

Anti- Suit Injunctions in International Arbitration (E. Gaillard, General Editor), Berna, Staempfli Verlag AG, 2005, ISBN 1-929446-60-8, pp. 73-85

**Anti-suit Injunctions Issued
by National Courts
Measures Addressed to the Parties
or to the Arbitrators**

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State courts are ordinarily called upon to intervene in arbitrations only when a pathological situation occurs during the course of an arbitral proceeding. In other words, courts usually intervene within the framework of what is referred to as “arbitral litigation,”¹ and generally in a supervisory capacity.² But there exists a complementary and no less important dimension that flows from the fact that arbitrators have no *imperium*: arbitral tribunals benefit from the legal assistance offered by state courts, contributing to the development of this specific form of dispute resolution. Contemporary arbitration statutes confer a number of powers on the courts, which flow from an understanding of the terms of arbitration agreements and which allow for judicial intervention in favor of the arbitral proceedings. This is distinct from the more traditional form of court intervention, which amounted to an interference in the arbitral process.

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¹ Philippe Fouchard, *Le juge et l'arbitrage: Rapport général*, 1980 REV. ARB. 416.

² Philippe Fouchard, *L'arbitrage judiciaire*, in ETUDES OFFERTES A PIERRE BELLET 169 (1991).

Most legal systems customarily grant state courts the possibility of intervening at all stages of the arbitral process.³ In a large number of countries that are respectful of arbitration, public authorities do recognize the effectiveness of arbitral awards by granting arbitrators extremely broad powers in relation to the settlement of disputes. Thus, arbitrators are authorized to rule on all the elements that need to be decided in order to resolve a dispute. But arbitrators have no power with respect to enforcement. Thus, where arbitrators wish to see certain measures enforced, they require the assistance of state courts. Whereas courts are under an obligation to assist the course of arbitral proceedings, arbitrators—as well as the parties to the dispute—must make use of such assistance with a certain self-restraint and in good faith. The relationships between judicial and arbitral activities are absolutely necessary in order to ensure the smooth operation of arbitral proceedings. Indeed, some go so far as to maintain the paradoxical position that arbitration, although it has developed apart from and separate to state courts, needs state courts to flourish. The best system in this respect is one that relies on a court specialized in dealing with arbitration issues. This is why, in jurisdictions that are favorable to arbitration, there exists—together with the assistance provided by the courts to arbitrators—a trend according to which specialized judicial chambers are being developed that are specifically designed to deal with annulment proceedings. This ensures uniformity of case law, which is

³ See, e.g., Belgian Judicial Code, Arts. 1684(1), 1685 and 1687(1); Dutch Code of Civil Procedure, Arts. 1026–35, 1041 and 1051; German Code of Civil Procedure, Arts. 1026, 1032–35, 1037, 1039, 1041 and 1050; 1987 Swiss Private International Law Statute, Arts. 179(2), 180(3) and 183–85; Italian Code of Civil Procedure, Arts. 809–11 and 815; 2003 Spanish Arbitration Act (Law 60/2003 of Dec. 23, 2003), Arts. 7, 8, 15, 33 and 42. In common law countries, the courts also play a considerable role in this respect. For those legal systems which do not allow any court intervention prior to the rendering of the award, see FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 671–82, at 406–13 (E. Gaillard and J. Savage eds., 1999).

indispensable for the certainty that is required by international commerce.

Of all the situations in which state courts must examine the validity and enforceability of the arbitration agreement, whether it is to rule on their own jurisdiction or in relation to the validity of the agreement, it is the involvement of the English courts that is the most striking. In England, parties to an arbitration may seize the courts before or during the arbitral proceedings in order to request that they rule on the validity and enforceability of the arbitration agreement, irrespective of their jurisdiction to hear the merits of a dispute.⁴ Another possibility is for the parties to request from the courts that an anti-suit injunction be issued.⁵ This measure, which is unknown in civil law countries, but commonplace in common law systems, consists of an injunction forbidding the party that is bringing the action before an ordinary court from proceeding. The enjoined party must therefore refrain from initiating or pursuing the dispute before state courts. From a dogmatic point of view, the anti-suit injunction finds its justification in the general theory of contract law. As the

⁴ In the case of *Caparo Group Ltd. v. Fagor Arrasate Soc. Coop.* (Unreported, August 7, 1998 (QBD (Comm. Ct))), the High Court of England and Wales ruled on an issue regarding the merits. Consulted on the issue of whether the effects of the arbitration agreement extended to the parent company of the Group, it examined the links between the parent and the subsidiary and whether both companies were bound by the contract. The answer on the merits affected the scope of the arbitration agreement, which was declared exclusively binding on the subsidiary. The arbitration could only continue with respect to the subsidiary.

⁵ See MARTA REQUEJO ISIDRO, *PROCESO EN EL EXTRANJERO Y MEDIDAS ANTIPROCESO (ANTI-SUIT INJUNCTIONS)* (2000). For case law, see *Pena Copper Mines Ltd. v. Rio Tinto Co.*, (1911) 105 L.T. 846; *Tracom S.A. v. Sudan Oil Seeds Co.*, [1983] 1 W.L.R. 1026; *Sohio Supply v. Gatoil*, [1989] 1 Lloyd's Rep. 588; *Aggeliki Charis Compania Maritima S.A. v. Pagnan S.p.A. (The "Angelic Grace")*, [1994] 1 Lloyd's Rep. 168, [1995] 1 Lloyd's Rep. 87; *Phillip Alexander Securities & Futures Ltd. v. Bamberger*, [1997] I.L.Pr. 73.

arbitration agreement is a contract that binds two private persons, its non-performance by one of them constitutes a breach of contract.⁶

In practice, the effect that the state courts' involvement will have at this stage depends on the penalty applicable should the injunction not be complied with. Non-compliance amounts to contempt of court and entails consequences that will affect property and may also have an effect on the legal status of the party that is in non-compliance. However, for the injunction to be effective, the enjoined party or/and its property must be located within the jurisdiction of the state court likely to enforce the penalty. Failing this, non-compliance with the injunction remains non-punishable, and any legal proceeding that has already started, despite the arbitration agreement, will continue. However, the decision rendered at the outcome of such a proceeding will not be recognized in the state where the anti-suit injunction was issued.⁷

Despite the ancient origins of procedural injunctions, it is only in the last twenty years that civil law lawyers have begun taking note of their existence and importance. This legal mechanism is well known in England and, given the increased interaction between parties and between different jurisdictions in international commerce, it has also become common in continental Europe. Its effect on the conduct of proceedings and its extraterritorial enforceability (considering that it is a measure which is designed to prohibit a litigant from initiating or

⁶ ADAM SAMUEL, JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY OF BELGIAN, DUTCH, ENGLISH, FRENCH, SWEDISH, SWISS, U.S. AND WEST GERMAN LAW 31–75 (1989).

⁷ José Carlos Fernández Rozas, *Le rôle des juridictions étatiques dans l'arbitrage commercial international*, in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, Vol. 290, Year 2001, at 9, 100–02.

continuing a proceeding before a foreign court⁸) has attracted the attention of certain jurisdictions and of international arbitration circles.

A number of interesting issues relating to these measures are addressed from diverse points of view in this publication. An in-depth analysis of their international impact has already been carried out and the question of whether they aid arbitration or hinder its progress has been discussed. In this contribution, I will study injunctions in international commercial arbitration from the point of view of the enjoined party or arbitral tribunal.

Although anti-suit injunctions are typically used to safeguard the possibility of instituting arbitral proceeding to ensure that they will be properly carried out, while at the same time avoiding the co-existence of two decisions relating to the same dispute, they are certainly far from being without risk. Indeed, anti-suit injunctions are only effective if the penalty that their non-observance entails is credible. According to the terms of Article VI, paragraph 4, of the 1961 European Convention on International Commercial Arbitration,⁹ relating to *lis pendens*, state courts have wide discretion to rule in favor of continuing a proceeding in parallel with the arbitration proceeding instead of suspending it. And even though certain laws require state courts to refer the parties to arbitration by virtue of an objection or a jurisdictional challenge, others (those belonging to the common law tradition) confer on state courts a certain discretionary power, thereby enabling them to ignore the arbitration clause where the party that has seized the court manages to establish that it would be fair and appropriate to allow the court proceedings to continue.

⁸ Trevor C. Hartley, *Comity and the Use of Anti-Suit Injunctions in International Litigation*, 35 AM. J. COMP. L. 487 (1987).

⁹ 349 U.N.T.S. 349 (1963–64).

Against this background, a party that wants the arbitral proceedings to go forward, and that failed in its attempts to have the arbitration agreement enforced, can seek to obtain judicial assistance indirectly through a declaratory suit for exemption from liability. This decision could become *res judicata* and subsequently serve as a basis to refuse recognition or enforcement of a court decision that would be rendered despite the arbitration clause.¹⁰ It could also serve as a foundation for a request for damages against the party that has not respected the arbitration clause.¹¹ Such damages could cover all the expenses and losses that the aggrieved party would have incurred as a consequence of the violation of the arbitration agreement by the other party, including the costs incurred to challenge jurisdiction or to request the anti-suit injunction.

Certain characteristics of anti-suit injunctions are worth mentioning.

When anti-suit injunctions are granted, their aim is to satisfy private interests. A party that wishes to obtain the benefit of an anti-suit injunction must prove to the court that the other party's behavior constitutes a breach of a valid arbitration agreement. The consequence of this breach is that two separate proceedings will be commenced with identical parties, subject matter and cause.

However, anti-suit injunctions do not only aim to satisfy private interests. One of the justifications often put forward in case law is the disadvantage of having two separate proceedings before two fora regarding the same matter. Where the issue arises

¹⁰ Phillip Alexander Securities & Futures Ltd. v. Bamberger, *supra* note 5.

¹¹ Mantovani v. Carapelli S.p.A., [1980] 1 Lloyd's Rep. 375; The "Jay Bola," [1992] 2 Lloyd's Rep. 62.

between two state courts, it can sometimes be resolved either through a *lis pendens* plea, or through the principle of *prior tempore, potior iure* (which is generally considered unsatisfactory by common law lawyers due to its rigidity). Thus, it is possible for jurisdiction to be granted to the state courts not on the basis of which forum had been seized first, but on the basis of the application of legal criteria regarding jurisdiction. In arbitration, these criteria are very important, given that a situation of *lis pendens* between judges and arbitrators cannot really arise. Arbitral tribunals enjoy jurisdiction as a result of the existence of a valid arbitration agreement, which at the same time negates the jurisdiction of state courts. It is therefore essential that judges and arbitrators interpret the validity and scope of arbitration agreements in exactly the same manner. In practice, however, this has not always been done, which can lead to the undesirable consequence of simultaneous and identical judicial and arbitral proceedings relating to the merits.

From this point of view, anti-suit injunctions have been presented as a flexible mechanism capable of preventing abusive behavior on the part of one of the parties, the existence of simultaneous proceedings and, finally, the risk of contradictory decisions as a result of said proceedings.

The purpose of these considerations is to rid the analysis of anti-suit injunctions of the prejudices with which civil law lawyers approach injunctions as a legal concept. Continental legal doctrine traditionally mistrusted injunctions, considering them to be “an intolerable interference with foreign justice (and with sovereignty).”¹² However, injunctions must be analyzed differently in international arbitration, as they are directed to the parties or to the arbitrators rather than to state courts. Anti-suit

¹² See, e.g., Sandrine Clavel, *Anti-suit injunctions et arbitrage*, 2001 REV. ARB. 669, 701–06.

injunctions can be used to protect arbitration, when they prevent a party acting in bad faith from initiating or pursuing court proceedings. However, such measures can also result in paralyzing arbitral proceedings. Thus the issue is not one of judicial sovereignty, but rather that of the respect of the competence-competence principle.

Anti-suit injunctions issued by state courts can have two effects.

Anti-suit injunctions can prohibit one of the parties from pursuing legal proceedings initiated in breach of an arbitration agreement entered into beforehand and considered valid by the courts. The clearest example of this type of application of an anti-suit injunction is *Tracomin S.A. v. Sudan Oil Seeds Co.*¹³ In that case, the litigant applied to the court in order to obtain an order of specific performance in relation to a particular contractual obligation. Given that the court was under no obligation to grant the injunction, it was faced with the following considerations:

- there was an actual breach of an obligation owed by one of the parties;
- the proceeding initiated by virtue of the non-performance of the arbitration agreement was considered to be unconscionable.

When a dispute is linked to more than one jurisdiction, it is impossible to prove one of these conditions without proving the other. That is, it is impossible to argue that a contractual obligation providing for the referral of all disputes to arbitration has been violated without considering that the chosen state court

¹³ *Tracomin S.A. v. Sudan Oil Seeds Co.* (2nd), *supra* note 5; the adoption of the measure was increased during the last years, as it was held by *Bankers Trust Co. v. P.T. Jakarta Int'l Hotels & Dev.*, [1999] 1 Lloyd's Rep. 910.

absolutely lacks jurisdiction. It is therefore necessary to determine the scope of the foreign court's jurisdiction, something that has been considered, with respect to international jurisdiction, as constituting interference with state sovereignty.

In relation to arbitration, apart from concerns relating to sovereignty, anti-suit injunctions are at odds with several established principles. Most notable in this respect is Article II, paragraph 3 of the 1958 New York Convention. This text sets forth that a state court that has been seized in a matter in respect of which the parties have made an arbitration agreement has to decide whether the arbitration agreement is valid. However, it should be noted that, even if this provision does not mention the court's intervention through the means of an application for an anti-suit injunction, it does not prohibit such a possibility either.¹⁴ Indeed, as set out by a commentator in relation to French law, different interpretations of Article II, paragraph 3, can be put forward, including one according to which decisions on the validity and enforceability of the arbitration agreement can only be made by the arbitrators, at least initially.¹⁵

This wide interpretation of Article II, paragraph 3, is in line with the position of English law by virtue of the provisions of the 1996 English Arbitration Act. Section 32 of the 1996 Act authorizes state courts to rule on the issue of the existence and validity of the arbitration agreement as a distinct question, but only in limited circumstances.¹⁶ This possibility constitutes one of the most notable examples of judicial intervention with respect to

¹⁴ The "Angelic Grace," *supra* note 5, [1995] 1 Lloyd's Rep. 87.

¹⁵ See Emmanuel Gaillard, *L'effet négatif de la compétence-compétence*, in *ETUDES DE PROCEDURE ET D'ARBITRAGE EN L'HONNEUR DE JEAN-FRANÇOIS POUURET* 387 *et seq.* (1999).

¹⁶ Michel Dassule, *Le contrôle de la compétence arbitrale par le juge anglais avant la sentence*, 2003 REV. ARB. 65, 70–77.

arbitration in comparative law. Indeed, it is not rare for English courts to rule on whether there has been a violation of an arbitration agreement in circumstances where an action has been initiated before the English courts or in another jurisdiction. From this point of view, the competence-competence principle only entails that arbitrators are competent to rule on their own jurisdiction, although the courts can also be asked to decide upon the same matter. In this theory, the negative effect of the competence-competence principle (that is, that state courts do not have any jurisdiction in this respect, at least initially) does not come into play.

An anti-suit injunction can also prohibit one of the parties from continuing arbitration proceedings that it deems to have been initiated in the absence of a valid arbitration agreement. In this case, the starting point is different. The decision does not relate to proceedings that are being initiated before state courts, but to an arbitration that has been initiated by one of the parties. The key question therefore becomes whether this measure is compatible with the principles of arbitration. In practice, where a party refers a matter to a court in order to obtain an anti-suit injunction, such as to prevent an arbitral proceeding from being continued, that party is convinced of the illegitimate nature of the arbitral proceedings and wishes to avoid them altogether.¹⁷ This mechanism was used repeatedly in both India and Pakistan. In one case, an Indian party obtained an order from the Supreme Court of India against an American party, ordering the latter to withdraw from the arbitral proceedings and, in case of non-compliance, against the enforceability of the arbitral award in the United States. It has been held that it would be unfair to request a party to continue long and costly arbitration proceedings even though it believes that the

¹⁷ Oil & Natural Gas Commission Ltd. v. Western Co. of North America, [1987] A.I.R. SC 674, XIII Y.B. COM. ARB. 473 (1988).

proceedings are illegal.¹⁸ The only way to justify these measures against an arbitration is where one of the parties has been forced to participate in an arbitration which was fraudulently instituted. Nevertheless, there is once again a degree of legal uncertainty arising from different states' perspectives in relation to this issue: the question of whether arbitral proceedings are valid depends on the validity and enforceability of the arbitration agreement. Findings on this issue may vary dramatically from one State to another. It has been suggested that the following rule should be applied in relation to the question of whether an injunction should be issued: where a court is certain that it will be impossible to obtain the enforcement of an arbitral award on which it has jurisdiction, such a measure is justified.

Anti-suit injunctions can be addressed to arbitrators, enjoining them to suspend the arbitral proceedings. As previously stated, in such a case, the relevant conflict is not between state courts (which is regulated, in Europe, by EC law¹⁹), but between state courts and arbitral tribunals. The *raison d'être* of such a measure against arbitrators in this situation is identical to that presented in the preceding paragraph, that is to say that one of the parties to the proceeding, or even the court itself, considers that the very existence of the arbitral proceeding is illegitimate. In these circumstances, two solutions are possible.

On the one hand, an agreement can be reached between the parties or arbitrators, within the framework of Article 32 of the 1996 Arbitration Act, which could lead to the withdrawal of the

¹⁸ Fomento de Construcciones y Contratas v. Colon Container Terminal, ATF 127 III 279 (2001); for an English translation, see 19 ASA BULL. 555 (2001).

¹⁹ Clare Ambrose, *Can Anti-Suit Injunctions Survive European Community Law?*, 52(2) INT'L COMP. L.Q. 401 (2003).

arbitral proceeding and which would render the anti-suit injunction useless.

On the other hand, and this is the controversial issue, it is important to ask to what extent a measure issued by a state court against an arbitral tribunal at the request of one of the parties should be taken into account by an arbitral tribunal. This question was considered in *Maritime International Nominees Establishment v. Guinea*²⁰ and *Sea Dragon, Inc. v. Uni-Ocean Line Singapore Pte. Ltd.*²¹ In these cases, the arbitral tribunal convinced the party that benefited from the measure not to seek its enforcement. The problem must be approached from the point of view of the relationship between the jurisdiction of state courts and that of arbitral tribunals. It is obviously the case that between these two institutions no “structural, hierarchical or jurisdictional relationships” exist. As a result, the decisions of state courts to suspend the proceeding are not automatically binding on arbitral tribunals. From this technical standpoint, the decisions of state courts can be considered to be an additional factor in the factual matrix that the arbitrators have to deal with when deciding on their jurisdiction, but nothing more. The contrary position would be tantamount to holding that the jurisdiction of arbitral tribunals is subject to the rules imposed by the national courts.

Nevertheless, the enforceability of these measures cannot be doubted when an arbitral award must be enforced in the jurisdiction in which the anti-suit injunctions were issued. The mere existence of such an injunction will most likely be sufficient proof of the irregularity of the arbitral proceedings in the eyes of

²⁰ Jan. 6, 1988 Award in ICSID Case No. ARB/84/4, 4 ICSID REP. 61 (1997), 3(1) INT’L ARB. REP. A (1988), XIV Y.B. COM. ARB. 85 (1989) (excerpts).

²¹ Award No. 1923 of the Society of Maritime Arbitrators, Inc., New York, Dec. 20, 1983, X Y.B. COM. ARB. 95 (1985).

the local courts asked to recognize or enforce the award, and they will refuse enforcement on the ground of Article V, paragraph (1)(a), of the New York Convention. Once again, from a technical perspective, the existence of an anti-suit injunction only binds arbitrators in their duty to render awards likely to be executed in several jurisdictions. Thus, this difficulty is essentially a practical one.

There are other issues relating to anti-suit injunctions that have not been addressed here, but the point that has been made is that it is possible to take advantage of this technique in order to benefit arbitration. However, this technique must be considered only in extreme circumstances, as it may affect the delicate balance of powers between national courts and arbitral tribunals.

