was exercised in *Paramedics Electromedicina Comercial, Ltd. v. GE Medical Systems Information Technologies, Inc.*, where the U.S. District Court for the Southern District of New York granted a motion to compel the performance of an arbitration agreement providing for arbitration under the rules of the Inter-American Commercial Arbitration Commission in Miami.¹⁸³ When a dispute arose, Paramedics brought suit before a Brazilian court notwithstanding the arbitration agreement. GE Medical Systems initiated arbitration proceedings. When Paramedics requested an anti-arbitration injunction from a New York court, GE Medical Systems requested an order compelling arbitration and an anti-suit injunction enjoining Paramedics from continuing with the Brazilian court proceedings. The court rejected Paramedics' request for an anti-arbitration injunction against GE Medical Systems. At the same time, it granted both the motion to compel Paramedics to arbitration and the anti-suit injunction enjoining Paramedics from continuing with the Brazilian action. The court held that where it is established

180. See generally GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 380 (2d ed. 2001) (discussing court orders compelling the performance of arbitration agreements in U.S. law).

181. Federal Arbitration Act §§ 4, 206, 9 U.S.C. §§ 4, 206 (2006).

182. *Id.* § 4 (providing recourse for an aggrieved party "if the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof").

183. 369 F.3d 645, 652 (2d Cir. 2004) (affirming the judgment of the District Court in granting "GEMS-IT's motion to compel arbitration").

that an arbitration agreement exists and that one of the parties to this agreement is not in compliance with it, an order compelling arbitration without further proceedings may be issued.¹⁸⁴

The United States Court of Appeals for the Second Circuit affirmed the anti-suit injunction and the imposition of sanctions, but remanded for reconsideration of the amount of the sanctions. The Second Circuit held that “[a]n anti-suit injunction against parallel litigation may be imposed only if: (A) the parties are the same in both matters, and (B) resolution of the case before the enjoining court is dispositive of the action to be enjoined.”¹⁸⁵ The court found that “the district court did not abuse its discretion in ruling that the” defendant sufficiently met the two requirements.¹⁸⁶ Cases such as these take their steer from the U.S. Supreme Court ruling in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, where the Court stated that a party that makes a bargain to arbitrate “should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”¹⁸⁷

Although pro-arbitration injunctions ought to appeal to those who support arbitration, there are good reasons to doubt whether they are beneficial to the arbitral process and/or accord with the core principles of arbitration practice. First, most national laws do not expressly allow courts to order parties to participate in arbitration proceedings even where there is a valid arbitration agreement. Rather the pressure is negative by refusing access to the court for matters covered by the arbitration agreement.¹⁸⁸ There is nothing in the New York Convention to suggest that a court has a duty to compel arbitration. Courts only have a duty to “refer” a party to arbitration.¹⁸⁹ The same language is used in the UNCITRAL Model Law.¹⁹⁰ The French NCPC requires a court to “decline jurisdiction”

184. *Id.* at 649 (concluding “that the anti-suit injunction was an appropriate measure to enforce and protect the judgment compelling arbitration”).

185. *See id.* at 652.

186. *Id.* at 652-54.

187. 473 U.S. 614, 628 (1985).

188. *See* Channel Tunnel Group Ltd. v. Balfour Beatty Constr. Ltd., [1993] A.C. 334, 367-68 (H.L.) (appeal taken from Ir.) (U.K.) (holding that court had power to stay proceedings brought in violation of arbitration agreement).

189. New York Convention, *supra* note 10, art. II, § 3.

190. UNCITRAL MODEL LAW, *supra* note 22, art. 8, § 1.

in the face of an arbitration clause,¹⁹¹ the Swiss PILA (Private International Law Statute) also requires a court to “decline jurisdiction”;¹⁹² the German ZPO (Civil Procedure Code) requires national authorities to reject court proceedings brought in breach of an arbitration agreement as being inadmissible;¹⁹³ and section 9 of the English Arbitration Act of 1996 provides for a stay of court action.¹⁹⁴

The *Channel Tunnel* case is a prominent example where a court refused to order parties to arbitration but stayed the court proceedings in support of an arbitration agreement.¹⁹⁵ Eurotunnel (the owners of the tunnel) and Trans-Manche Link (a consortium of English and French companies) had concluded a contract for the construction of a tunnel under the English Channel between England and France. The contract provided for a two-stage dispute resolution mechanism. First, any dispute between Eurotunnel and Trans-Manche Link should be brought before a Panel of Experts. Then, if either party disagreed with the Panel’s decision, the dispute could be referred to ICC arbitration with its seat in Brussels. A dispute arose as to the amounts payable in respect of the works on the tunnel’s cooling system. Trans-Manche Link threatened to suspend their work alleging a breach of contract by Eurotunnel. Eurotunnel brought an action in the English courts requesting an interim injunction to restrain Trans-Manche Link from suspending their works. Trans-Manche Link argued that the English courts did not have the power to order such an injunction.

In addition, Trans-Manche Link requested a stay of the action brought by Eurotunnel in favor of the arbitration on the basis of the then governing Arbitration Act of 1975. The English House of Lords decided to stay the proceedings in favor of arbitration based on the

191. N.C.P.C., *supra* note 88, art. 1458.

192. Swiss PIL Statute, *supra* note 86, art. 7.

193. Zivilprozessordnung [ZPO] [Civil Procedure Statute] Dec. 5, 2005, Bundesgesetzblatt [BGBl] I, 3302, as amended, § 1032, ¶ 1 (F.R.G.), *translated in GERMAN COMMERCIAL CODE & CODE OF CIVIL PROCEDURE IN ENGLISH* (Charles E. Stewart trans., 2001).

194. Arbitration Act, 1996, c. 23, § 9 (Eng.), *available at* http://www.opsi.gov.uk/Acts/acts1996/plain/ukpga_19960023_en#sch1.

195. *Channel Tunnel Group Ltd. v. Balfour Beatty Constr. Ltd.*, [1993] A.C. 334, 367-68 (H.L.) (appeal taken from Ir.) (U.K.).

court's inherent jurisdiction to stay proceedings brought before it in breach of an arbitration agreement.¹⁹⁶ Section 9 of the 1975 Arbitration Act further provided in its fourth paragraph that "the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."¹⁹⁷ The obligation to stay proceedings under section 9 applies even if the arbitral seat "is outside England and Wales or Northern Ireland or no seat has been designated or determined."¹⁹⁸ However, there is no power under the English Arbitration Act of 1996 for the courts to order a party to participate in an arbitration. Instead of actively enforcing an arbitration agreement, therefore, most national courts are similarly limited to a passive role, giving effect to the arbitration agreement only indirectly.¹⁹⁹

Secondly, the stay of court proceedings brought in breach of an arbitration agreement might be indirect but is nevertheless an efficient means of ensuring respect for an arbitration agreement while keeping court involvement to a minimum. It forces the claimant to go to arbitration, or at least is a major incentive, because the latter will have no other forum in which to bring his claim.²⁰⁰

Thirdly, pro-arbitration agreements threaten the principle of competence-competence, in that arbitrators could feel inhibited to reach a decision different from that of a national court that has compelled the arbitration.²⁰¹ The assumption is that if a court has

196. *Id.* at 352.

197. Arbitration Act, 1996, c. 23, § 9, ¶ 4 (Eng.), available at http://www.opsi.gov.uk/Acts/acts1996/plain/ukpga_19960023_en_1 (last visited Jan. 21, 2009).

198. *Id.* § 2, ¶ 2(a).

199. *Channel Tunnel*, [1993] A.C. at 367-68 (determining that the parties' choice of arbitration to resolve their disputes outweighed the need to protect the party seeking an injunction).

200. See JEAN-FRANCOIS POUURET & SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION para. 497 (Stephen V. Berti & Annette Ponti trans., 2d ed. 2007) ("English law is peculiar because the court can neither declare itself incompetent nor refer the parties to arbitration, but can only stay its proceedings. It is thus essentially by generalising the mandatory character of the stay and leaving aside the additional requirement of the existence of a dispute that the Arbitration Act 1996 has reinforced respect of the arbitration agreement . . .").

201. See William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT'L ARB. 133, 144-45 (1997) (claiming that government interference with arbitration means that arbitrators cannot determine their own jurisdiction).

issued a pro-arbitration order it will have satisfied itself that there is a valid arbitration agreement. This of course is not the case: rather it is still for the arbitral tribunal to make the primary decision on jurisdiction.

Fourthly, pro-arbitration injunctions threaten the sanctity of party autonomy in that parties agree to go to arbitration on the basis that the party who believes itself to have been wronged initiates the arbitral process. The arbitral agreement is not founded on the power of the courts to force a recalcitrant party to settle its disputes through arbitration.²⁰²

2. How Far Should Such Orders Reach: To Include Third Parties Allegedly Covered by the Arbitration Agreement?

If courts are prepared to compel parties to arbitrate their disputes, where does the process stop? Are courts justified in compelling a party who is not an express or named party to the arbitration clause to abide by the arbitration agreement, solely on the basis of closeness of relationship to one of the main parties to the arbitration or on account of some other factor? This of course is the controversial issue of companies and entities which are the alter egos of the state. This issue is increasingly raised, and many consider that it should be determined by the arbitrators rather than a national court.²⁰³

The courts appear to have a mixed approach to this issue. Two recent English cases reached opposite conclusions. In *UK Film Finance Inc. v. Royal Bank of Scotland*, an arbitration agreement was directed at only two of three parties, and the English court extended the scope of the agreement to cover all three.²⁰⁴ However, in *Starlight Shipping Co. v. Tai Ping Insurance Co.*, the English court found that it had no jurisdiction to grant an order in favor of the ship manager

202. Cf. Linda R. Boyle, Note, *Three's Company: Examining the Third-Party Problem through an Analysis of Bidas S.A.P.I.C. v. Government of Turkmenistan*, 45 HOUS. L. REV. 261, 262 (2008) (stating that the power for an arbitration tribunal stems from agreement between the parties).

203. See *id.* at 262 (arguing that arbitrators should be able to make jurisdictional decisions regarding third parties).

204. [2007] EWHC (Comm) 195, [48] (Eng.).

despite the proceedings being vexatious and oppressive as a matter of English law.²⁰⁵

In the United States, courts have relied on the principle of estoppel to read an arbitration agreement as covering parties who are not ostensibly party to that agreement.²⁰⁶ However, in 2007, in *Regent Seven Seas Cruises, Inc. v. Rolls Royce, PLC*, a federal judge in Miami refused to extend an arbitration agreement in a charter agreement to parties to the related shipbuilding contract.²⁰⁷ Regent and Radisson had entered into a time charter agreement containing an arbitration clause. Regent was the owner of the vessel. It claimed that Rolls Royce and Alstom “defrauded and deceived” it into installing the Mermaid pod propulsion system.²⁰⁸ These parties requested that the court compel Regent to arbitrate the dispute based on the charter agreement. U.S. Judge Paul C. Huck of the Southern District of Florida found that the petitioners could not enforce the time-charter’s arbitration clause because “[i]t is inconceivable that, as non-signatories, they would be able to compel Regent to arbitrate claims that do not even appear to arise out of the Time Charter agreement.”²⁰⁹

The São Paulo Court of Appeal held that a controlling shareholder was bound by an arbitration agreement included in a contract to which it was not expressly a party, given that there was sufficient evidence of its inherent connection to the legal relationship.²¹⁰ Some commentators have gone further than the São Paulo Court and argued for extension when the same economic or operational purpose can be identified.²¹¹ This is a complicated and controversial area and

205. [2007] EWHC (Comm) 1893, [42] (Eng.).

206. See *Regent Seven Seas Cruises, Inc. v. Rolls Royce, PLC*, Nos. 06-22347-CIV & 06-22539-CIV, 2007 WL 601992, at *7-8 (S. D. Fla. Feb. 21, 2007).

207. *Id.* at *11-12.

208. *Id.* at *1.

209. *Non-Signatories Not Bound to Arbitrate, Florida Judge Rules*, MEALEY’S INT’L ARB. REP., Mar. 2007, at 7, 7-8.

210. See Paul E. Mason & Mauricio Gomm-Santos, *New Keys to Arbitration in Latin America*, 25 J. INT’L ARB. 31, 59-60 (2008) (citing *Trelleborg do Brasil Ltd. v. Anel Empreendimentos Participacoes e Agropecuaria Ltd.* (citation omitted)); see also the French CA Paris case of November 30, 1988 *Korsnas Marma v. Durand-Auzias*.

211. See, e.g., Olagoke O. Olatawura, *The “Privy to Arbitration” Doctrine: The Withering of the Common-Law Privy of Contract Doctrine in Arbitration Law*, 16 AM. REV. INT’L ARB. 429, 460 (2005).

each case can only be discussed on its merits. The real question is who properly should decide what was agreed, and who does it bind: a national court selected by the party wishing to achieve a particular result or the arbitration mechanism selected by the parties?

The main justification for courts to interfere with arbitration in this way is to save costs and time, to ease the administrative burden, and to allow for an efficient settlement of disputes, including consistency of decision making.²¹² Although, these objectives are worthy, it is essential that the arbitral process remain autonomous, and it is for arbitrators to decide who the proper parties are and whether third parties were properly covered by this arbitration agreement.

There is a danger that pro-arbitration injunctions will not reach their target because they will not be respected by another court.²¹³ There also exists the possibility that one injunction leads to a battle of injunctions.²¹⁴ For example, in *Dependable Highway Express, Inc. v. Navigators Insurance Co.*, the U.S. Court of Appeals for the Ninth Circuit recently considered the situation where Navigators had obtained an injunction from the English courts forbidding Dependable from proceeding with litigation in U.S. courts in relation to an indemnity contract.²¹⁵ The Ninth Circuit found that it was not necessary to recognize the English injunction because its sole purpose was to interfere with the U.S. suit. The court stated:

Indeed, “there are limitations to the application of comity. When the foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimize the aberration or to encourage retaliation, undercutting the realization of the goals served by comity. No nation is under an unremitting obligation to enforce foreign

212. Cf. Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1206 (2003) (emphasizing economy, efficiency, and effectiveness as objectives of dispute resolution).

213. See, e.g., *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059 (9th Cir. 2007).

214. See, e.g., *Comandate Marine Corp. v. Pan Australia Shipping Pty Ltd.* (2006) FCAFC 192, ¶¶ 16-20 (Austl.).

215. *Dependable*, 498 F.3d at 1062.

interests which are fundamentally prejudicial to those of the domestic forum."²¹⁶

3. *What Other Options are There to Compel Arbitration Other than by Injunction?*

Can a party forced to go to court to claim damages for breach of contract, that is, failure to arbitrate? This would include the cost of preventing any court proceedings. The initial difficulty with this argument is that it could be applied to any claim in damages. Is there something different in arbitration that, unlike other forms of contractual breach, the costs should not be treated as costs in the litigation? Is the fact that the agreement was to resolve a dispute in a certain way a justification for a separate damages claim?

In England, courts have held that a failure to abide by a dispute resolution clause can sound in damages. In *Union Discount Co. v. Zoller*, the English Court of Appeal found that there was no objection to a claim for damages based on a breach of contract. Union and Zoller were parties to a series of contracts, each of which contained a jurisdiction clause. In 2001, Union commenced proceedings in England against Zoller for sums due under the contracts. Zoller initiated proceedings in New York. Union successfully applied to strike out the New York proceedings as being in breach of the exclusive jurisdiction clause. It was common ground that Union did not ask the New York court for its costs of that application, since under New York law they were not recoverable. In the English proceedings, Union added a claim to recover the costs of the New York proceedings as damages for breach of contract.²¹⁷

This was recently revisited in *A v. B*, where there was an agreement between parties and an arbitrator to settle existing disputes by arbitration in Switzerland and under Swiss law.²¹⁸ One party unsuccessfully brought proceedings in the English courts for an anti-arbitration injunction against the arbitrator and the other parties. On the question of whether the successful party was entitled to

216. *Id.* at 1067 (quoting *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984)).

217. *Union Discount Co. v. Zoller*, [2001] EWCA (Civ) 1755, [31] (Eng.).

218. *A v. B*, [2007] EWHC (Comm) 54, [16]-[17] (Eng.).

recover indemnity costs, i.e., more than the normal amount of costs allowed under the English system for taxation of costs, the English court stated that, provided that it could be established that the other party was in breach of the arbitration or jurisdiction clause and that the breach had caused the innocent party reasonably to incur legal costs, those costs should normally be recoverable on an indemnity basis.²¹⁹

An interesting question is who should determine this damages question: the court where anti-arbitration proceedings are brought or the arbitration tribunal that has jurisdiction? This author suggests it should be the latter that determines damages.

CONCLUSIONS

In relation to the question of whether national court involvement undermines the arbitral process, the answer is that it depends on the nature and circumstances of the involvement. In this respect, it must be remembered that national courts operate in different legal and cultural contexts: there are common law and civil law jurisdictions; developing and developed countries; legal systems with or without political or religious influences. The way that each national court views its relationship to international arbitration is inevitably colored by these factors.²²⁰

However, notwithstanding the above, there are a number of principles that ought to inform the way in which national courts approach the issue of their involvement with international arbitration. First, despite its autonomous character, international arbitration depends on national courts to provide effectiveness, support, and assistance for the process. Second, international arbitration does not depend on national courts for legitimacy; this exists as of right, based on the agreement of the parties, the New York Convention, and

219. *See id.* [54]; *see also* Nat'l Westminster Bank PLC v. Rabobank Nederland, [2007] EWHC (Comm) 1742, [36] (Eng.); Scandinavian Airlines Sys. Den.-Nor.-Swed. v. Sunrock Aircraft Corp., [2007] EWCA (Civ) 882, [37]-[42] (Eng.). On the issue of damages for breach of arbitration clauses, *see generally* Justin Michealson & Gordon Blanke, *Anti-Suit Injunctions and the Recoverability of Legal Costs as Damages for Breach of an Arbitration Agreement*, 74 INT'L J. ARB., MEDIATION & DISPUTE MGMT. 12 (2008).

220. Carbonneau, *supra* note 213, at 1193-94.

international arbitration practice.²²¹ Third, accordingly, national courts should become involved where they are asked to give effect to the agreement to arbitrate and support the process agreed between the parties, including by assisting with the establishment of the tribunal, the protection and collection of evidence for use in the arbitration, and, if need be, preservation of the status quo. Fourth, once an award has been made, courts should seek to give effect to the tribunal's award because it is a recognition of the autonomous character of arbitration, an implied agreement of the parties to honor the award of the arbitrators and the New York Convention—which of course contains the exceptions to the general rule.²²²

Fifth, with respect to injunctions, all injunctions have the capacity to be abused and used as vehicles for mischief making. If an injunction fails to reach its target, it will not be respected by another court and could be a source of a second litigious front, which the parties no doubt would have wished to avoid. There also exists the possibility that one injunction leads to a battle of injunctions. Anti-suit injunctions, which aim to restrain a party from resorting to a national court, are often justified. They support the arbitration process by directing parties to the forum chosen by the parties to determine their differences. The main focus in deciding whether to grant an injunction ought to be the parties' agreement to settle their dispute by arbitration rather than issues of oppression or fairness or any broader effects of the decision on matters of comity. These injunctions ought to be granted only by the seat of the arbitration and prior to an award's being granted. The tribunal can then, as it is authorized and in accordance with the competence-competence doctrine, determine its own jurisdiction.

Most abusive are the anti-arbitration injunctions. Although these are rare, they are often applied for with the specific intention of undermining the arbitration process. Here again this is not a matter for a court: if there is some reason the arbitration cannot or should not proceed, this should be determined by the method chosen by the parties, i.e., an arbitration tribunal. Pro-arbitration orders may well stem from good intentions, but they run the risk of undermining the arbitration process by failing to recognize the self-correcting

221. New York Convention, *supra* note 10, art. I.

222. *Id.*, art. V.

measures built into the arbitration system.²²³ An over-zealous court is in clear danger of trespassing on the domain of the arbitral tribunal and/or pre-empting the decision of such a tribunal. The safest course is for the national court to content itself with offering passive support and recognition.

Further, national courts should take a hands-off approach when parties have agreed on arbitration because there is an inevitable parochialism in every national court—no matter how strongly it avows an internationalist perspective. Every international arbitration gives rise to a unique blend of legal perspectives that derive from the various backgrounds of the participating lawyers, arbitrators, and parties.²²⁴ A national court asked to intervene cannot possibly fully take account of these perspectives in reaching its decisions. The same cannot be said of the arbitrators who are intimately involved in the arbitration and are therefore well (or at least much better) placed to understand its every nuance. As a matter of practical wisdom, matters are very often best left to them to decide.

However, it is also the case that arbitrators and parties must give national courts due respect because it is the national courts that ultimately hold the keys to recognition and enforcement. To return to the analogy used earlier, if national courts refuse to provide the nourishment and sustenance sought at the right time and in the right place, the giant squid of international arbitration might be forced into shallower waters, where it will inevitably find itself in peril.

223. See Park, *supra* note 202, at 140-42.

224. See Boyle, *supra* note 203, at 264.