PERSPECTIVES ON ANTI-ARBITRATION INJUNCTIONS

by

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1. INTRODUCTION

An anti-arbitration injunction restrains a party from commencing or continuing with arbitration proceedings.[2] It may be issued when the jurisdiction of the arbitral tribunal has been wrongly invoked by going beyond the terms of the arbitration agreement.[3] It is intended to prevent the arbitration proceedings.

A party can apply for such an injunction at any stage of the arbitration from a court. It may be issued against the party and/or the arbitral tribunal.[4] Such intervention by curial intervention in arbitration proceedings by issuing such an anti-arbitration injunction is highly controversial and contentious.[5]

On the one hand, anti-arbitration injunctions are viewed as:

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2 *Weissfisch v Julius* [2006] EWCA Civ 218.

3 Nicholas Poon, 'The Use and Abuse of Anti-Arbitration Injunctions' (2013) 25 *SacLJ* 244, Singapore Academy of Law Journal at 250.

4 Nicholas Poon, 'The Use and Abuse of Anti-Arbitration Injunctions' (2013) 25 SacLJ 244, Singapore Academy of Law Journal at 246. See, *Salini Costruttori SPA v The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority, Partial Award in ICC Case No. 10623* (2003) 21 ASA Bull 59, 99.

5 Ting Wei-Chang, 'Anti-Arbitration Injunctions in Investment Arbitration: Lessons learnt from the *India v. Vodafone* Case' 2018 Contemporary Asia Arbitration Journal 11(2) 251-275, 252.

(1) threats to the principle of *kompetenz-kompetenz* ie, it strips the power of the arbitral tribunal to adjudicate any objections to its jurisdiction;[6]

(2) inconsistent with the legal framework for conduct of an international arbitration (where interference of courts is restricted to certain limited scenarios);[7]

(3) tools used by state entities to get the dispute adjudicated upon by national courts rather than the neutral arbitration forum.[8] For this reason, they have often been criticised as frustrating arbitration by engaging in judicial protectionism of local companies and governmental entities;[9] and

(4) judicial intervention procured by unscrupulous parties to evade or delay the agreed arbitration mechanism.

The general view is that anti-arbitration injunction increases the level of court interference in the arbitral process. It leads to the abuse of the arbitral process. It derails party autonomy where parties have freely entered and executed arbitration agreements.

Stephen Schwebel states that anti-arbitration injunctions 'violate conventional and customary international law, international public policy and the accepted principles of international arbitration';[10] Doak Bishop terms them as 'arbitral terrorism'.[11] Emmanuel Gaillard suggests that anti-arbitration injunctions should be prohibited altogether.[12]

Professor Gary Born, too, makes his distaste for such injunctions known by stating that they are 'deliberately obstructionist tactics, typically pursued in sympathetic local courts, aimed at disrupting the parties' agreed arbitral mechanism'.[13] He argues that in international cases, subject to the review of the

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6 *Weissfisch v Julius* [2006] EWCA Civ 218.

7 Romesh Weeramantry, 'Anti-Arbitration Injunctions: The Core Concepts' https://cil.nus.edu.sg/wp-content/uploads/2014/06/Note-on-anti-arbitration-injunctions.pdf.

8 Sharad Bansal, Divyanshu Agrawal, 'Are anti-arbitration injunctions a malaise? An analysis in the context of Indian Law' (2015) Arbitration International 31 (4) 613-629, 614.

9 Hakeem Seriki, *Injunctive Relief and International Arbitration* (CRC Press 2014) 7.02.

10 Stephen Schwebel, 'Anti-suit Injunctions in International Arbitration - An Overview' in Gaillard (ed), *Anti-suit Injunctions in International Arbitration* (Juris Publishing 2005) 5.

11 Doak Bishop, 'Combating Arbitral Terrorism: Anti-Arbitration Injunctions increasingly threaten to frustrate the International Arbitral System' (King & Spalding).

12 Sharad Bansal, Divyanshu Agrawal, 'Are anti-arbitration injunctions a malaise? An analysis in the context of Indian Law' (2015) Arbitration International 31 (4) 613-629, 618.

13 Gary B. Born, *International Commercial Arbitration* (3rd edn, vol 1, Wolters Kluwer 2021) 1410.

national courts of the seat of arbitration, an anti-arbitration injunction should virtually never be issued due to the risk of interfering with the arbitral tribunal's assessment of its own jurisdiction.[14]

On the other hand, anti-arbitration injunctions do have their benefits. When the validity of the arbitration agreement is being contested, if the issue is not dealt with by the court at the outset it may be raised by the party at the time of challenge of the award.[15]

There will be tremendous wastage of time, cost and effort if at that stage the award is found to be unenforceable. Therefore, it may be more efficient for courts to deal with these issues whenever raised by the parties, by issuing an anti-arbitration injunction.[16]

Nicholas Poon explains:

> While the court is deliberating the issue, it is only sensible that the arbitration not be permitted to commence (if it has not been commenced) or continue (if it has been commenced). In the absence of any consensus between the parties or an order of the arbitral tribunal to voluntarily stay the arbitration, an anti-arbitration injunction is the best way to ensure that the court's ruling on jurisdiction would not be rendered nugatory by the time it is issued. This may occur if an award is rendered within the time the court takes to decide the issue.[17]
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> ...
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> The arguments from principle and policy establish a strong foundation for the issuing of anti-arbitration injunctions. There is mounting acceptance for the idea that early determination of issues concerning the jurisdiction of the arbitral tribunal is in the best interests of the parties and the arbitral process... the recognition of the anti-arbitration injunction is desirable.[18]

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14 Gary B. Born, *International Commercial Arbitration* (3rd edn, vol 1, Wolters Kluwer 2021) 1419.

15 Nicholas Poon, 'The Use and Abuse of Anti-Arbitration Injunctions' (2013) 25 SacLJ 244, 262.

16 S R Subramaniam, 'Anti-Arbitration Injunctions and their compatibility with the New York Convention and the Indian Law of Arbitration: Future directions for Indian law and policy' (2018) Arbitration International 34 (2) 2; Adrian Briggs, 'Anti-Suit Injunctions and Utopian Ideals' (2004) 120 LQR 529, 530 ('(a)s an antidote to jurisdictional shenanigans' the usefulness of anti-arbitration injunctions is 'second to none').

17 Nicholas Poon, 'The Use and Abuse of Anti-Arbitration Injunctions' (2013) 25 SacLJ 244, 262.

18 Nicholas Poon, 'The Use and Abuse of Anti-Arbitration Injunctions' (2013) 25 SacLJ 244, 265-266.

For the above-mentioned reasons, courts need to ensure that certain competing claims are balanced when deciding whether to grant an anti-arbitration injunction.

These are:

(1) sanctity of the arbitration process;

(2) costs suffered by a party forced to participate in the arbitration; and

(3) possibility that it will have to adjudicate upon the validity of the arbitration agreement post rendering of the award.[19]

It follows, naturally, from the pro-arbitration attitudes of courts associated with most successful arbitration centres in accordance to safe seat principles, that injunctions to stay arbitrations will only be used sparingly, if at all.[20]

While an anti-arbitration injunction cannot take away the right of a party to pursue its substantive remedies, a failure to comply with it can amount to contempt of court.[21] It may also result in the court refusing to enforce the arbitral award.[22]

Hence, an anti-arbitration injunction, if obtained, is a very powerful remedy.

2. ANTI-ARBITRATION INJUNCTIONS VIS A VIS THE NEW YORK CONVENTION AND UNCITRAL MODEL LAW

There is no express provision in the New York Convention on the Recognition and Enforcement of Arbitral Awards, 1958 ('New York Convention')[23] or the

19 Sharad Bansal, Divyanshu Agrawal, 'Are anti-arbitration injunctions a malaise? An analysis in the context of Indian Law' 2015 Arbitration International 31 (4) 613-629.

20 J Lew, 'Does National Court Involvement Undermine the International Arbitration Processes?' (2009) 24 3 American University International Law Review 499; Shearer and Jaynel, 'Anti-suit and Anti-Arbitration Injunctions in International Arbitration: A Swiss Perspective' (2009) Int ALR.

21 Nicholas Poon, 'The Use and Abuse of Anti-Arbitration Injunctions' (2013) 25 SacLJ 244, 246.

22 Nicholas Poon, 'The Use and Abuse of Anti-Arbitration Injunctions' (2013) 25 SacLJ 244, 246.

23 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

UNCITRAL Model Law on International Commercial Arbitration ('UNCITRAL Model Law')[24] that authorises or bars the issuance of an anti-arbitration injunction.

However, under the New York Convention a Contracting State is obligated to give recognition to an arbitration agreement.[25] Further, the UNCITRAL Model Law, gives supremacy to the principle of *kompetenz-kompetenz*[26] and limits court intervention.[27] Hence it is often argued that any attempt to injunct arbitrations subject to the New York Convention, will be contrary to its basic legal framework.[28]

In contrast, it may be argued that the principle of *kompetenz-kompetenz* cannot be interpreted to absolutely limit the powers of the court. Lord Collins in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*[29] explained the approach:

> ... the principle that a tribunal in an international commercial arbitration has the power to consider its own jurisdiction is no doubt a general principle of law... But it does not follow that the tribunal has the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it. Nor does it follow that the question of jurisdiction may not be re-examined by the supervisory court of the seat in a challenge to the tribunal's ruling on

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24 UNCITRAL Model Law on International Commercial Arbitration, 1985 (with amendments as adopted in 2006).

25 New York Convention, Art II.1 reads:
Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

26 UNCITRAL Model Law Art 16(1): 'The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement...'.

27 UNCITRAL Model Law Art 5: 'In matters governed by this Law, no court shall intervene except where so provided in this Law'.

28 Gary B. Born, *International Commercial Arbitration* (3rd edn, vol 1, Wolters Kluwer, 2021) 1418: '... all Contracting States have mutual obligations to recognize and enforce arbitration agreements, that argues cogently against the issuance of anti-arbitration injunctions enjoining international arbitral proceedings and award enforcement, even though such injunctions might well be permissible and sensible in domestic matters'.

29 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] 3 WLR 1472; [2010] UKSC 46.

> jurisdiction. Still less does it mean that when the award comes to be enforced in another country, the foreign court may not re-examine the jurisdiction of the tribunal.[30]

In fact, certain provisions of the New York Convention[31] and UNCITRAL Model Law[32] appear to impliedly permit the issuance of an anti-arbitration injunctions.

These provisions indicate that national courts are only obligated to refer a dispute to arbitration after determining that the arbitration agreement does not suffer from any of the specified infirmities, namely, it is not null and void, inoperative or incapable of being performed. If such infirmities are present, the national court is under no obligation to refer the dispute to arbitration.[33] Hence, the court can impliedly injunct or prevent the arbitration proceeding under certain circumstances.

Separately, Article 5 of the UNCITRAL Model Law only limits the intervention of the court in 'matters governed by this Law'. Since the Model

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30 *Dallah Real Estate and Tourism Holding Co. v Ministry of Religious Affairs of the Government of Pakistan* [2010] 3 WLR 1472; [2010] UKSC 46 [84].

31 New York Convention Art II.3: 'The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, 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'.

32 UNCITRAL Model Law Art 8(1): 'A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed'.

33 Sharad Bansal, Divyanshu Agrawal, 'Are anti-arbitration injunctions a malaise? An analysis in the context of Indian Law' (2015) Arbitration International 31 (4) 613-629, 620: '... surely arbitration cannot be seen as a process that arbitrarily seeks to force a party to appear before and/or challenge the jurisdiction of a tribunal that it never consented to ...'.

Law is silent on anti-arbitration injunctions, it is arguable that court intervention on that aspect is not limited.[34]

In summary, a determination of whether grant of an anti-arbitration injunction is opposed to the New York Convention and UNCITRAL Model Law will depend upon the importance given to the principle of *kompetenz-kompetenz:*

> Either we consider the principle of kompetenz-kompetenz to be inflexible and absolute or consider it to be relatively flexible. In the case of the former, the national court should not be deciding on the question of invalidity and instead defer it to the arbitral tribunal to be constituted later. Conversely, in the case of the latter, we may recognize the role of the national court in the arbitral process and its potential contributions in the protection of innocent parties, in which case, it may be allowed to rule on the validity of the agreement. Needless to say, the existence of the anti-arbitration injunction will be a possibility only in the latter option.[35]

However, notwithstanding the fact that issuance of such injunctions may find support in international law and issued by national courts, arbitral tribunals

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34 Nicholas Poon, 'The Use and Abuse of Anti-Arbitration Injunctions' (2013) 25 SacLJ 244, 268-270 ('The court's power to grant injunctive relief is only restricted by Art 5 if the intervention related to 'matters governed by this Law'). *See* S R Subramaniam, 'Anti-Arbitration Injunctions and their compatibility with the New York Convention and the Indian Law of Arbitration: Future directions for Indian law and policy' (2018) Arbitration International 34 (2) 6 ('no provision exists within the framework of the Model Law to address cases in which it is alleged that no valid and real arbitration agreement exists between the parties, the arbitration of a certain issue is barred by res judicata or the arbitration is contemplated on a matter that is clearly not subject to arbitration ... if the national court exercises jurisdiction in any such scenario, it would not come within the scope of the expression 'in matters governed by this law' ...').

35 S R Subramaniam, 'Anti-Arbitration Injunctions and their compatibility with the New York Convention and the Indian Law of Arbitration: Future directions for Indian law and policy' (2018) Arbitration International 34 (2) 5.

may refuse to recognise the same.[36]

3. ANTI-ARBITRATION INJUNCTION IN INTERNATIONAL COMMERCIAL ARBITRATION

This section of the article deals with the approach adopted by the courts of the countries regarded as safe seats for conducting arbitrations.

England

Courts in England, both prior to,[37] and post[38] the promulgation of the English Arbitration Act, 1996, have consistently held that they possess the jurisdiction to restrain arbitral proceedings. They derive their power to issue anti-arbitration injunctions from Section 37 of the Supreme Court Act, 1981.[39]

The English Court of Appeal in *Weissfisch v Julius*,[40] dealing with an arbitration governed by Swiss Law with seat in Geneva, held that an English Court should not grant the anti-arbitration injunction sought as it would

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36 *Salini Costruttori SPA v The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority* , ICC Case No 10623/ AER/ACS, Award (7 December 2001), [177]: 'The Arbitral Tribunal accords great respect to the Ethiopian courts, both in their own right and as the courts of the seat. Nevertheless, in this case, we are of the view that it would be improper, in light of our primary duty to the parties, to observe the injunctions issued by those courts, which have already significantly delayed these proceedings, given that they have the effect of frustrating the parties' agreement to submit disputes to international arbitration'; Saipem S.p.A. v The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Award (30 June 2009) [167]: '... generally acknowledged that the issuance of an anti-arbitration injunction can amount to a violation of the principle embedded in Article II of the New York Convention ... Technically, the courts of Bangladesh did not target the arbitration or the arbitration agreement in itself, but revoked the authority of the arbitrators. However, it is the Tribunal's opinion that a decision to revoke the arbitrators' authority can amount to a violation of Article II of the New York Convention whenever it de facto 'prevents or immobilizes the arbitration that seeks to implement that [arbitration] agreement' thus completely frustrating if not the wording at least the spirit of the Convention'; *Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listruik Negara, Interim Award (26 September 1999), Final Award (16 October 1999)* (2000) Yearbook Comm Arb'n XXV at 109.

37 *Kitts v Moore* [1895] 1 QB 253, CA (Eng).

38 *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KTF (No. 2)* [2011] EWHC 345 (Comm); *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm); *Intermet FZCO v Ansol Ltd* [2007] EWHC 226 (Comm); *Weissfisch v Julius* [2006] EWCA Civ 218.

39 *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] EWHC 1262 (TCC); *Elektrim SA v Vivendi Universal SA* [2007] EWHC 571 (Comm), 242.

40 *Weissfich v Anthony Julius* [2006] EWCA Civ 218.

infringe the principles of international arbitration, the seat being a foreign jurisdiction. It was held that it is only under exceptional circumstances that an injunction must be granted.

Later, in 2011, the English Court of Appeal, in *Claxton Engineering Services Ltd. v TXM Olaj*,[41] deliberated upon the exceptional circumstances in which an injunction against an ongoing arbitration should be given. It was held that in order to establish exceptional circumstances, it would usually be necessary to establish that the applicant's legal or equitable rights were infringed or threatened by a continuation of the arbitration or that its continuation would be 'vexatious, oppressive or unconscionable'.

Recently, the English Court of Appeal in *Sabbagh v Khoury*,[42] restrained parties from participating in the Lebanon-seated arbitration on the grounds that the party who had been joined in the arbitration had earlier obtained a ruling from the English court that she was not bound by the arbitration agreement:

> Where it is clear that the dispute is within the terms of a valid arbitration agreement, then the courts should not interfere. When the converse is true, 'either because it is common ground between the parties or because of a previous determination' (per Andrew Smith J in Amtrust Europe v Trust risk Group at [25]), the court may grant an anti-arbitration injunction but only if the circumstances of the case require it.[43]

The Court stated that, 'first, there must be identified the rationale of the rule that England must be the natural forum before an anti-suit injunction will be granted on grounds of oppressive and vexatious conduct. Second, it must be determined whether that rationale has any application in the context of an anti-arbitration injunction'.[44]

Singapore

Singapore follows the non-interference principle as envisaged under Art 5 of the Model Law. The Singapore High Court in *Mitsui Engineering &*

41 *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KTF (No. 2)* [2011] EWHC 345 (Comm).
42 *Sabbagh v Khoury* [2019] EWCA Civ 1219.
43 *Sabbagh v Khoury* [2019] EWCA Civ 1219, [110].
44 *Sabbagh v Khoury* [2019] EWCA Civ 1219, [106].

Shipbuilding Co. Ltd. v Easton Graham Rush and Anr,[45] held that it did not have the residual power to stay an arbitration; rather, it was for the arbitral tribunal to decide whether the arbitration should be stayed, with supervisory recourse to the courts being available once such a decision had been rendered.[46]

Courts in Singapore have narrowly interpreted the UNCITRAL Model Law and held that grant of anti-arbitration injunction would contravene the Model Law.[47]

Hong Kong

The Court of First Instance in *Lin Ming and another v Chen Shu Quan and others*[48] was prepared to assume that it retained jurisdiction to restrain arbitration proceedings as part of its general jurisdiction to grant injunctive relief, but emphasised that such jurisdiction must be exercised 'very sparingly and with great caution'.

France

In France, courts have ruled that they do not possess any authority to restrain the arbitral proceedings once the tribunal has been constituted.[49]

French courts may only intervene in support of the arbitration and in the limited cases provided by the law. In no circumstance can they entertain instrumental claims aimed at staying or disrupting the arbitration.[50]

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45 *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush and Anr* [2004] 2 SLR(R) 14; [2004] SGHC 26. Also see, *Air (PTY) Ltd v International Air Transport Association, Tribunal de Premiere Instance (2 May 2005) Case No C/1043/2005-15SP (Switzerland) translated in* (2005) 23 ASA Bull 739.

46 See, *Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd* [2009] 2 SLR(R) 532; [2009] SGHC 1. In this particular case, arbitration was commenced but under the wrong institution and the other party sought a stay of arbitration. The court did not touch on the issue of residual jurisdiction and dismissed the application based on estoppel arising out of conduct.

47 *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush and Another* [2004] 2 SLR(R) 14; [2004] SGHC 26.

48 *Li Ming v Chen Shu Quan* , HCA 1900/2011.

49 *SA Elf Aquitaine and Total v Mattei, Lai Kamara and Reiner (6 January 2010) (Tribunal de Grande Instance, Paris) RG No 09/60539; Republic of Equatorial Guinea v Fitzpatrick Equatorial Guinea (29 March 2010) (Tribunal de Grande Instance, Paris)* [2010] Revue de l'arbitrage 390.

50 Alexis Mourre, 'French Courts firmly reject anti-arbitration injunctions' (*Kluwer Arbitration Blog*, 6 May 2010) http://arbitrationblog.kluwerarbitration.com/2010/05/06/french-courts-firmly-reject-anti-arbitration-injunctions/.

Other jurisdictions

In Australia, too, courts have upheld their power to grant anti-arbitration injunctions, even in case of foreign seated arbitrations.[51]

In India, while some courts have taken the view that anti-arbitration injunctions cannot be granted under any circumstance;[52] others have opted for a more moderate approach whereunder these injunctions can be granted as long as certain exceptional circumstances are satisfied.[53]

In the United States of America, the Federal Arbitration Act, 1925, governs international commercial arbitrations and inter-state arbitrations. In addition, most states have their own arbitration statutes, several of which contain provisions relating to the grant of anti-arbitration injunctions.[54]

There is a divergence of opinion among Federal District Courts on whether anti-arbitration injunctions are permitted in international arbitrations. Some courts have taken the stand that issuance of such an injunction will be inconsistent with the New York Convention.[55]

Others are of the view that issuance of an anti-arbitration injunction when the parties have not entered into a valid and binding arbitration agreement, will

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51 *Kraft Foods Group Brands LLC v Bega Cheese Ltd* [2018] 358 ALR 1; *Caratti v Caratti [No 2]* [2014] WASC 65.

52 *Kvaerner Cementation Ltd v Bajranglal Agarwal* (2012) 5 SCC 214; *National Aluminium Company Limited v Subhash Infra Engineers Pvt Ltd* 2019 SCC OnLine SC 1091, [14]; *Chatterjee Petrochem Company and Anr v Haldia Petrochemicals Ltd and Ors.* (2014) 14 SCC 574

53 *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte Ltd.* (2014) 11 SCC 639, [23], [24], [36]; *McDonald's India Pvt Ltd v Mr Vikram Bakshi 2016 SCC OnLine Del 3949,* (2016) 232 DLT 394 (The Supreme Court of India dismissed a special leave petition appealing against this judgment on 30 August 2016 in SLP(C) No 24914/2016); *Bina Modi & Ors v Lalit Modi & Ors.* 2020 SCC OnLine Del 1678, [77], [86], [87].

54 See, New York Civil Practice Law Rules 2012 s 7503(b): '... a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502'.

55 *URS Corporation v Lebanese Company for the Development and Reconstruction of Beirut Central District SAL* 512 F Supp 2d 199 (D Del. 2007), Yearbook Commercial Arbitration, 1024 XXXIII (2008); *Firooz Ghassabian v Fatollah Hematian* 08 Civ 4400 (SAS) (SDNY Aug 27 2008), Yearbook Commercial Arbitration, 1224 XXXIII (2008); *Republic of Ecuador v ChevronTexaco Corp.* 376 F Supp 2d 344, 348–49 (SDNY 2005); *Tai Ping Insurance Co. v M/V Warschau* , 731 F2d 1141 (5th Cir 1984).

not violate the Federal Arbitration Act. Neither does it violate the principles of the New York Convention, and in fact, furthers the goals of arbitration.[56]

An approach similar to Singapore has been taken by courts in Switzerland. The Swiss Court of First Instance has ruled that anti-arbitration injunctions can neither be issued nor enforced since they are contrary to the principle of *kompetenz-kompetenz* and the Swiss legal regime.[57]

3.0 TESTS FOR GRANT OF ANTI-ARBITRATION INJUNCTION

Though courts in most common law jurisdictions assert that they possess the power to grant anti-arbitration injunctions, they exercise this power with caution,[58] vigilance,[59] and frugality.[60]

Only if the court is satisfied that continuation of the arbitration will lead to unnecessary duplication of work[61] or threaten legal remedies,[62] will such an anti-arbitration injunction be granted.

The test for granting an anti-arbitration injunction should not be the same as that for granting an anti-suit injunction which are intended to prevent.[63]

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56 *Societe Generale de Surveillance, SA v Raytheon European Management and Systems Co.* 643 F 2d 863 (1st Cir 1981); *Glen P Farrell v Subway International BV* 2011 WL 1085017 (SDNY 23 March 2011), No 11 Civ. 08 (JFK) (SDNY Mar 23, 2011); *Anderson v Beland (In re Am Exp Fin Advisors Secs Litig)* 672 F3d 113, 140 (2d Cir 2011); *McLaughlin Gormley King Co v Teminix Intl Co* LP 105 F3d 1192 (8th Cir 1997); *CRT Cap. Group v SLS Cap* , SA 2014 WL 6807701 (SDNY Dec 3, 2014); *Citigroup Glob. Markets Inc. v Al Children's Hosp, Inc* 5 F Supp 3d 537 542 (SDNY 2014).

57 *Air (PTY) Ltd v International Air Transport Association, Tribunal de Premiere Instance (2 May 2005) Case No C/1043/2005-15SP (Switzerland), translated in* (2005) 23 ASA Bull. 739.

58 *Intermet FZCO v Ansol Ltd* [2007] EWHC 226 (Comm).

59 *British Caribbean Bank Ltd v The Attorney General* [2013] CCJ 4 (AJ), 37.

60 *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] EWHC 1262 (TCC); *Injazat Technology Capital Limited v Dr Hamid Najafi* [2012] EWHC 4171 (Comm).

61 *Intermet FZCO v Ansol Limited* [2007] EWHC 226 (Comm), [30]–[31]; *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KTF (Claxton)* [2011] EWHC 345 (Comm), [36].

62 *Minister of Finance (Inc.) 1 Malaysia Development Berhad v International Petroleum Investment Company Aabar Investments PJS* [2019] EWCA Civ 2080; [2019] EWHC 1151 (Comm).

63 *McDonald's India Pvt Ltd v Mr Vikram Bakshi* 2016 SCC OnLine Del 3949; *Elektrim SA v Vivendi Universal SA* 2007 EWHC 571 (Comm).

Further, foreign seated arbitrations must be only injuncted under exceptional circumstances, since the court of the seat should ordinarily have supervisory jurisdiction over the arbitration.[64]

Some of the circumstances warranting the grant of an anti-arbitration injunction are:

(1) the arbitration agreement appears to be void/ voidable;[65]

(2) the claimant's claim is time-barred;[66]

(3) there has been breach of an agreement to not arbitrate;[67]

(4) there is arbitration of an issue that was *res judicata*;[68]

(5) an exclusive jurisdiction agreement has been breached;[69] and

(6) arbitration has been commenced against a third party who was not a party to the arbitration agreement.[70]

However, any delay is likely to be fatal to an anti-arbitration injunction application.[71]

An anti-arbitration injunction will not be granted where:

(1) the underlying contract is terminated by repudiation;[72]

(2) where performance of the contract becomes impossible;[73]

(3) where the contract has debatably come to an end;[74]

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64 *Weissfich v Julius* [2006] EWCA Civ 218. See, *Sabbagh v Khoury* [2018] EWHC 1330 (Comm); *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KTF (Claxton)* [2011] EWHC 345 (Comm); *Republic of Kazakhstan v Istil Group Inc (No. 2)* [2007] EWHC 2729 (Comm).

65 *Kitts v Moore* [1895] 1 QB 253, CA (Eng); *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909; *Albon (trading as N A Carriage Co) v Naza Motor Training Sdn Bhd* [2008] 1 All ER (Comm) 351; [2008] 1 Lloyd's Rep 1, CA.

66 *Compagnie Europenne de Cereales SA v Tradax Export SA* [1986] 2 Lloyd's Rep 301.

67 *Li v Rao* [2019] BCCA 264; *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620.

68 *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm).

69 *Claxton Engineering Services Ltd v TXM Olaj-ÉS Gázkutató KTF (No 2)* [2011] EWHC 345 (Comm).

70 *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm).

71 *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] EWHC 1262 (TCC), [40].

72 *Heyman v Darwins Ltd* [1942] AC 356.

73 *Smith, Coney & Barrett v Becker, Gray & Co* [1916] 2 Ch 86, CA (Eng).

74 *James Scott & Sons Ltd. v R & N Del Sal* (1923) 14 Ll L Rep. 65.

(4) where no injury will be caused to the party requesting for an injunction;[75] and

(5) where it appears that the arbitrator is exceeding his jurisdiction.[76]

4.0 THE MALAYSIAN PERSPECTIVE ON ANTI-ARBITRATION INJUNCTIONS

The Malaysian Arbitration Act 2005,[77] amended in 2011 and 2018 in line with the latest UNCITRAL Model Law recommendations, adopts the minimum intervention and maximum judicial support principle as envisaged in the Model Law.

Section 8 of the Act states that '[n]o court shall intervene in matters governed by this Act, except where so provided in this Act'. Further, s 10 of the Act which follows Art 8 of the Model Law mandates the courts to refer parties to arbitration and stay the court proceedings in case a suit is instituted in respect of a matter which is the subject of an arbitration agreement.

Traditionally, courts in Malaysia followed the minimum intervention and maximum judicial support principle and have rarely issued anti-arbitration injunctions. For instance, the application for anti-arbitration injunction to restrain the institution of foreign arbitration proceedings in Singapore in the Court of Appeal case of *Nishimatsu Construction Co Ltd v Kecom Sdn Bhd*,[78] was dismissed on the ground that there was no pleading on which the injunction could issue.

Recently, a different approach in granting an anti-arbitration injunction to an applicant who was not party to the arbitration agreement has emerged in Malaysia following the legal principles set out in the *American Cyanamid* test[79] namely:

(i) whether there are serious issues to be tried;

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75 *Farrar v Cooper* [1890] 44 Ch D 323.

76 *The North London Railway Company v The Great Northern Railway Company* (1883) 11 QBD 30, CA (Eng).

77 (Act 646).

78 *Nishimatsu Construction Co Ltd v Kecom Sdn Bhd* [2009] 2 MLJ 404.

79 *American Cyanamid Co v Ethicon Ltd* [1975] 2 WLR 316; once it is established that the continuation of the arbitration would be oppressive or unconscionable, the *American Cyanamid* principles usually apply to the decision of the court to grant the injunction; see *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd* [2013] EWHC 1240 (Comm), [73]; note that the test is not universal and will not be applicable in all cases, *British Caribbean Bank Ltd v Attorney General* [2013] CCJ 4 (AJ), [24]–[28].

(ii) whether damages would be an adequate remedy; and

(iii) whether the balance of convenience lies in favour of granting the injunction.

This is exemplified in the case of *Jaya Sudhir al Jayaram v Nautical Supreme Sdn Bhd & Ors*[80] where a non-party to the arbitration agreement sought an anti-arbitration injunction. The Federal Court held that when a person who is not a party to an arbitration agreement applies to restrain arbitral proceedings, the courts would apply the general test for interlocutory injunctions, ie, the *American Cyanamid* test.

The court held that the following issues be considered where there are parallel court and arbitral proceedings, namely:[81]

(1) the existence of multiplicity or duplicity of proceedings;

(2) the risk of inconsistent findings; and

(3) whether the interests of the party who is not party to the arbitral proceedings to be affected by the arbitral proceedings.

The court pointed out that the Arbitration Act 2005 did not apply in an application by a non-party to an agreement.[82]

The court in *Federal Land Development Authority & Anor v Tan Sri Haji Mohd Isa bin Dato Haji Abdul Samad & Ors,*[83] followed the *Jaya Sudhir* case. It held that the issues in the arbitration proceedings and the issues in the court proceedings cannot be divided distinctly. Where there is clearly an overlap of issues and a risk of inconsistent decisions, it held that it will be the interest of justice for the court proceedings to proceed first.[84] Further, if the agreement between the parties was valid, arbitration proceedings could continue, otherwise, there was no need for arbitration proceedings.[85] Finally, the court granted the anti-arbitration injunction as being the just and fairest approach.

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80 *Jaya Sudhir al Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1.

81 Thayananthan Baskaran, 'Why should a Stranger Restrain My Arbitration' (*Kluwer Arbitration Blog*, 29 February 2021) http://arbitrationblog.kluwerarbitration.com/2020/02/29/why-should-a-stranger-restrain-my-arbitration/.

82 *Jaya Sudhir al Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1, [48].

83 *Federal Land Development Authority & Anor v Tan Sri Haji Mohd Isa bin Dato Haji Abdul Samad & Ors* [2021] 8 MLJ 214.

84 *Federal Land Development Authority & Anor v Tan Sri Haji Mohd Isa bin Dato Haji Abdul Samad & Ors* [2021] 8 MLJ 214, [55].

85 *Federal Land Development Authority & Anor v Tan Sri Haji Mohd Isa bin Dato Haji Abdul Samad & Ors* [2021] 8 MLJ 214, [55].

The Malaysian High Court in this *Government of Malaysia v Nurhima Kiram Fornan & Ors.*[86] dealt with an application for an anti-arbitration injunction in an arbitration relating to a dispute of a historical territory claim by the heirs of Sultan of Sulu over Sabah (a state in the Malaysian Federation). The heirs commenced an arbitration proceeding against the Government of Malaysia.

The latter then filed an application in the Malaysian court to injunct the arbitration proceedings on the ground that there was no agreement to arbitrate and waiver of sovereign immunity. The court granted an anti-suit injunction on the grounds that there was no waiver of sovereign immunity, and the requirement to submit disputes pursuant to a deed of cession could not be interpreted as an arbitration agreement as it lacks the essential elements of an arbitration agreement.

The Malaysian High Court also issued an anti-arbitration injunction in another case of *MISC Berhad v Cockett Marine Oil (Asia) Pte Ltd.*[87] restraining parties from taking further steps in the arbitration proceedings in London relying on the *American Cyanamid* test.

The above cases may suggest to the international arbitral community that where anti-arbitration injunctions are involved, the Malaysian courts are prepared to a shift away from the minimum intervention and maximum judicial support principle. If the trend as shown in these recent cases continue, it may probably affect the reputation of Malaysia as safe seat to arbitrate despite the Arbitration Act 2005 being amended incorporated the latest UNCITRAL Model Law recommendations.

5.0 ANTI-ARBITRATION INJUNCTION IN INVESTMENT TREATY DISPUTES

Investment arbitration is a procedure to resolve disputes that arise between foreign investors and the host state. The arbitral tribunal resolving investment treaty disputes derives its jurisdiction from a *sui generis* arbitration agreement contained in a bilateral or multilateral treaty, to which the investor's home state is also a contracting party.[88]

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86 *Government of Malaysia v Nurhima Kiram Fornan & Ors.* [2020] 6 CLJ 429.
87 *MISC Berhad v Cockett Marine Oil (Asia) Pte Ltd* [2021] MLJU 563.
88 Jan Paulson, 'Arbitration without Privity' 10(2) ICSID Review- Foreign Investment Law Journal 232 (1995).

In an investment arbitration, there is often more than one forum (ie, since there are several legal entities involved, the same claim can be advanced under different treaties) available to the investor for resolution of disputes.[89] Investors tend to initiate parallel proceedings under different treaties so as to put pressure on the state.[90] In these circumstances, anti-arbitration injunctions are often sought by states to avoid parallel proceedings.[91]

However, such injunctions are not commonly granted in investment arbitrations. This is because, by consenting to arbitrate under the Convention on the Settlement of Investor Disputes between States and Nationals of Other States ('ICSID Convention'),[92] parties lose their right to approach national forums for relief.[93]

Further, the principle of *kompetenz-kompetenz* has been incorporated into the ICSID Convention. As such, an arbitral tribunal preserves the power to decide any objections to its own jurisdiction.[94]

Separately, a party to a bilateral investment treaty ('BIT') is bound by the Vienna Convention on the Law of Treaties ('Vienna Convention') to perform it in good faith.[95]

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89 Ting Wei-Chang, 'Anti-Arbitration Injunctions in Investment Arbitration: Lessons learnt from the *India v Vodafone Case*' (2018) Contemporary Asia Arbitration Journal 11 (2) 251–275, 260.

90 Nadja Erk-Kubat, 'Jurisdictional Disputes in Parallel Proceedings: A Comparative European Perspective on Parallel Proceedings Before National Courts and Arbitral Tribunals', 12–14 (23 October 2013) (unpublished Ph.D. dissertation, University of St. Gallen); Emmanuel Gaillard, 'Abuse of Process in International Arbitration' (2017) 32 ICSID REV. 17, 24-25.

91 Ting Wei-Chang, 'Anti-Arbitration Injunctions in Investment Arbitration: Lessons learnt from the *India v Vodafone Case*' (2018) Contemporary Asia Arbitration Journal 11 (2) 251–275, 260.

92 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965).

93 ICSID Convention Art 26: 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention'; Abhilasha Vij, 'The Notorious Case of Anti-Arbitration Injunctions in Investor-State Dispute Settlement' *Investment and Commercial Arbitration Review* (ICAR) (15 August 2020).

94 ICSID Convention Art 41(1).

95 Vienna Convention on the Law of Treaties Art 27: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

By way of an example, the High Court of New Zealand in *Attorney General v Mobil Oil NZ Ltd.*,[96] stayed the suit initiated by the New Zealand government seeking an interim injunction restraining ICSID arbitration proceedings.

Similarly, the Swiss Federal Tribunal, in *Maritime International Nominees Establishment (MINE) v Republic of Guinea*,[97] acknowledged the exclusivity of arbitration proceedings under the ICSID Convention.

The court in *British Caribbean Bank Ltd. v The Government of Belize*[98] too, cautioned against the issuance of anti-arbitration injunctions in investment treaty disputes:

> Lord Goff's opinion in Societe National Industrielle Aerospatiale v Lee Kui Jak29 is now generally accepted as clarifying the law in England with regard to the granting of orders restraining the continuation of proceedings in a foreign jurisdiction while there are domestic proceedings pending. The jurisdiction is to be exercised when the ends of justice require it. The order is not made against the foreign court but against the parties proceeding or threatening to proceed. An injunction will only be issued against a party who is amenable to the jurisdiction of the court; and that since such an order indirectly affects the foreign court, the jurisdiction must be exercised with caution.[99]

However, national courts do not always pay deference to Art 26 of the ICSID Convention.

The Supreme Court of Pakistan in *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*[100] suspended the ICSID arbitration proceedings at the request of the Government of Pakistan.

However, the ICSID tribunal refused to be bound by this order. It directed the Government of Pakistan not to initiate any action against the claimant for contempt before its local courts.

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96 *Attorney General v Mobil Oil NZ Ltd* [1989] 2 NZLR 649; 4 ICSID Reports 117.
97 *Maritime International Nominees Establishment (MINE) v Republic of Guinea ASA Bulletin* (1987) 26, 4 ICSID Reports 39.
98 *British Caribbean Bank Ltd. v The Government of Belize* [2013] CCJ 3 (AJ).
99 *British Caribbean Bank Ltd. v The Government of Belize* [2013] CCJ 4 (AJ), [36]. https://www.italaw.com/sites/default/files/case-documents/italaw1514.pdf.
100 ICSID Case No ARB/01/13, Procedural Order No 2, (October 16, 2002).

In case of non-ICSID investment arbitrations, however, national courts may presume jurisdiction to grant anti-arbitration injunctions.[101] Courts in India have been quick to presume the jurisdiction to grant such injunctions.[102]

6.0 CONCLUSION

Though attacks to the legitimacy of anti-arbitration injunctions are numerous, it seems that they are here to stay. Even though these injunctions are *prima facie* inconsistent with the principle of *kompetenz-kompetenz*.

They increase the court's interference in the arbitral proceedings. Parties wanting to delay or stop the arbitration favour such applications as they hold the arbitration process in abeyance.

In international commercial arbitrations, national courts of most common law countries entertain applications for such injunctions. Courts have repeatedly held that they possess the jurisdiction to restrain arbitral proceedings.

To maintain the sanctity of the arbitration process, however, courts have formulated strict tests for interference. Hence, these injunctions are not normally issued unless the continuance of arbitration proceedings will be oppressive or vexatious or unconscionable.

In contrast, courts in civil law countries have refused to interfere in the arbitration proceedings and have held suits for anti-arbitration injunctions to be non-maintainable.

However, in the face of a recent shift in Malaysia towards granting anti-arbitration injunctions, it remains to be seen how arbitral tribunals will deal with them and what the corresponding impact on the enforcement of an arbitral award will be.

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101 Out of the 193 member states of the United Nations, 40 have not signed or ratified the ICSID Convention. See, 'Database of ICSID Member States' https://icsid.worldbank.org/about/member-states/database-of-member-states; Ting Wei-Chang, 'Anti-Arbitration Injunctions in Investment Arbitration: Lessons learnt from the *India v Vodafone Case* (2018) Contemporary Asia Arbitration Journal 11 (2) 251–275, 261; *Union of India v Vodafone Group PLC United Kingdom & Anr* 2018 SCC OnLine Del 8842.

102 *Union of India v Vodafone Group PLC United Kingdom & Anr* 2018 SCC OnLine Del 8842.