

Anti-Suit Injunctions Issued by Arbitrators

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I. INTRODUCTION

The topic addressed in this contribution is well illustrated by a recent case:¹ two parties enter into a contract, which they wish to keep highly confidential, so they execute a single copy of the agreement that they then entrust to a third party escrow agent. The parties have provided for two different arbitration clauses—one clause requiring *ad hoc* arbitration in the event of a dispute arising from their contractual relations, and the other providing for ICC arbitration with the third party escrow agent.

The escrow agreement provides that the escrow agent must deliver the original agreement under certain terms, specifically so as to enable the party so requesting to provide the original agreement to the *ad hoc* arbitrators should the *prima facie* existence of an arbitration agreement need to be established.

A dispute arises between the parties. The escrow agent refuses to hand over the original agreement. One of the parties initiates an *ad hoc* arbitration against both the other party and the escrow agent. Simultaneously, the Claimant initiates arbitration proceedings against the escrow agent before the ICC.

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¹ The facts of this matter have been slightly changed to preserve confidentiality.

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The claimant requests from the *ad hoc* arbitrators that they order the other party to agree to the handing over of the escrow agreement, and the escrow agent seeks an order that the claimant request a stay of the ICC proceedings.

Both of the aforementioned proceedings were eventually settled. However, this example clearly illustrates the risk of escalation inherent to anti-suit injunctions.

We will now, in turn, examine whether arbitrators have the authority to grant anti-suit injunctions (II) and whether anti-suit injunctions issued by arbitrators are appropriate in international commercial arbitration (III).

II. THE AUTHORITY OF ARBITRATORS TO GRANT ANTI-SUIT INJUNCTIONS

The question of whether arbitrators have the authority to grant anti-suit injunctions and, if so, what types of orders can be made, raises issues of both jurisdiction (A) and power (B).

A. Jurisdiction

Unlike judges, arbitrators, as private persons, do not represent the interest of a State. Thus arbitrators may decide on the jurisdiction of a judge without breaching state sovereignty.² Nor must arbitrators ensure that their decisions be consistent with the

² *But see* Pierre Karrer, *Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please*, in ICCA CONGRESS SERIES NO. 10, INTERNATIONAL ARBITRATION AND NATIONAL COURTS, THE NEVER ENDING STORY 97, 106 (A.J. van den Berg ed., 2001).

Lugano Convention or the Brussels Regulation I-44/2001.³ Nevertheless, in deciding upon the jurisdiction of a court or another arbitral tribunal, arbitrators must respect the following basic principles:

1. Each court or arbitral tribunal has the power to decide on its own jurisdiction:

The Arbitral Tribunal would, however, have had serious reservations about ruling on the lack of jurisdiction of a state Court and issuing a decision, which could purport to deny a party access to justice before such a state Court. It is a fundamental principle that each Court and Arbitral Tribunal has jurisdiction to rule on its own jurisdiction or, in other words, has Kompetenz-Kompetenz.⁴

2. Admittedly, in upholding their jurisdiction, arbitrators implicitly declare that any other court or arbitral tribunal is prevented from ruling on the same subject matter. In due course, domestic courts, at least those of the seat of the arbitration, will have the last word in this respect. Arbitrators must satisfy themselves with this ruling and may not order performance in kind of the arbitration agreement.⁵ The Algiers Accords of January 19,

³ On April 27, 2004, the European Court of Justice held that anti-suit injunctions are inconsistent with Brussels Regulation I-44/2001 (Case C-159/02 *Turner v. Grovit*, [2004] I.L.Pr. 25, [2004] All E.R. (EC) 485, [2004] 2 Lloyd's Rep. 169). The text of this decision is reproduced in this volume as Annex 6.

⁴ Unreported ICC case, Procedural Order of November 2000 (refusing an anti-suit injunction).

⁵ A party to an arbitration agreement is under a duty to refer all disputes arising out of such agreement to the arbitrators. Several mechanisms ensure that such duty is complied with (*e.g.*, the appointment of an arbitrator by the competent court at the seat of the arbitration should a party fail to appoint its arbitrator). Whether a party may be ordered to perform the arbitration agreement in kind is debated. Thus, some laws provide that the courts will have jurisdiction over disputes arising out of arbitration agreements when the arbitral tribunal cannot be constituted due to reasons for which the defendant is clearly

1981 set up an international arbitral tribunal responsible for deciding disputes between Iran and the United States. In *E-Systems Inc. v. Iran*, this tribunal made the above distinction and also requested:

[t]he Government of Iran to move for a stay of the proceedings before the Public Court of Tehran until the proceedings in this case before the Tribunal have been completed.⁶

In this case, the Claimant sought to have Iran enjoined from prosecuting before its own courts an action that it could have initiated before the arbitral tribunal as a counterclaim. The arbitral tribunal noted that it would have jurisdiction over a counterclaim, which would exclude the jurisdiction of any other tribunal, but that its jurisdiction was not exclusive. Hence, the arbitral tribunal refused to order Iran to withdraw its action before the Iranian courts but ordered Iran to request a stay of the latter in order to ensure that its jurisdiction and authority was fully effective. The Tribunal noted:

responsible (*see, e.g.*, Art. 7(c) of the Swiss Private International Law Act). The question of the admissibility of an action to confirm the existence of an arbitration agreement is also debated (*see* Art. 1032(2) of the German Code of Civil Procedure, which provides for such an action). See also, in favor of the admissibility of an action before an arbitral tribunal and seeking principally that the defendant be enjoined from referring a matter to a foreign court (performance of the arbitration agreement in kind), GION JEGHER, *ABWEHRMASSNAHMEN GEGEN AUSLÄNDISCHE PROZESSE* 176 *et seq.* (2003). Against the admissibility of an action before a Swiss court and seeking principally a declaration that the arbitration agreement is null, see François Perret, *Parallel Actions Pending Before an Arbitral Tribunal and a State Court: The Solution under Swiss Law*, 16 *ARB. INT'L* 333, 335 (2000).

⁶ See Feb. 4, 1983 Interim Award in Case No. 338, *E-Systems, Inc. v. Iran*, 2 *Iran-U.S. Cl. Trib. Rep.* 51, 57 (1983). This decision was confirmed several times thereafter, in particular in Case No. 12118, *Tadger-Cohen Associates, Inc. v. Iran*, 9 *Iran-U.S. Cl. Trib. Rep.* 302 (1985).

This Tribunal has an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective.⁷

3. *A fortiori*, unless a matter has been referred to it, an arbitral tribunal may not order a party to withdraw a court action, which would be tantamount to depriving a party of its substantive rights:

In the opinion of the Arbitral Tribunal, . . . [Claimant's] request for Injunctive Relief is inconsistent with this fundamental feature of provisional and conservatory measures. [Claimant] is not seeking an order requiring [Respondent] to request a stay of the [Court] action pending the final award in the arbitration. Rather, Claimant is requesting the Arbitral Tribunal to grant an order requiring (Respondent] to withdraw the [Court] Action with prejudice.⁸

English judges sometimes prohibit a party from referring a case to a foreign jurisdiction, where such referral would constitute a breach of a choice of forum clause or of an arbitration agreement.⁹ The argument advanced in support of such orders is that, by doing so, the enjoining judge is ordering the performance of the arbitration agreement in kind. In our opinion, this reasoning

⁷ *Id.* at 57.

⁸ *See supra* note 4.

⁹ Sandrine Clavel, *Anti-suit injunctions et arbitrage*, 2001 REV. ARB. 669. *See also* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 380 *et seq.* (2d ed. 2001); JULIAN D.M. LEW, LOUKAS A. MISTELIS, STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 15-24, at 363 (2003), and further references; Lawrence Collins, *Anti-Suit Injunctions Process and Arbitration*, in ASA SPECIAL SERIES NO. 15, ARBITRAL TRIBUNALS OR STATE COURTS – WHO MUST DEFER TO WHOM? 85 *et seq.* (2001); JEAN-FRANÇOIS POUURET & SÉBASTIEN BESSON, DROIT COMPARÉ DE L'ARBITRAGE INTERNATIONAL (2002).

is questionable. It is debatable whether an arbitration agreement gives rise to a strict obligation (*i.e.*, a duty) which, if violated, may result in an award of damages. Jurisdiction is something that is declared, not something that can be ordered. Declaring jurisdiction enables the arbitrator to rule on the merits of the dispute before him but does not comprise the power to exclude the jurisdiction of others.

Confronted with existing or impending parallel proceedings with a similar subject matter, arbitrators may only rule on their own jurisdiction. If arbitrators affirm their jurisdiction, this may result in discouraging a party from referring the matter to a domestic court or another arbitral tribunal. Yet the arbitrators may not enjoin the party in this regard. Arbitrators may neither decide on the jurisdiction of a court (or that of another arbitral tribunal) nor, *a fortiori*, on the cogency of the case brought before such court (or arbitral tribunal). In other words, arbitrators should not enjoin the parties from bringing an action in a court (or another arbitral tribunal) on the sole ground that they retain jurisdiction whereas the court (or arbitral tribunal) does not.

However, arbitrators may be able to prohibit a party from bringing an action in another forum on different grounds: the issue then becomes the power of the arbitrators.

B. Power

In enjoining a party from referring a matter to a court, arbitrators act within the scope of the arbitration agreement, of which they are ordering the performance. However, the arbitrators cannot rule over a jurisdiction other than their own: therefore, the crux of the issue is the power of the arbitrators to issue anti-suit injunctions.

The existence of an arbitral tribunal's power to order interim measures is becoming less debated (1). However, the exercise of this power may give rise to a number of difficulties (2).

1. Existence

Modern arbitration laws acknowledge the power of arbitrators to order interim measures (*see, e.g.*, Art. 17 of the UNCITRAL Model Law). However, other laws exclude such power and, in any event, the parties are free to exclude it or to increase its scope (*see* Arts. 38 and 39 of the English Arbitration Act 1996). In our opinion, the question of whether or not an arbitral tribunal has the authority to grant interim relief must be determined under the *lex arbitri*. What types of interim measures may be ordered in a specific case is a different question, which is governed either by the relevant procedural rules or by the *lex causae*, depending on whether interim measures are considered to be a matter of procedural law or to be substantive in nature. In any event, arbitrators only have a limited number of options: they may give orders to the parties, but not to third parties, and they cannot order certain types of measures, such as those related to specific performance. Moreover, the measures ordered must remain within the framework of the applicable substantive law.

With a goal of avoiding worsening a dispute, protecting its subject matter, and easing the enforcement of an upcoming award, may the arbitrators enjoin a party from referring the matter to a court or another arbitral tribunal?

In principle, nothing prohibits such an act. Thus, some arbitrators have not hesitated to order or, according to the wording of Article 47 of the Washington Convention, to "recommend any provisional measures which should be taken to preserve the

respective rights of either party.”¹⁰ In a case arising out of a bilateral investment treaty, an ICSID tribunal applied those principles and recommended that one of the parties request a stay of another pending arbitration.¹¹

The Tribunal, however, also believes that normally it would be wasteful of resources for two proceedings relating to the same or substantially the same matter to unfold separately while the jurisdiction of one tribunal awaits determination. No doubt the parties have been put to considerable expense already. At the same time, the Tribunal is concerned that Pakistan not be effectively deprived of a forum for the hearing of its own claims relating to the . . . Agreement [including the other arbitration clause].¹²

¹⁰ ICSID Case No. ARB/84/4, *Maritime International Nominees Establishment v. Republic of Guinea*, 4 ICSID REP. 61 (1997), 3(1) INT’L ARB. REP. A (1988), XIV Y.B. COM. ARB. 82 (1989) (excerpts). The arbitral tribunal appears to have based its decision on the ground that one of the parties acted in bad faith; see Paul Friedland, *Provisional measures and ICSID arbitration*, 2(4) ARB. INT’L 335, 346 (1986): “The Tribunal recommends in addition that MINE withdraw all other provisional measures before national jurisdictions (including any seizures or attachments of property of the Republic of Guinea whatever their judicial designation and whatever the method) and that MINE refrain from seeking additional provisional measures before any national jurisdiction.”

¹¹ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Procedural Order No. 2 of Oct. 16, 2002, 18 ICSID REV. – FOREIGN INV. L.J. 293 (2003), reproduced in this volume as Annex 3. See also Aug. 6, 2003 Decision of the Tribunal on Objections to Jurisdiction, 18(9) INT’L ARB. REP. 6 and A-1 (2003).

¹² In this case, the State’s consent to arbitrate resulted from the bilateral investment treaty. However, in contrast with the reasoning adopted by arbitrators in other instances, the award does not state that “any award to be rendered in the case by the Tribunal, which was established by inter-governmental agreement, will prevail over any decision inconsistent with it rendered by Iranian or United States courts” (see *E-Systems, Inc. v. Iran*, *supra* note 6, at 57).

In an ICC arbitration, in September 2003, the arbitral Tribunal was more cautious.¹³ A dispute had arisen between a contractor and an owner, the owner having called a performance guarantee posted by the contractor. The guarantee being blocked, the contractor initiated separate arbitral proceedings against the bank that issued the guarantee. The first tribunal refused to enjoin the contractor from pursuing the second arbitration on the grounds that it did not have the power to interfere with another arbitration, in particular because the latter had arisen out of a separate arbitration clause. The arbitral tribunal affirmed its power to grant interim measures but stated that the Claimant had delayed requesting the interim measures and, hence, did not meet the urgency requirement.

2. Exercise of the Power

As pointed out above, arbitrators may not rely on grounds such as *lis pendens*, *Kompetenz-Kompetenz* or *res judicata* to issue anti-suit injunctions: parties do not waive their right to resort to courts for interim measures as courts retain jurisdiction in this respect.¹⁴

However, arbitrators should not refrain from issuing anti-suit injunctions where such measures appear necessary to protect the arbitral proceedings. In so doing, arbitrators must ensure that these measures do not violate a party's fundamental right of seeking relief before national courts, that the conditions for

¹³ Unreported ICC case.

¹⁴ In principle, the parties are free to exclude the power of courts to order interim measures: in English law, see Article 44 of the English Arbitration Act 1996; in French law, see FOUCHARD GAILLARD GOLDMANN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 1319, at 718 (E. Gaillard & J. Savage eds., 1999). For a different position, see POUURET & BESSON, *supra* note 9, ¶ 614, at 559.

granting interim measures are satisfied and that the measures envisaged are appropriate.

Thus, the issue is less the existence of the power of the arbitrators than the modalities of its exercise and, especially, criteria to be used by arbitrators in deciding whether an order is appropriate.

III. APPROPRIATENESS OF ANTI-SUIT INJUNCTIONS

As noted above, arbitrators may issue anti-suit injunctions in relation to other proceedings so that the proceedings brought before them can continue in due course. Provided that the applicable legal requirements are satisfied, arbitrators may order a wide range of measures (A) but must remain extremely cautious (B).

A. Types of Measures and Conditions

Arbitrators may consider:

- enjoining a party from initiating (court or arbitral) proceedings;
- ordering a party to seek specific relief in related proceedings (for example, a stay); or
- ordering a party to withdraw another lawsuit or to inform the arbitral tribunal of its progress.¹⁵

¹⁵ In his contribution entitled *Interim or Preventive Measures in Support of International Arbitration in Switzerland* (2000 ASA BULL. 31, 37), Markus Wirth refers to two procedural orders enjoining parties from referring a matter to a court or from taking part in court proceedings. The first order is based on the negative effect of the *Kompetenz-Kompetenz* principle—a reasoning with which

It is conceivable that such orders also be made in relation to criminal (“*action civile*”) or administrative proceedings.

Arbitrators will have to ensure that the requested measures are urgent, aimed at preventing irreparable harm or necessary to facilitate the enforcement of the upcoming award.¹⁶ That is the source of difficulties.

First of all, there is a risk that the requested measures be ordered without the arbitrators having fully taken into account their impact. For example, prohibiting the initiation of proceedings before another court or arbitral tribunal may prevent a party from tolling a limitations period and may cause the loss of a party’s rights. Furthermore, the stay of an action may result in a party being prevented from offsetting its claim if such claims remain disputed and the arbitral tribunal issues an award affirming that the other party’s claim is due.

In addition, courts directly or indirectly concerned with the measure may chafe at such measures. In particular, they may refuse to enforce the arbitral award on their territory, on the grounds, for example, that the award violates public policy or that the arbitrators lacked impartiality. Thus, unlike an English judge who protects a third party or another court in issuing an anti-suit injunction, the arbitrator may be taken as having been a judge for his own cause.¹⁷

we disagree—and the second one is based on a confidentiality clause provided in the contract.

¹⁶ *Id.* at 37 *et seq.*; SÉBASTIEN BESSON, *ARBITRAGE INTERNATIONAL ET MESURES PROVISOIRES – ÉTUDE DE DROIT COMPARÉ* (1998).

¹⁷ For an illustration, see the unsuccessful attempt to challenge the Arbitral Tribunal in ICC case No. 10623 on the ground that a hearing was not held at the seat of the arbitration (Dec. 7, 2001 Award Regarding the Suspension

For all these reasons, in addition to necessary reservations concerning the interference, even indirect, in proceedings pending before another court (or arbitral tribunal), arbitrators should be very cautious. In our opinion, in the absence of a clear legal basis and confirmed case law, arbitrators should only issue anti-suit injunctions when it comes to their attention that one of the parties has committed fraud or otherwise engaged in abusive behavior in order to revoke the arbitration agreement. This can be the case when there is an abusive petition for interim measures designed to paralyze the arbitration or of when there is an attempt to slow down the proceedings or to harm the interests of another party, as is well-illustrated by the *Turner v. Grovit* case.¹⁸

This need for caution is even especially important because few remedies are available if an anti-suit injunction is not complied with.

B. Sanctions

It is unnecessary to restate here the difficulties inherent to the enforcement of interim measures failing voluntary compliance by the parties. Theoretically, several remedies exist (*e.g.*, enforcement by the assisting judge, *astreintes*). However, each remedy gives rise to both practical and legal difficulties.

As far as anti-suit injunctions are concerned, it is worth mentioning the difficulties connected with the imposition of damages or penalties.

of the Proceedings and Jurisdiction, 2003 ASA BULL. 59, 65 *et seq.* and comments by A. Crivellaro at 65, 68), reproduced in this volume as Annex 4.

¹⁸ See *supra* note 3.

Theoretically, the lack of compliance with an anti-suit injunction may cause a prejudice to the other party, which arbitrators can order to be compensated (provided that the arbitration clause is sufficiently broad). However, what is the specific prejudice? It is not that the award would have been more favorable than that of another judge or arbitrator. Where one of the parties has initiated proceedings abusively, the arbitrators will only have the power to order that party to pay for the unnecessary costs generated by such proceedings. This was the situation in ICC arbitration No. 8887. In that case, one of the parties referred the matter to the Turkish courts notwithstanding that the arbitrators had enjoined it from doing so. The arbitrators stated that the arbitration clause had been breached and ordered the party that violated the anti-suit injunction to compensate the other party for the prejudice suffered, which was determined to correspond to the fees paid by the aggrieved party to its Turkish lawyer. Compensation for an additional prejudice was rejected for lack of evidence.¹⁹

English courts may order the criminal sanctions of contempt of court if a party does not comply with an anti-suit injunction. Under certain conditions, it is conceivable that English arbitrators may impose the same sanction on their orders (Art. 42 of the Arbitration Act 1996). Whether arbitrators in civil law jurisdictions would have the same power is doubtful. Some authors affirm that arbitrators sitting in Switzerland may subject their orders to the sanctions in Article 292 of the Swiss Criminal Code.²⁰ We have some doubts in this respect, as this provision

¹⁹ Final award of April 1997 in ICC case No. 8887, in 11(1) ICC BULL. 91, 94 (2000).

²⁰ Under Swiss law, see GEHRARD WALTER, WOLFGANG BOSCH, JÜRGEN BRÖNNIMANN, INTERNATIONALE SCHIEDSGERICHTSBARKEIT IN DER SCHWEIZ 137 and n. 60 (1991).

only applies to orders issued by state authorities or civil servants, and an arbitrator is obviously neither.

Arbitrators may request the assistance of a competent court in order that sanctions be imposed on their injunctions. However, such a measure would not really be effective in an international context: if a party does not comply with an anti-suit injunction in a country other than the one where the seat of the arbitration is located, it will not be punished unless this behavior (*i.e.*, the non-compliance with the order) is also punishable in the country in question.²¹

IV. CONCLUSION

The conclusion is straightforward: first, arbitrators should not take the risk of ordering a judge or other arbitrators how to behave. They are the arbitrators' equals and have no orders to receive. Second, jurisdiction is something that is declared, not something that can be ordered. Hence, arbitrators should only decide on their own jurisdiction and may not order performance of an arbitration agreement in kind. Third, anti-suit injunctions are only appropriate where it appears necessary to protect the arbitral proceedings, namely where a party is fraudulently attempting to undermine the arbitral tribunal's jurisdiction. Finally, arbitrators should always exercise utmost care before issuing anti-suit injunctions, as the effect of these anti-suit injunctions may be more

²¹ Article 292 of the Swiss Criminal Code punishes the non-compliance with an order rather than the harm caused by such non-compliance. Therefore, this provision only applies when the act of non-compliance is committed in Switzerland. By contrast, contempt of court punishes the final result of the non-compliance, namely an obstruction to justice. As contempt of court can only take place where the order was made, the sanctions attached to contempt of court can be effective even when the non-compliance occurs outside of the jurisdiction of the court issuing the order.

harmful than the problem they are seeking to resolve. This will be the case, in particular, if the measure ordered prevents a party from exercising legitimate rights or if it leads to the annulment of the award on the ground that the arbitral tribunal has been the judge in its own cause and, hence, lacked impartiality.

