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BACK TO BASICS?

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# Anti-suit Injunctions Issued by Arbitrators

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## I. INTRODUCTION

It has become increasingly frequent in international arbitration for a recalcitrant party to attempt to disrupt the arbitral process by bringing the dispute covered by the arbitration agreement before national courts (ordinarily those of that party's own State) and seeking an "anti-suit injunction" from those courts. The nuisance introduced into international arbitration by this type of measure has been widely commented upon and criticized.<sup>1</sup> The fact that the mechanism of anti-suit injunctions—in this instance, anti-arbitration injunctions—originates from common law systems in no way means that the disruption of the arbitral process is specific to those systems. Courts in civil law countries such as Brazil or Venezuela have had recourse to this mechanism in the same way as courts in common law countries such as Pakistan, India or the United States.<sup>2</sup>

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1. On anti-suit injunctions in international arbitration, see Emmanuel GAILLARD, ed., *Anti-Suit Injunctions in International Arbitration*, IAI Series on International Arbitration No. 2 (Juris Publishing 2005) (hereinafter *Anti-Suit Injunctions in International Arbitration*). See also the report by Julian LEW, "Control of Jurisdiction by Injunctions Issued by National Courts", this volume, pp. 185-220.

2. For the numerous examples of anti-suit injunctions issued by domestic courts against arbitral proceedings at the request of one of the parties, see *Anti-Suit Injunctions in International Arbitration*, *op. cit.*, fn. 1; Emmanuel GAILLARD, "Il est interdit d'interdire: Réflexions sur l'utilisation des anti-suit injunctions dans l'arbitrage commercial international", *Rev. Arb.* (2004) p. 47; "Reflections on the Use of Anti-Suit Injunctions in International Arbitration" in L.A. MISTELIS & D.M. LEW, eds., *Pervasive Problems in International Arbitration* (Kluwer 2006) p. 203. On the situation in Latin America, see Horacio A. GRIGERA NAÓN, "Competing Orders Between Courts of Law and Arbitral Tribunals: Latin American Experiences" in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (ICC Publishing 2005) (hereinafter *Liber Amicorum in Honour of Robert Briner*) p. 335.

Although severe criticism has been expressed in relation to orders issued by domestic courts enjoining the parties, an arbitral institution or the arbitrators from proceeding with or participating in an arbitration, the frequency of the parties' recourse to anti-suit injunctions has not diminished in any manner. In reaction, in those jurisdictions most familiar with the mechanism of anti-suit injunctions, the question was raised as to the possibility for the courts to provide support to the arbitral process by enjoining the recalcitrant party from proceeding with its request for an anti-suit injunction, or prohibiting the party targeted by the injunction from complying with the first court's decision. This chain reaction results in anti-anti-suit injunctions whereby each State court prohibits a party either from proceeding with an arbitration or from pursuing its disruptive attempts against an arbitral proceeding. Neither situation, however, offers a suitable response to the extent that, in each case, the domestic court's injunction is based on the presumption that that court's view of the existence and validity of the arbitration agreement will have absolute extraterritorial effect.<sup>3</sup>

Although less often debated,<sup>4</sup> the question has arisen as to whether arbitrators, when they are confronted with a party's attempt to submit a dispute that is covered by an arbitration agreement to a domestic court – or another arbitral tribunal<sup>5</sup> – may issue an injunction to prohibit that party from escaping the arbitration agreement. In other words, may arbitrators issue anti-suit injunctions? Three situations are, in this respect, relevant: when a party starts a court action in relation to a dispute that is covered by an arbitration agreement; when the court seized decides that it has jurisdiction to hear the dispute; when the court, having decided that it has jurisdiction, enjoins the other party from initiating an arbitral proceeding or from pursuing an ongoing arbitral proceeding. In other words, the arbitral tribunal may be confronted with the introduction of a parallel court action or with an existing court action, and a possible anti-arbitration injunction issued by the court. In all these situations, the same outcome is sought, more or less successfully, by the recalcitrant party: disrupt or terminate the arbitral proceeding by submitting the dispute that is covered by the arbitration agreement to another court. What is the appropriate response in such cases? Must the arbitrators comply with anti-suit injunctions issued against them and stay the arbitral proceeding? Should they ignore anti-suit injunctions issued against them on the basis of the fundamental principle of competence-competence and the recognition of the existence

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3. See Emmanuel GAILLARD, "The Misuse of Anti-Suit Injunctions", *New York Law Journal* (1 August 2002) pp. 3 and 7; "KBC v. Pertamina: Landmark Decision on Anti-Suit Injunction", *New York Law Journal* (2 October 2003) pp. 3 and 8.

4. See Laurent LÉVY, "Anti-suit Injunctions Issued by Arbitrators", in *Anti-Suit Injunctions in International Arbitration*, *op. cit.*, fn. 1, p. 115.

5. In practice, this question arises less frequently, for example when a dispute arises as to the respective scope of two distinct arbitration agreements (see, e.g., the example given by L. LÉVY in his article, *op. cit.*, fn. 4, p. 115) or, in investment arbitration, when a contractual claim is brought before the arbitral tribunal having jurisdiction over such claims and, at the same time, another claim is brought before the tribunal having jurisdiction on the basis of the investment protection treaty containing an umbrella clause for the violation of such clause. See also Kaj HOBÉR, "Parallel arbitration proceedings – Duties of the Arbitrators" in *Parallel State and Arbitral Procedures in International Arbitration* (ICC Publishing 2005) p. 243.

and validity of the arbitration agreement on the basis of which the arbitral tribunal has been constituted? Can, and should, the arbitrators issue anti-suit injunctions against a recalcitrant party? All these questions are addressed below through the examination of the arbitrators' jurisdiction to issue anti-suit injunctions (II), the widespread recognition of such jurisdiction in arbitral case law (III), the advisability of arbitral anti-suit injunctions (IV) and the legal regime of such measures (V).

## II. THE ARBITRAL TRIBUNAL'S JURISDICTION TO ISSUE ANTI-SUIT INJUNCTIONS

Well-established principles of international arbitration law unquestionably provide the basis for the arbitrators' jurisdiction to issue anti-suit injunctions. These are the jurisdiction to sanction violations of the arbitration agreement and the power to take any measure necessary to avoid the aggravation of the dispute or to protect the effectiveness of the final award (1). Contrary views, which have denied arbitrators the power to issue anti-suit injunction, are unpersuasive (2).

### 1. *The Legal Bases of the Arbitral Tribunal's Jurisdiction to Issue Anti-suit Injunctions*

The notion that, in issuing anti-suit injunctions, arbitrators would make use of powers exclusively vested in State courts, echoes past debates over the power of the arbitrators to award punitive damages<sup>6</sup> or "*astreintes*".<sup>7</sup> Such power is deeply rooted in well recognized principles of international arbitration law, namely the arbitrators' jurisdiction to sanction all breaches of the arbitration agreement and the arbitrators' power to take any appropriate measures either to avoid the aggravation of the dispute or to ensure the effectiveness of their future award.

a. *Jurisdiction to sanction, by equivalent or in kind, violations of the arbitration agreement*  
The agreement by which two or more parties undertake to submit to international arbitration the disputes which may arise in relation to their contract unquestionably grants arbitrators the power to decide all questions related to the merits of the dispute brought before them.

However, the jurisdiction thus conferred to the arbitral tribunal by the arbitration agreement is not confined to the resolution of the merits of the dispute. The two main

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6. M. Scott DONAHEY, "Punitive Damages in International Commercial Arbitration", 10 J. Int'l Arb. (1993, no. 3) p. 67; E. Allan FARNSWORTH, "Punitive Damages in Arbitration", 7 Arb. Int. (1991, no. 1) p. 3; for US case law, see *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), 10 Int'l Arb. Rep. (Mar. 1995) p. 3, and Rev. Arb. (1995) p. 295, commentary by Laurent NIDDAM, *ibid.*, p. 301.

7. See Laurent LÉVY, "*Les astreintes et l'arbitrage international en Suisse*", 19 ASA Bull. (2001, no. 1) p. 21. For the French case law, see *S.A. Otor Participations, "Emballage 48", Yves Bacques and Michèle Bouvier [together "the founders"] v. S.A.R.L. Carlyle (Luxembourg) Holdings 1 and S.A.R.L. Carlyle (Luxembourg) Holdings 2 [together, "Carlyle"]*, Paris Court of Appeal, 7 October 2004, reported by Denis BENSUADE, "*S.A. Otor Participations v. S.A.R.L. Carlyle (Luxembourg) Holdings 1: Interim Awards on Provisional Measures in International Arbitration*", 22 J. Int'l Arb. (2005, no. 4) p. 357.

effects of the arbitration agreement are to oblige the parties to submit all disputes covered by the arbitration agreement to arbitration, and to confer jurisdiction on the arbitral tribunal to hear all disputes covered by the arbitration agreement. It is thus a fundamental principle of arbitration law that arbitrators have the power to rule on their own jurisdiction, a principle that is the corollary of the principle of the autonomy of the arbitration agreement. Under this latter principle, any claim that the contract containing the arbitration agreement is void or voidable has no impact on the arbitration agreement and the arbitrators' jurisdiction. Thus the principle of autonomy allows arbitrators to examine any challenges to their jurisdiction based on the alleged ineffectiveness of the disputed contract. The principle of competence-competence further allows the arbitrators to decide any challenge to the arbitration agreement itself.

The fundamental principles of international arbitration law thus allow any disputes related to the arbitration agreement to be decided by the arbitrators themselves, something that has been widely recognized in case law<sup>8</sup> and in domestic arbitration statutes or international arbitration rules.<sup>9</sup> They provide solid grounds to the arbitrators to decide such matters notwithstanding the parties' attempts to frustrate the arbitral process by escaping their contractual undertaking to arbitrate their dispute.

Against this background, the arbitrators' jurisdiction to decide disputes relating to the arbitration agreement contains, by definition, the jurisdiction to decide breaches of the obligation to arbitrate. It also contains the arbitrators' power to sanction any breaches that are ascertained on that basis.<sup>10</sup> Arbitral jurisdiction would, otherwise, be simply negated. By comparison, a significant body of case law has developed in national systems according to which submitting disputes that are covered by an arbitration agreement to the domestic courts, or refusing to perform the undertaking to arbitrate, amounts to breaches of the arbitration agreement.<sup>11</sup> Domestic courts have further ruled that damages can be awarded on that ground,<sup>12</sup> taking into account, for the quantification of the damages, the costs incurred by the party brought before a national court in the face of an arbitration agreement.

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8. See generally Emmanuel GAILLARD, John SAVAGE, eds., *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) (hereinafter *Fouchard Gaillard Goldman on International Commercial Arbitration*) paras. 388 et seq. and paras. 647 et seq.; Julian LEW, Loukas A. MISTELIS, Stefan KRÖLL, *Comparative International Commercial Arbitration* (Kluwer Law International 2001) pp. 390 et seq.; Jean-François POUDRET, Sébastien BESSON, *Droit comparé de l'arbitrage international* (Bruylant 2002) pp. 407 et seq.

9. See Art. 6(2) of the ICC Arbitration Rules; Art. 23.1 of the LCIA Arbitration Rules; Art. 21(1) of the UNCITRAL Arbitration Rules.

10. For a different view, see Laurent LÉVY, *op. cit.*, fn. 4, p. 120.

11. See, e.g., *Aggeliki Charis Compania Maritima S.A. v. Pagnan SPA*, [1995] 1 Lloyd's Law Rep. 87; *Shell International Petroleum Co. Ltd. v. Coral Oil Co. Ltd.*, [1999] 1 Lloyd's Law Rep. 72; *Through Transport Mutual Insurance Association (EURASIA) Ltd. v. New India Assurance Co. Ltd.*, [2005] 1 Lloyd's Law Rep. 67.

12. See, e.g., *Mantovani v. Carapelli S.p.A.*, [1980] 1 Lloyd's Law Rep. 375. See also Jane WESSEL, Sherri NOTH COHEN, "In Tune with Mantovani: The 'Novel' Case of Damages for Breach of an Arbitration Agreement", *Int. A.L.R.* (2001) p. 65.

Arbitral case law shows that arbitral tribunals have repeatedly recognized their power to award damages for the breach by a party of its undertaking to arbitrate its dispute, taking into account the costs incurred by the other party in domestic proceedings notwithstanding the arbitration agreement.<sup>13</sup> Such compensation is nothing more than the reparation, by equivalent, of the breach of the arbitration agreement. Ordinary rules of reparation, however, also provide for reparation in kind. In other words, arbitrators have the power to sanction a contractual breach either by an award of damages or by ordering specific performance, the recalcitrant party being ordered to cease such breach and take all necessary measures to restore the situation. In that context, anti-suit injunctions ordered by the arbitrators are in reality nothing more than an order given to the party acting in breach of the arbitration agreement to comply with its contractual undertaking to arbitrate the dispute it has submitted to domestic courts.<sup>14</sup>

*b. Power to take any measure necessary to avoid the aggravation of the dispute or to protect the effectiveness of the award*

In deciding the dispute before them and assessing the question of whether or not they may order anti-suit injunctions, the arbitrators often refer to the principle according to which the parties must refrain from any conduct that may aggravate their dispute.<sup>15</sup>

Submission of the matters covered by an arbitration agreement to the domestic courts, or even the risk of such submission, constitutes a factor that may aggravate the dispute between the parties, and that may justify the issuance of an order addressed to the parties prohibiting such conduct.<sup>16</sup> Depending on the facts of each case, it is within the arbitrators' power, as recognized in international arbitration law, to decide whether a decision in the form of an anti-suit injunction directed to one or more parties is the appropriate measure designed to prohibit conduct which may aggravate the dispute.<sup>17</sup>

A further principle may justify the recourse by the arbitrators to anti-suit injunctions in the context of the protection of the arbitral process. It is an entrenched principle of

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13. See, e.g., ICC Award No. 5946 (1990), *ICCA Yearbook Commercial Arbitration* XVI (1991) (hereinafter *Yearbook*) p. 97; ICC Award No. 8887 (April 1997), 11 *ICC Bull.* (2000, no. 2) p. 91; Final Award dated 13 July 1993, *Yearbook* XXII (1997) p. 197; Final Award dated 19 September 2003, *Yearbook* XXVIII (2003) p. 100.

14. For a review of the case law in this respect, see *infra* Part III.

15. See, e.g., ICC Award No. 3896 (dated 23 December 1982), 110 *J.D.I.* (1983) p. 914, commentary by Sigvard JARVIN, *ibid.*, p. 918 (English translation in Sigvard JARVIN, Yves DERAÏNS, eds., *Collection of ICC Arbitral Awards 1974-1985* (ICC Publishing/Kluwer 1990) p. 161); *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures of 9 December 1983, 24 *I.L.M.* (1985) p. 365; ICC Case No. 10596, Interlocutory Award (2000), *Yearbook* XXX (2005) p. 66 ("the parties must refrain from any conduct (whether action or inaction) which may aggravate the dispute, and ... arbitrators sitting under the ICC Rules have the power to issue decisions prohibiting such conduct", *ibid.*, para. 17).

16. See, e.g., *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order dated 6 September 2005, para. 45 (published on the ICSID website).

17. For a review of the case law in this respect, see *infra* Part III.

international arbitration that arbitrators must render an award capable of being recognized and enforced.<sup>18</sup>

By submitting to a domestic court a matter that is covered by an arbitration agreement, and creating the risk of multiple, and possibly divergent, decisions on such matter (including on the question of the existence and the validity of the arbitration agreement), a party may not only breach the arbitration agreement but also undermine the effectiveness of the award to be rendered by the arbitrators. In that context, it is not questionable that the power to issue anti-suit injunctions is only one aspect of the arbitrators' power to take all necessary measures to protect the international effectiveness of their future award.<sup>19</sup>

## 2. *Analysis of Arguments Sometimes Raised to Deny Arbitrators the Power to Issue Anti-suit Injunctions*

The arbitrators' power to issue anti-suit injunctions is not unanimously recognized. Three types of criticism have been expressed in this respect, all of which have in common the meaning and scope of the principle that arbitrators have jurisdiction to decide their own jurisdiction.

Under a first view, it would be somehow improper for an arbitral tribunal to address injunctions to State courts. A second critical position is advanced on the basis that domestic courts, too, have competence-competence. Finally, it has been maintained that an arbitral tribunal that issues anti-suit injunctions would be a judge in its own cause. Each of these positions will be examined in turn.

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18. See, e.g., Art. 35 of the ICC Arbitration Rules; Art. 32.2 of the LCIA Arbitration Rules. See also ICC Case No. 9593, Final Award (December 1998), 11 ICC Bull. (2000, no. 1) p. 105, at pp. 109-110 ("The Arbitral Tribunal urges both parties to refrain from taking any steps that may deprive of any purpose the Arbitral Tribunal's decision to be rendered following the hearing to be held on....").

19. See the recent decision by the High Court of Justice, Queen's Bench Division Commercial Court, *Republic of Ecuador v. Occidental Exploration & Production*, 2 March 2006, [2006] EWHC 345 (Comm). The High Court had to decide on the request for annulment of an award in which the arbitral tribunal held that it had jurisdiction and ordered the claimant to desist from carrying claims brought before the Ecuadorian courts on subject matters related to the arbitration. The Court refused to vacate the award under Sect. 68 of the 1996 Arbitration Act, considering that the arbitrators, who acted under the UNCITRAL Arbitration Rules, did not exceed their powers by ordering in their award that a party should refrain from pursuing national judicial actions connected to the subject matter of the BIT arbitration. The Court found that the justification on which the tribunal based its order (avoidance of the risk of double recovery by the investor) shows that the anti-suit injunctions were "consequential declarations that follow from the tribunal's decision that [the investor] is entitled to monetary compensation" (para. 125). Judge Aiksen further held that, "[i]n principle, it seems to me, the tribunal must have the power to make orders that are intended to give the proper effect to its primary order granting [the investor] monetary compensation" (para. 125) and that "[i]t is an order which is consequential to the order granting [the investor] monetary compensation, and is made so as to ensure that [the investor] does not obtain a double recovery" (para. 127).

a. *It is somehow improper for an arbitral tribunal to address injunctions to State courts*  
 Some scholars have expressed the view that an arbitral tribunal should not issue anti-suit injunctions because such orders interfere with the State courts' jurisdiction or the parties' fundamental right of seeking relief before those courts:

“... it is highly doubtful whether an arbitral tribunal should be allowed to tell another tribunal or a state court what to do, or whether it should be allowed to interfere indirectly with the working of another arbitral tribunal by ordering one of the parties what to do in the other arbitration or litigation”.<sup>20</sup>

It has been suggested that, even when issuing an order to prohibit the parties from submitting their dispute to the State courts in order to protect the arbitral proceedings, “arbitrators must ensure that these measures do not violate a party's fundamental right of seeking relief before national courts”.<sup>21</sup>

These views overlook the fact that, other than in relation to the right to seek interim measures for which jurisdiction remains vested in the State courts, the parties who enter into an arbitration agreement accept, by definition, to waive their right to resort to domestic courts for the settlement of their dispute. By entering into the arbitration agreement, the parties undertake to submit to arbitration any disputes covered by their agreement, thereby renouncing to have recourse to the courts of a given country for the settlement of the same disputes, the corollary principle being that such courts are prohibited from hearing such disputes and that, if seized of a matter covered by the arbitration agreement, they will be required, under the applicable rules, to refer the parties to arbitration.<sup>22</sup>

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20. Pierre KARRER, “Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please”, in *International Arbitration and National Courts, The Never Ending Story*, ICCA Congress Series no. 10 (2001) (hereinafter *ICCA Congress Series no. 10*) p. 97, at p. 106. For a different view, see Horacio A. GRIGERA NAÓN, “Competing Orders Between Courts of Law and Arbitral Tribunals: Latin American Experiences”, in *Liber Amicorum in Honour of Robert Briner*, *op. cit.*, fn. 2, p. 335, at p. 340. See also ICC Case No. 9593, Final Award (December 1998), *op. cit.*, fn. 18, p. 110, which is often referred to as establishing the principle of the arbitrators' refusal to issue anti-suit injunctions, although, in that case, the outcome was determined by the fact that the court proceedings were outside the scope of the arbitration agreement (“... [the tribunal] has no authority to interfere in State Court proceedings dealing with the compliance of prior judicial decisions rendered and thus outside the scope of the arbitration clause and its subject matter”). See also *Société Générale de Surveillance S.A. (SGS) v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2 dated 16 October 2002, 18 ICSID Review—FILJ (2003, no. 1) p. 293, at p. 301 (the tribunal rejected the request to enjoin the respondent State from “commencing or participating in all proceedings in the courts of Pakistan relating in any way to this arbitration in the future”, on the basis that the request would have required to “enjoin a State from conducting the normal processes of criminal, administrative and civil justice within its own territory”).

21. Laurent LÉVY, *op. cit.*, fn. 4, p. 123.

22. See, in particular, Art. 8 of the UNCITRAL Model Law, or Art. II(3) of the New York Convention (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



The relevant question, therefore, is not a party's fundamental right to seek relief before national courts, but whether a valid arbitration agreement exists and whether the dispute is covered by such agreement, and who has jurisdiction to decide these questions. In that context, the answer is provided by the rules of international arbitration law concerning the interaction between arbitral tribunals and domestic courts: accepting the principle of competence-competence and the arbitrators' inherent power to determine their jurisdiction on the basis of the arbitration agreement entails the consequence that domestic courts should not, in parallel and with the same degree of scrutiny, rule on the same issue, at least at the outset of the arbitral process. In other words, when seized of the matter, the courts should limit, at that stage, their review to a *prima facie* determination that the agreement is not null and void, inoperative or incapable of being performed.

Recognizing the arbitrators' power of first determination of their jurisdiction by no means suggests that domestic courts relinquish their power to review the existence and validity of an arbitration agreement or that the parties lose any fundamental right in that respect. The acceptance by the national legal systems—by way of rules incorporated in arbitration statutes or in international conventions—that the courts refer the parties to arbitration simply means that the courts, when making a *prima facie* determination that there exists an arbitration agreement and that it is valid, leave it to the arbitrators to rule on the question and recover their power of full scrutiny at the end of the arbitral process, after the award is rendered by the arbitral tribunal. Under this rule, known as the negative effect of the rule of competence-competence, the arbitrators must be the *first* (as opposed to the *sole*) judges of their own jurisdiction and the courts' control is postponed to the stage of any action to enforce or to set aside the arbitral award rendered on the basis of the arbitration agreement. As a result, a court that is confronted with the question of the existence or validity of the arbitration agreement must refrain from hearing substantive arguments as to the arbitrators' jurisdiction until such time as the arbitrators themselves have had an opportunity to do so.<sup>23</sup> A fortiori, a court that is seized of a party's claim pertaining to the merits of a dispute covered by an arbitration agreement must refer the parties to arbitration or, at the very least, exercise self-restraint,<sup>24</sup> the parties having relinquished their right to seek relief before national courts upon entering into the arbitration agreement.

*b. Arbitral anti-suit injunctions deny the State courts' competence-competence*

Somewhat related to the argument according to which arbitral tribunals are not in a position to address injunctions to State courts, a second type of reasoning lays emphasis

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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".).

23. On the notion of competence-competence generally, see *Fouchard Gaillard Goldman on International Commercial Arbitration*, *op. cit.*, fn. 8, paras. 650 et seq.; on the negative effect of competence-competence and the *prima facie* review more particularly, see Emmanuel GAILLARD, "La reconnaissance, en droit suisse, de la seconde moitié du principe d'effet négatif de la compétence-compétence", in *Liber Amicorum in honour of Robert Briner*, *op. cit.*, fn. 2, p. 311.

24. On the notion of self-restraint, see the references at fns. 2 and 3.

on the co-existence between the jurisdiction of arbitral tribunals and that of State courts, each being entitled to equal recognition of its jurisdiction to rule on its own jurisdiction:

“... 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.”<sup>25</sup>

This view seems to be based on the premise that, in issuing anti-suit injunctions, arbitrators will decide the question of the State courts’ jurisdiction in lieu of the State courts:

“... 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....”<sup>26</sup>

Such a position, however, discounts the fact that the dispute which is covered by the arbitration agreement is, by definition, excluded from the jurisdiction of the State courts. As recognized by the same authority, “[a]dmittedly, 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.”<sup>27</sup>

The recognition of the courts’ competence-competence is therefore not at issue. Nor is there any doubt as to the fact that ordering a party to comply with its undertakings under the arbitration agreement does not result in negating the exercise of the courts’ competence-competence. The question is rather one of the existence, validity and scope of the arbitration agreement, with a right of first determination by the arbitrators, the courts recovering their power of full scrutiny at the end of the arbitral process.

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25. Laurent LÉVY, *op. cit.*, fn. 4, p. 120. See also Pierre KARRER, *op. cit.*, fn. 20, p. 106.

26. Laurent LÉVY, *op. cit.*, fn. 4, p. 117.

27. *Ibid.*

c. *The arbitral tribunal is a judge in its own cause when issuing anti-suit injunctions*

A further view has been suggested according to which arbitrators issuing anti-suit injunctions should exercise utmost care so as to avoid such measures to be more harmful than the problem they are seeking to resolve, something that would occur when the measure “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”.<sup>28</sup>

The rationale behind this proposition is not convincing. This warning suggests that, because in deciding on their own jurisdiction arbitrators would be the judge in their own cause, they could not as a matter of principle be entrusted with the determination of their jurisdiction, something that fundamentally conflicts with the principle of competence-competence. Furthermore, an arbitral award would likely be set aside if rendered in the absence of an arbitration agreement or on the basis of an arbitration agreement that is void or has expired, or if the arbitral tribunal has ruled without complying with the mission conferred upon it. The issuance of an order to the parties to comply with their agreement to arbitrate, however, is merely a measure designed to protect the arbitrators' jurisdiction, be it in the presence of an existing and valid arbitration agreement or on the basis of a *prima facie* determination that there exists an arbitration agreement and that it is valid, until such time as the arbitrators have made a final determination, subject to the domestic courts' power of full scrutiny at the end of the arbitral process. Any other understanding would imply a fundamental distrust of the arbitral process and the arbitrators' ability to be entrusted with the mission of determining whether they have been established on the basis of an existing and valid arbitration agreement and reaching decisions that are fair and that protect the interests of society as well as those of the parties to the dispute.

III. THE RECOGNITION OF THE ARBITRAL TRIBUNAL'S JURISDICTION TO ISSUE ANTI-SUIT INJUNCTIONS

The conclusion that arbitrators, as a matter of principle, have jurisdiction to issue anti-suit injunctions is consistent with, and confirmed by, international arbitration practice. Anti-suit injunctions have been issued in a significant number of ICSID and Iran-US arbitrations, as well as in international commercial arbitration proceedings (1). The Reports of the UNCITRAL Working Group on Arbitration concerning possible modifications of the UNCITRAL Model Law also confirm that the arbitrators' power to issue such injunctions is both widespread and legitimate (2).

1. *Arbitral Case Law*

a. *ICSID*

Requests addressed to ICSID tribunals to enjoin a party to refrain from initiating or continuing State court proceedings are far from being a recent trend. In fact, this issue was raised in the very first ICSID arbitration in 1972, *Holiday Inns S.A. and others v.*

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28. Laurent LÉVY, *op. cit.*, fn. 4, p. 129.

*Morocco*.<sup>29</sup> The tribunal ordered both parties “to abstain from any measure incompatible with the upholding of the Contract and to make sure that the action already taken should not result in any consequences in the future which would go against such upholding”. Regarding the risk that a party might raise questions before the Moroccan courts which were also before the arbitral tribunal, the tribunal held that “[i]n such a hypothetical situation the Moroccan tribunals should refrain from making decisions until the Arbitral Tribunal has decided these questions or, if the Tribunal had already decided them, the Moroccan tribunals should follow its opinion. Any other solution would, or might, put in issue the responsibility of the Moroccan State and would endanger the rule that international proceedings prevail over internal proceedings.”<sup>30</sup>

In *Maritime International Nominees Establishment (MINE) v. Guinea*,<sup>31</sup> the parties entered into a contract under which a mixed company (Sotramar) was to be established in order to export Guinean bauxite from Guinea to Europe and North America. The contract contained an ICSID arbitration clause. The contract was never performed and a dispute arose between the parties as to which of them was responsible. Claiming that Guinea was refusing to participate in ICSID proceedings, MINE obtained an order from a US court compelling arbitration before the AAA. In the AAA arbitration, in which Guinea did not participate, an award was rendered in favor of MINE. Guinea then appeared in the US proceedings in which MINE moved to confirm the AAA award and sought the dismissal of the motion on the ground that the arbitral tribunal had lacked jurisdiction. MINE eventually filed a request for arbitration with ICSID, seeking both a finding that Guinea was liable and an award for damages. In the meantime, on the basis of the AAA award, MINE had obtained attachments on Guinean assets from Swiss and Belgian courts. Guinea asked the ICSID tribunal to order that the company dissolve all the attachments. The tribunal at first refused to grant the request as premature, because Guinea had not yet presented any defense in the State court proceedings, but the ICSID tribunal later issued an unreported order finding that, by initiating legal action to enforce the AAA award, MINE had breached both the requirement of exclusivity of ICSID arbitration (pursuant to Art. 26 of the Convention) and the ICSID arbitration agreement. Furthermore, the tribunal stated that these actions had harmed the respondent, and it therefore recommended that MINE:

“immediately withdraw and permanently discontinue all pending litigation in national courts and it commence no new action ... [and] dissolve every existing attachment and that it seek no new remedy in any national court”.<sup>32</sup>

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29. *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1, reported by Pierre LALIVE, “The First ‘World Bank’ Arbitration (*Holiday Inns v. Morocco*) – Some Legal Problems”, 51 *British Yearbook of International Law* (1980) p. 123, at p. 134. This commentary represents the only available source on this matter.

30. *Ibid.*, p. 137 and p. 160.

31. *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Award of 6 January 1988, 4 ICSID Rep. (1997) p. 59.

32. As reported in the Award dated 6 January 1988, *ibid.*, p. 69.

The tribunal also made it clear that, should MINE not comply with the recommendation, it would take this failure into account in its award.<sup>33</sup>

In *Ceskoslovenska Obchodni Banka (CSOB) v. Slovak Republic*, the dispute related to a "Collection Agreement" between CSOB, the Ministry of Finance of the Slovak Republic and the Ministry of Finance of the Czech Republic, which contained an ICSID arbitration clause. During the arbitration, a bankruptcy proceeding was initiated before the Bratislava Regional Court against the Slovak Collection Company. Although the Slovak Collection Company was not a party to the ICSID arbitration, CSOB argued that the arbitration and the bankruptcy case involved the same issues, namely "the nature and the extent of the Slovak Republic's obligations to fund the Slovak Collection Company and the validity and quantum of CSOB's claims against the Slovak Collection Company".<sup>34</sup>

For this reason, CSOB requested that the tribunal order "that Respondent take all necessary measures immediately to stay until the issuance of the final award in this arbitration the bankruptcy proceeding". After having rejected the request twice,<sup>35</sup> in January 1999, the tribunal recommended the suspension of the Slovakian bankruptcy proceedings, which dealt "with matters under consideration by the Tribunal in the instant arbitration", after the Regional Court had denied the claimant's application for a stay. It recommended that the national bankruptcy proceedings

"be suspended to the extent that such proceedings might include determinations as to whether the Slovenska inkasni spol. s.r.o. [Slovak Collection Company] has a valid claim in the form of a right to receive funds from the Slovak Republic to cover its losses as contemplated in the Consolidation Agreement at issue in this arbitration".<sup>36</sup>

By Procedural Order No. 5 dated 1 March 2000, the tribunal not only reiterated its previous Order, but also recommended that the bankruptcy proceedings

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33. MINE subsequently presented evidence that it had withdrawn the attachments and discontinued the litigation, as reported in the Award dated 6 January 1988, *ibid.*, p. 69. As a counterclaim, Guinea sought to recover the expenses and legal fees it had incurred both to reverse the US court's confirmation of the AAA award and to obtain the release of the attachments. The tribunal denied the former claim (since MINE had not attempted to avoid ICSID arbitration by seeking to compel arbitration and because Guinea was properly informed of all judicial and arbitral proceedings) and upheld the latter claim, awarding Guinea a sum for the costs and legal fees it incurred in connection with the attachments. It found that the actions brought by MINE before the national courts "were contrary to the exclusive jurisdiction granted ICSID in this proceedings".

34. *Ceskoslovenska Obchodni Banka (CSOB) v. Slovak Republic*, ICSID Case No. ARB/97/4, Procedural Order No. 2 dated 9 September 1998, p. 1 (published on the ICSID website).

35. The tribunal found no reason to assume that the Regional Court would not have suspended the proceedings if it had been informed of the pendency of an ICSID arbitration and of the legal rules applicable thereto (see Procedural Order No. 2, *op. cit.*, fn. 34, and Procedural Order No. 3 dated 5 November 1998, published on the ICSID website).

36. Procedural Order No. 4, dated 11 January 1999, p. 2 (published on the ICSID website).

“be suspended to the extent that such proceedings might include determinations as to whether the Slovenska inkasni spol. s.r.o. has made a loss resulting from the operating costs and the schedule of payments for the receivables assigned to it by Ceskoslovenska Obchodni Banka, A.S., including payment of interest, as contemplated in the Consolidation Agreement at issue in this arbitration”.<sup>37</sup>

The tribunal requested the parties to bring the Order to the attention of the “appropriate judicial authorities of the Slovak Republic so that they may act accordingly”.<sup>38</sup>

These orders are worthy of note for two reasons, as they show that anti-suit injunctions designed to protect the ongoing arbitral proceeding may be far-reaching. First, the parallel court proceedings in this case involved bankruptcy, a subject generally reserved for the exclusive jurisdiction of national courts. Second, the entity that was the focus of these bankruptcy proceedings was not a party to the arbitration in which the anti-suit injunctions were granted.

*Société Générale de Surveillance S.A. (SGS) v. Islamic Republic of Pakistan*<sup>39</sup> involved a contract for pre-shipment inspection services, entered into by SGS and the Government of Pakistan. The contract contained an arbitration clause, with Islamabad as the place of arbitration. A dispute arose between the parties under the contract. After having unsuccessfully brought an action before the Swiss courts, which declined jurisdiction, SGS filed a request for ICSID arbitration on the basis of the Swiss-Pakistani bilateral investment treaty (BIT), claiming that the respondent had breached its obligations under the BIT. Pending the ICSID decision on jurisdiction, Pakistan obtained from a Pakistani court an anti-suit injunction against the ICSID proceedings and an order stating that the dispute between the parties should be referred to a domestic arbitrator appointed by the court. SGS asked the ICSID tribunal to recommend that the respondent withdraw immediately from all State court proceedings (including an action to hold SGS in contempt of court) and refrain from commencing or participating in any such proceedings in the future.<sup>40</sup> Furthermore, the claimant requested a stay of the domestic arbitration until the ICSID tribunal had decided on its jurisdiction.<sup>41</sup>

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37. Procedural Order No. 5, dated 1 March 2000, pp. 2-3 (published on the ICSID website).

38. *Ibid.*, p. 3.

39. ICSID Case No. ARB/01/13, *op. cit.*, fn. 20.

40. See Procedural Order No. 2 dated 16 October 2002, *op. cit.*, fn. 20, p. 293 (“immediately withdraw from and cause to be discontinued all proceedings in the courts of Pakistan relating in any way to this arbitration, including Pakistan's application for a stay of this arbitration and its application to have SGS held in contempt of court, and that the Respondent refrain from commencing or participating in any other such proceeding in the future”).

41. *Ibid.*, pp. 293-294 (“the Islamabad-based arbitration pending between SGS and Pakistan be stayed until such time, if any, as this Tribunal has issued an award declining jurisdiction over the present dispute, and that award is no longer capable of being interpreted, revised or annulled pursuant to the ICSID Convention”). The tribunal was also requested to order Pakistan to “take no action of any kind that might aggravate or further extend the dispute” submitted to it (*ibid.*, p. 294). The tribunal rejected this request, finding that no party had taken any measure that could aggravate the dispute.

Having noted that the Pakistani court's anti-suit injunction against the ICSID proceedings, while final, did not as a matter of international law bind the ICSID tribunal,<sup>42</sup> the arbitrators recommended that Pakistan take no action to have SGS held in contempt of court. The tribunal also recommended a stay of the Islamabad-based arbitral proceeding, considering that 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".<sup>43</sup>

In *Tokios Tokelés v. Ukraine*,<sup>44</sup> the arbitral tribunal addressed the claimant's requests for anti-suit injunctions directed against national proceedings in two different orders.

In the first Order, the tribunal stated that all Ukrainian authorities had the legal obligation "to abstain from, and to suspend and discontinue, any proceedings before any domestic body, whether judicial or other, which might in any way jeopardize the principle of exclusivity of ICSID proceedings or aggravate the dispute before it".<sup>45</sup> This was because only the ICSID tribunal had jurisdiction to determine whether the BIT between Ukraine and Lithuania had been breached. The tribunal therefore issued an Order which was worded in broad terms:

"Pending the resolution of the dispute now before the Tribunal, both parties shall refrain from, suspend and discontinue, any domestic proceedings, judicial or other, concerning Tokios Tokelés or its investment in Ukraine, namely Taki Spravy – including those noted in the request for provisional measures and in the Claimant's letter of June 24, 2003 – which might prejudice the rendering or implementation of an eventual decision or award of this Tribunal or aggravate the existing dispute."<sup>46</sup>

In a second Order,<sup>47</sup> the tribunal dismissed the claimant's request that the respondent be ordered to refrain from, suspend and discontinue criminal proceedings against the General Director of the claimant's subsidiaries in Ukraine, an arrest of their assets and a tax investigation initiated against them. The tribunal refused to take these measures, finding a lack of both necessity and urgency, which are essential requirements for the granting of a provisional measure. At the same time, the tribunal recognized that an ICSID tribunal has the power to order an anti-suit injunction even in relation to criminal proceedings or tax investigations. It specified that in order to direct a stay of national proceedings, it is not necessary that these proceedings satisfy the jurisdictional

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42. *Ibid.*, p. 299.

43. *Ibid.*, p. 304. On the other hand, the tribunal refused to order the respondent to refrain, in the future, from commencing or participating in all proceedings relating in any way to the arbitration. It held that it could not "enjoin a State from conducting the normal processes of criminal, administrative and civil justice within its own territory" (*ibid.*, p. 301), since such a request was not sufficiently determined.

44. ICSID Case No. ARB/02/18.

45. Procedural Order No. 1 dated 1 July 2003, p. 3 (published on the ICSID website).

46. *Ibid.*, p. 4.

47. Procedural Order No. 3 dated 18 January 2005, 20 Int'l Arb. Rep. (Feb. 2005) C14.

requirements of Art. 25 of the Convention, but it is required that “the actions of the opposing party ‘relate to the subject matter of the case before the tribunal and not to separate, unrelated issues or extraneous matters’”.<sup>48</sup>

In *Plama Consortium Limited v. Republic of Bulgaria*,<sup>49</sup> the claimant requested that the tribunal order the respondent to discontinue all pending proceedings and refrain from bringing new actions before the Bulgarian courts and Bulgarian authorities relating to the arbitration, including: (i) insolvency proceedings against Nova Plama; (ii) execution actions commenced by the Agency for State Receivables to recover Nova Plama’s tax debts, an action that, according to the claimant, would have aggravated the existing dispute; and (iii) the execution of the Commission on Protection of Competition’s decision that Nova Plama had to reimburse an illegal State subsidy that it had received. The claimant also requested that Bulgaria be ordered to take “no action of any kind that might aggravate or further extend the dispute submitted to the Tribunal”.<sup>50</sup>

The arbitral tribunal, composed of C. Salans, A. van den Berg and V.V. Veeder, refused to issue the anti-suit injunctions requested by the claimant. However, it is noteworthy that the request was rejected on the grounds that the requirements necessary for the issuance of an order had not been met, not on the grounds that the tribunal lacked the authority to take such a measure.

The tribunal dismissed the request on the grounds that it was not aimed at protecting “rights relating to the dispute” and that none of the Bulgarian proceedings could affect the issues involved in the arbitration since their outcomes have “no foreseeable effect on the Arbitral Tribunal’s ability to make a determination of the issues in the arbitration”.<sup>51</sup> Nevertheless, as a matter of principle, the tribunal stated that:

“Provisional measures are appropriate to preserve the exclusivity of ICSID arbitration to the exclusion of local administrative or judicial remedies as prescribed in Art. 26 of the ICSID Convention. They are also appropriate to prevent parties from taking measures capable of having a prejudicial effect on the rendering or implementation of an eventual award or which might aggravate or extend the dispute or render its resolution more difficult.”<sup>52</sup>

Furthermore, the tribunal provided the following guidance on the circumstances justifying ICSID tribunals to issue anti-suit injunctions against State court or administrative proceedings:

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48. *Ibid.*, p. 6.

49. ICSID Case No. ARB/03/24, *op. cit.*, fn. 16.

50. Procedural Order dated 6 September 2005, *op. cit.*, fn. 16, p. 1.

51. *Ibid.*, p. 14. The tribunal also determined that the parties to the national proceedings and to the arbitration were different, and thus an order to stay the national proceedings would have had a prejudicial effect on third parties, who would therefore be deprived of their right to pursue their judicial remedies.

52. *Ibid.*, p. 12.



“The proceedings underway in Bulgaria may well, in a general sense, aggravate the dispute between the parties. However, the Tribunal considers that the right to non-aggravation of the dispute refers to actions which would make resolution of the dispute by the Tribunal more difficult. It is a right to maintenance of the *status quo*, when a change of circumstances threatens the ability of the Arbitral Tribunal to grant the relief which a party seeks and the capability of giving effect to the relief.”<sup>53</sup>

On this basis, the tribunal found that none of the outcomes of the pending Bulgarian proceedings would likely affect the tribunal’s ability to determine the issues raised in the ICSID arbitration.

*b. Iran-United States Claims Tribunal*

In the same way, the Iran-United States Claims Tribunal (Iran-US Tribunal) has not hesitated to affirm its power to issue anti-suit injunctions when it has felt such measures to be appropriate in the context of the dispute before it.

The seminal decision in this respect is the award rendered in *E-Systems, Inc. v. The Islamic Republic of Iran, Bank Melli Iran*.<sup>54</sup> All subsequent decisions of the Iran-US Tribunal on this issue have referred to this case.

The claim brought by E-Systems against Iran and Bank Melli Iran related to a contract that the company had entered into with the Iranian Government for the modification of two Iranian military aircraft and their equipment. E-Systems was to install on the airplanes equipment to be supplied to it by the Government through suppliers in the United States. The claimant alleged that Iran had breached the contract by not paying the suppliers who were to deliver the necessary equipment, thereby causing E-Systems to interrupt its deliveries, and by not compensating E-Systems for the work it had performed. The claimant therefore terminated the contract and filed an action with the Iran-US Tribunal requesting, inter alia, compensation for the damages it had incurred as a result of such termination of the contract.

During the proceedings, Iran sought from the Public Court of Tehran an order requiring E-Systems to return the aircraft and to reimburse the damages Iran had incurred as a result of both the breach and the termination of the contract by E-Systems. The company filed with the Iran-US Tribunal a motion to compel the dismissal or stay of the Iranian proceedings. It alleged that the claims brought in the domestic lawsuits should have been brought as counterclaims before the Iran-US Tribunal, as they arose from the same contracts, transactions, and occurrences as the claim before the tribunal, and that Iran, by filing these lawsuits in a different forum, had violated “the overall intent and spirit of the Algiers Declarations”, specifically their arbitration provisions. E-Systems requested that the tribunal order that the Government “immediately cause to be dismissed the claim filed with the Iranian Court” and that “there be no re-filing of the

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53. *Ibid.*, p. 15.

54. Iran-US Tribunal, Award No. ITM 13-388-FT, Case No. 388, *E-Systems, Inc. v. The Islamic Republic of Iran, Bank Melli Iran*, 4 February 1983, 2 Iran-United States Claims Tribunal Rep. (1983) p. 51.

claim in Iran or any other forum so long as the Tribunal has pending before it a claim for relief by E-Systems regarding the subject matter as referred to in the instant case".<sup>55</sup>

The request was heard by the Full Tribunal. It found that the claim brought by Iran before the Iranian court would have been admissible as a counterclaim in the arbitral proceeding. However, the Tribunal concluded that the Algiers Declarations did not reveal an intent by Iran and the United States to provide exclusive jurisdiction over counterclaims to the Tribunal. Thus, the Tribunal held that "the Algiers Declarations leave the Government of Iran free to initiate claims before Iranian courts even where the claims had been admissible as counterclaims before the Tribunal". Nevertheless, the Tribunal went on to state that it

"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. Not only should it be said that the award to be rendered in this case by the Tribunal, which was established by inter-governmental agreement, will prevail over any decisions inconsistent with it rendered by Iranian or United States courts, but, in order to ensure the full effectiveness of the Tribunal's decisions, the Government of Iran should request that actions in the Iranian Court be stayed until proceedings in this Tribunal have been completed.

For these reasons,  
the Tribunal requests the 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."<sup>56</sup>

In his concurring opinion, Judge Holtzmann opined that the issuance of such an order was a means of protecting the Tribunal's jurisdiction and the integrity of its awards, since the claims before the Tribunal and the Iranian lawsuit involved the same issues relating to the same contract.<sup>57</sup>

*c. International commercial arbitration*

The principle of confidentiality, which covers most arbitral awards and procedural orders in international commercial arbitration, makes it difficult to determine how often arbitrators have actually issued anti-suit injunctions in purely commercial matters. A review of reported cases, however, shows that, contrary to what one might assume, the issuance of such measures by arbitral tribunals is neither recent nor uncommon in international commercial arbitration.

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55. *Ibid.*, p. 53.

56. *Ibid.*, p. 57.

57. He further observed that the power of an international tribunal to order a party to halt proceedings initiated in its national courts has been recognized by other international tribunals and can also be based on Art. 26 of the Iran-US Tribunal Rules, according to which the tribunal may issue interim protective measures (*ibid.*, pp. 59 et seq.).

The initiation by a party of parallel State court proceedings in violation of an arbitration agreement is an issue that arbitral tribunals have faced for some time. In such cases, the party relying on the arbitration agreement frequently complains of such a breach before the arbitral tribunal itself, requesting sometimes damages, sometimes a decision to enjoin the other party not to initiate or pursue the court proceedings in violation of the arbitration agreement.

As early as 1970, a sole arbitrator, Pierre Lalive, in ICC Case No. 1512, chose to continue the arbitral proceeding in the face of simultaneous national court proceedings, although, in appearance, he had not been requested to (and so did not) issue an anti-suit injunction. The dispute was between an Indian cement company and a Pakistani bank. It arose in connection with a guarantee agreement, containing an ICC arbitration clause, that the bank had offered to the cement company in relation to the obligations of a manufacturer to deliver a certain amount of cement to the cement company. When the manufacturer failed to deliver the cement, the cement company initiated ICC arbitration against the bank to enforce the guarantee. The arbitration took place in Geneva. In a second preliminary Award, dated 14 January 1970<sup>58</sup>, the sole arbitrator addressed an argument by the Pakistani bank that the arbitrator lacked jurisdiction because the Pakistani cement manufacturer had brought an action (after the initiation of the arbitral proceeding) against the bank in a Pakistani court. In addition, the bank had brought suit against the Indian cement company and the Pakistani cement manufacturer in the High Court of West Pakistan, which then issued an injunction restraining the Indian cement company from pursuing the arbitration.

In upholding his jurisdiction, the sole arbitrator found that “the defendant’s decision to institute the national lawsuits was another tactical move to gain time and to slow down the arbitration proceedings”.<sup>59</sup> Noting that the parties had agreed to international arbitration outside Pakistan according to the ICC Rules, the arbitrator declared that there was a widely held principle that “once the parties have chosen a law to govern the arbitration proceedings, there is no room for the laws of the country of the parties”. The arbitrator went on to state that:

“[T]he ICC rules, expressly accepted by both parties, constitute the law governing the objection raised by the defendant.

... No support whatever can be found in the Rules for the contention that the admissibility or justification of the defendant’s objection should be governed by the defendant’s own law, that of Pakistan.

It is indisputable also that the ICC Rules *exclude* any resort by one party to a judicial authority *pendente arbitratione* outside the narrow limits of Art. 13(5), a provision which ... has no application here.”<sup>60</sup>

Thus, the arbitrator made clear that he would exercise jurisdiction despite the Pakistani court proceedings:

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58. *Yearbook V* (1980) p. 170 at p. 174.

59. *Ibid.*, p. 175.

60. *Ibid.*, pp. 176-177.

"I have no alternative but to conclude, with regret, that the defendant has contravened its undertaking to arbitrate and violated the ICC Rules in instituting [proceedings] in the West Pakistan High Court. This course of action may well have been caused by a misunderstanding as to the exact legal position and an insufficient familiarity with the peculiar features of international arbitration. I would therefore venture to express the hope that this arbitration may now go on its normal course with the full cooperation of both parties."<sup>61</sup>

Subsequent decisions show that ICC tribunals have been willing to issue injunctions to parties in order to ensure that arbitral proceedings were able to follow their "normal course". In ICC Case No. 3896 of 1982,<sup>62</sup> the arbitral tribunal, composed of Pierre Lalive (President), Jacques Robert and Berthold Goldman, having its seat in Lausanne, had to settle a dispute brought by a French construction company against an Iranian Government agency. During the arbitration, the respondent instructed an Iranian bank to make a call under a performance guarantee given by a banking syndicate to secure the claimant's contractual obligations. The claimant asked the arbitral tribunal to issue, as interim relief, a declaration that the bank guarantee was invalid, that the respondent's attempt to call the guarantee was fraudulent, and that the respondent should suspend the call until a decision was reached on the merits of the dispute. Meanwhile, a national court issued an order prohibiting the guarantor from paying any sum until the arbitral tribunal had rendered a final decision on the merits. The respondent asked the tribunal to declare that the action in State court was abusive because it tended to obstruct the performance of the guarantee and to aggravate or extend the dispute. In response, the tribunal issued a Partial Award stating that

"it has the duty to recommend or propose to them measures which, in its view, are appropriate to prevent an aggravation of the dispute between the Parties.... From this point of view, the Tribunal must recall the well-established principle of international arbitration law ... according to which : The parties must abstain from any action likely to have a prejudicial effect on the execution of the forthcoming decision and, in general, to refrain from committing any act, whatever its nature, likely to aggravate or to prolong the dispute."<sup>63</sup>

It concluded:

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61. *Ibid.*, p. 177.

62. ICC Award No. 3896, *op. cit.*, fn. 15.

63. *Ibid.* ("il a le devoir de leur recommander ou proposer les mesures propres, à son avis, à prévenir une aggravation du litige entre les Parties.... De ce point de vue, le Tribunal tient à rappeler le principe bien établi en droit international de l'arbitrage commercial ... selon lequel: Les parties doivent s'abstenir de toute mesure susceptible d'avoir une répercussion préjudiciable à l'exécution de la décision à intervenir et, en général, ne laisser procéder à aucun acte, de quelque nature qu'il soit, susceptible d'aggraver ou d'étendre le différend." (110 J.D.I. (1983) p. 917)).

“the Arbitral Tribunal considers that there exists, undeniably, the risk of the dispute before it becoming aggravated or magnified, and that the parties should, in the same spirit of goodwill that they have already demonstrated in signing the Terms of Reference, refrain from any action likely to widen or aggravate the dispute, or to complicate the task of the Tribunal or even to make more difficult, in one way or another, the observance of the final arbitral award”.<sup>64</sup>

In ICC Case No. 5650,<sup>65</sup> the dispute related to a contract entered into by an African State, a US company and two other companies pursuant to which these companies were to “study and carry out the complete extension program” for a hotel. The contract provided for ICC arbitration as the means to settle any disputes. Before the initiation of the arbitration, the US company received a writ (*assignation en référé*) from three experts appointed by the courts of the African State in relation to a lawsuit between the African State and another company involved in the hotel program. The US company was informed that, in the lawsuit, some of the hotel’s deficiencies were attributed to it. The US company responded that, since an ICC arbitration agreement covered disputes relating to the contract, the writ should be withdrawn. A month later, however, the State filed a Summons and Petition for damages in its own courts against the US company and the other companies. The US company then commenced an arbitration seeking a declaration that the respondent had breached the arbitration agreement by initiating the lawsuit and that this lawsuit should be terminated. During the arbitration, the respondent withdrew the lawsuit brought before its courts.

In his Final Award of 1989, the sole arbitrator, sitting in Lausanne, dismissed the argument that the writ (*assignation en référé*) had breached the arbitration agreement, since no judicial action was brought against the claimant at that time. However, the arbitrator declared that the subsequent Summons and Petition before the African court amounted to “a clear violation of Art. 8(5) of the ICC Arbitration Rules and consequently of” the arbitration agreement. The arbitrator seemed to approve of the use of anti-suit injunctions by arbitrators in such situations, stating: “According to the statements of the respondent, said violation is no more continuing, as the lawsuit against the claimant has been terminated. Should that not be the case, the claimant would be entitled to have the lawsuit terminated in favour of the arbitration proceedings pursuant to [the arbitration agreement].”<sup>66</sup>

In an arbitration conducted pursuant to the Arbitration Rules of the Zurich Chamber of Commerce, the arbitral tribunal, having its seat in Zurich, had to decide questions

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64. *Ibid.*, p. 164 for the English translation (“le Tribunal estime qu’il existe des risques indéniables d’aggravation ou d’augmentation du litige qui lui est soumis et que les Parties devraient, dans l’esprit de bonne volonté qu’elles ont déjà manifesté en signant l’Acte de Mission, s’abstenir de tout acte susceptible d’étendre ou d’aggraver le différend, de compliquer la tâche du Tribunal arbitral, voire même de rendre plus difficile, d’une manière ou d’une autre, l’exécution d’une éventuelle sentence arbitrale.” (110 J.D.I. (1983) p. 918)). Finally, the tribunal “proposed” that, in order to preserve the status quo, the claimant withdraw its allegations of fraud and the defendant withdraw its call under the guarantees, until the tribunal’s decision on the merits.

65. *Yearbook XVI* (1991) p. 85.

66. *Ibid.*, p. 91.

relating to alleged breaches of contract in the contractual relations based on four different agreements. In parallel to the arbitration, a subsidiary of the claimant brought an action in the US against the respondent in relation to two other agreements concluded for the development and marketing of the same products, which did not provide for an arbitration clause. The respondent objected to the jurisdiction of the US court on the basis that these two agreements related to the four agreements being the subject of the exclusive arbitration pending in Zurich. The respondent later amended its response to make a counterclaim against the claimant's subsidiary as well as the claimant in the arbitration, seeking the production of documents from the claimant in the US proceeding on the basis of the four agreements being considered in the arbitration.

The claimant requested from the arbitral tribunal a preliminary injunction with respect to the pursuit, by the respondent, of any claims in relation to the agreements being the subject of the arbitration. The arbitral tribunal found that it had the power to order the requested measures, on the basis of Art. 28 of the International Arbitration Rules of the Zurich Chamber of Commerce, which allows for provisional or conservatory measures in accordance with Art. 183 of the Swiss Private International Law Statute, as well as the Zurich Civil Procedure which allows for protective measures in the event of irreparable harm or urgency. As to the appropriateness of the measures, the arbitral tribunal found that the measures requested seemed "appropriate in order to prevent imminent disadvantages to the petitioner", in particular in light of the fact that the production of documents in the US proceeding would have represented a "genuine danger" with respect to business secrets, to the benefit of the claimant's competitors and other third persons.

In a Resolution concerning provisional measures, the arbitral tribunal therefore ordered the respondent:

"to refrain from submitting or pursuing any claim arising out of, or relating to the Agreements ... their breach, termination or invalidity by way of action, notice or any other manner against [the Claimant] to any authority or Court other than this contractually agreed Arbitration Tribunal.

to refrain from disclosing to any third party or otherwise using any information (including but not limited to briefs, documents, testimonies, expert opinions etc.) which have been made available by [the Claimant] to this Arbitration Tribunal...

"to refrain from submitting or pursuing any claim which it may allege to have under the Agreements before any other Court outside the jurisdiction of the Arbitration Tribunal...."<sup>67</sup>

It is worthy of note that the injunctions were made "under the penalty of referral of the respondent's officers to the criminal prosecution bodies for punishment (detention or fine) under Art. 292 of the Swiss penal code in case of disobedience".

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67. Decision of the Arbitral Tribunal dated 20 September 1994, unpublished.

In an ICC arbitration held in Paris in 1994,<sup>68</sup> the arbitral tribunal was faced with a claim brought by two companies (of US and Monaco nationality) against two joint ventures (of Swiss and Monaco nationality) relating to a contract for the building and leasing of a hotel in Monaco. Despite the arbitration clause in the contract, the Monaco joint venture filed two legal actions with the *Tribunal de Grande Instance* in Monaco involving claims related to the contract. The tribunal found that the lawsuits violated the parties' agreement to arbitrate, or "at least" the ICC Rules. The Monaco joint venture had previously agreed to suspend these actions. Since the tribunal had now decided on its jurisdiction and on the merits of the dispute, the tribunal in its Final Award "invited" the Monaco joint venture to withdraw its court actions.

ICC Case No. 8887<sup>69</sup> involved a claim brought by an Italian company against a Turkish company relating to civil engineering works that the Italian company was to perform on a liquid petrochemical trans-shipment facility in Romania. After the initiation of the arbitration, the respondent sought from the Turkish courts a declaration that the claimant had no valid claim against it. In the meantime, appearing in the arbitral proceedings, the respondent contended that the sole arbitrator lacked jurisdiction. During the course of the proceedings, the sole arbitrator, sitting in Geneva, issued a procedural order requesting the respondent to refrain from pursuing the lawsuit in court. The respondent, however, did not abide by this injunction and continued to argue in the arbitration that the arbitration agreement was invalid and that the arbitration should be stayed under *lis pendens*, since the arbitration and the lawsuit involved the same parties and subject matter. In its Final Award of 1997, the sole arbitrator rejected both arguments, holding that in light of the arbitration clause, the Turkish courts were required by Art. II(3) of the New York Convention to refer the matter to arbitration. The sole arbitrator stated that:

"I therefore find that the *lis pendens* objection is not admissible and that Defendant is in breach of its agreement to arbitrate. This breach not only raises jurisdictional issues but, as the agreement to arbitrate is a part of a binding contract between the parties, Defendant makes itself liable for damages which Claimant might suffer, provided such damages are in direct causation with the breach. Relief for such damages is specifically sought by Claimant in its request ... Claimant has alleged in these proceedings – without being contradicted – that, due to the breach, it had to retain counsel in Istanbul and instruct counsel in representing [it] in the Turkish proceedings. Obviously, the cost triggered by such proceedings has to be considered as damage in direct relation with the breach."<sup>70</sup>

In ICC Case No. 8307, the sole arbitrator, Pierre Tercier, sitting in Geneva, issued an Interim Award<sup>71</sup> on a request by party A and party C that party B be enjoined from

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68. ICC Case No. 6998, Final Award of 1994, *Yearbook XXI* (1996) p. 54.

69. Excerpts published in 11 ICC Bull. (2000, no. 1) p. 91.

70. *Ibid.*, pp. 93-94.

71. The Interim Award dated 14 May 2001 is published as Annex 5 in *Anti-Suit Injunctions in International Arbitration*, *op. cit.*, fn. 1, p. 307.

pursuing the domestic judicial proceedings it had brought against the other two parties on “the same object of the dispute outlined in the Terms of Reference”.<sup>72</sup> The arbitrator found that party B’s actions in the domestic courts violated the binding arbitration clause between the parties, which granted exclusive jurisdiction to the arbitrator. He then concluded that he had the power to issue an anti-suit injunction:

“... the agreement to arbitrate implies that the parties have renounced to submit to judicial courts the disputes envisaged by the arbitral clause. If a party despite this commence a judicial action when an arbitration is pending, it not only violates the rule according to which a dispute between the same parties over the same subject can be decided by one judge only, but also the binding arbitration clause....

It is not contested that an arbitrator has the power to order the parties to comply with their contractual commitments. The agreement to arbitrate being one of them, its violation must be dealt with in the same manner when it is patent that the action initiated in a state court is outside the jurisdiction of such court and is therefore abusive. This is also a guarantee of the efficiency and credibility of international arbitration.”<sup>73</sup>

The arbitrator therefore ordered party B to desist from pursuing its actions in the State courts. He added that, should the measures to enforce the anti-suit order be unsuccessful, the parties could seek in arbitration relief for any damages suffered as a consequence of the breach of the arbitration agreement.

An arbitral tribunal composed of Horacio Grigera Naón (Chairman), John Rooney and Emilio Pittier, constituted pursuant to the ICDR Arbitration Rules and having its seat in Miami (United States), was asked to settle a dispute arising from a contract for the operation and management of a hotel. The respondent, a corporation organized under the laws of Venezuela, contested the tribunal’s jurisdiction, alleging, inter alia, the exclusive jurisdiction of the Venezuelan courts over disputes arising from the contract. During the arbitration, the respondent filed various claims with these courts. In response, the claimants, three companies incorporated under the laws of Venezuela, The Netherlands and Canada, requested the US courts to compel the respondent to arbitrate. They also asked the arbitral tribunal to issue an injunction to prohibit the

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72. In order to rule on the applications, the sole arbitrator declared that, as requested by the parties, he had to examine the relations between the arbitral proceedings and domestic court proceedings. He concluded that the parties, the remedies requested, and the subject matters were primarily the same. Finally, he rejected the contention that the claims of the two proceedings would be different, asserting that both claims were grounded on the same facts, which were within the jurisdiction of the arbitrator.

73. *Ibid.*, paras. 9-10, pp. 313-314. In deciding whether to issue the measure, the arbitrator highlighted, inter alia, the risk of contradictory judgments, due to the similarity of the two proceedings, and the duplication of expenses and costs that the respondent de facto imposed on the claimant by bringing the action before national courts.



respondent from pursuing the domestic lawsuits. In an unpublished Partial Award of 10 October 2002, the tribunal held that it had jurisdiction<sup>74</sup> and stated that:

“by initiating certain legal actions in Venezuela, Respondent has disregarded the arbitration clauses set out in the Contracts and failed to honor its obligations thereunder. By upholding and asserting its jurisdiction under such arbitration clauses and finding that all claims under the Contracts, including those submitted in Claimant’s arbitration request and those introduced by Respondent through its amended complaint ... before the Caracas Tenth Court of First Instance, Civil and Commercial Division ... the Arbitral Tribunal has signified that Respondent’s introduction of such complaint and provisional relief obtained *inaudita parte* in the same case ... and on the same date ... in support of such complaint ... constitutes a breach of Respondent’s obligations to arbitrate under [the arbitration clause]. The inevitable consequence of these findings by the Arbitral Tribunal is that Respondent must withdraw and desist from continuing legal action on the merits and supportive injunctive relief obtained from the Caracas Tenth Court of First Instance, Civil and Commercial Division, and refrain from initiating or reinstating similar actions, or applying for injunctive relief in support of such actions, from that and any other courts in Venezuela in connection with any, or all, of the Contracts.”<sup>75</sup>

Finally, the tribunal ordered the respondent

“(i) [t]o desist and withdraw from the lawsuit ... initiated by Claimant against [Respondent] before the Caracas Tenth Court of First Instance, Civil and Commercial Division and injunctive relief applied for and obtained in such legal suit;  
(ii) [t]o refrain from (a) re-introducing such claims in a new lawsuit, or reinstating such or similar lawsuit, before the Venezuelan courts; (b) applying for injunctive relief before the courts of Venezuela in connection with, or in support of, any such lawsuits or claims, or (c) submitting claims ... to the Venezuelan courts arising out or relating to the Contracts.”<sup>76</sup>

In an arbitration that took place in Singapore under the UNCITRAL Rules between two Bangladesh companies, the claimant requested the arbitral tribunal, composed of Michael Lee (Chairman), Michael Pryles and Andrew Rogers, to issue an emergency measure to restrain the respondent from continuing an action it had brought before a national court aiming to obstruct the claimant’s participation in the arbitration, and from commencing similar actions concerning issues within the tribunal’s jurisdiction. At that time, the arbitral tribunal had not yet decided on its jurisdiction. After granting a temporary emergency restraining order on 31 January 2006, the tribunal heard the

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74. Partial Award, 10 October 2002, para. 11 of the “Merits” section

75. *Ibid.*, para. 26.

76. *Ibid.*, para. A(2) of the dispositive part of the Award.

parties' arguments on the injunction. In an unreported interim Order of 8 February 2006, it ruled that under UNCITRAL Rules and Art. 12(1)(i) of the Singapore Arbitration Act<sup>77</sup>, it had the power to issue the injunction. Finding that the requirements for the issuance of the order (prima facie jurisdiction, urgency, irreparable harm) had been met and that the measure was appropriate under the circumstances of the case,<sup>78</sup> the tribunal ordered that:

“Respondent be restrained by itself, its servants and agents until further order of the Tribunal from arguing otherwise than before this Tribunal issues as to the Tribunal’s jurisdiction and competence to determine all matters arising from the [request for arbitration].”

## 2. *Findings of the UNCITRAL Working Group on Arbitration*

The Reports of the UNCITRAL Working Group on Arbitration are another useful resource for assessing the extent to which the arbitrators' power to issue anti-suit injunctions is recognized and accepted in international arbitration.

Since March 2000, the Working Group has been dealing with the topic of interim measures of protection issued by arbitral tribunals and has been devising a mechanism for their enforcement,<sup>79</sup> as part of its mission to evaluate “in a universal forum ... the acceptability of ideas and proposals for the improvement of arbitration laws, rules and practices”.<sup>80</sup> During its fortieth session, held in New York on 23-27 February 2004, the Working Group took up a new draft of Art. 17 of the UNCITRAL Model Law concerning the arbitrators' power to issue interim measures. After expressing the principle that, unless the parties have agreed otherwise, arbitral tribunals have the power to grant interim measures, the new draft provides at para. 2 that:

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77. Art. 12 (Powers of arbitral tribunal) of the Singapore International Act of 2002 reads as follows:

“Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for ...  
(i) an interim injunction or any other interim measure.”

78. Inter alia, the arbitrator specified that:

“Whilst the Tribunal has the greatest respect for [the national court seized of the claims] the Tribunal considers this to be a case where the claim made in the [national] proceedings and those made in this arbitration are sufficiently connected and that the Claimant may be deprived of its contractual right to have those claim decided by arbitration, the parties' chosen forum.”

79. During its thirty-third session (Vienna, 20 November-1 December 2000), the Working Group agreed that a new Article (numbered as 17 bis) should be added to the UNCITRAL Model Law in order to regulate the enforcement of interim measures issued by arbitral tribunals.

80. “Report of the Working Group on Arbitration on the work of its fortieth session” (New York, 23-27 February 2004) UNCITRAL, 40th Sess., UN Doc. A/CN.9/547 (16 April 2004) para. 1.

“An interim measure of protection is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

- “(a) Maintain or restore the status quo pending determination of the dispute;
- “(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm;
- “(c) Provide a [preliminary] means of [securing] [preserving] assets out of which a subsequent award may be satisfied; or
- “(d) Preserve evidence that may be relevant and material to the resolution of the dispute.”

The Working Group discussed whether this paragraph, with the list of measures that may be issued by tribunals, should be interpreted to include the power to issue anti-suit injunctions, particularly in light of the wording of sub-para. (b). Although the discussion clearly showed that there were different positions, the majority of the Working Group agreed that modifying the wording of para. 2(b) of Art. 17 would be appropriate in order to clarify that arbitrators possess the power to issue this kind of injunction, taking into account, *inter alia*, that these measures were “becoming more common and served an important purpose in international trade”.<sup>81</sup> Indeed, anti-suit injunctions are increasingly issued even by arbitral tribunals having their seat in countries which traditionally are not familiar with the use of anti-suit injunctions. Furthermore, given the unfamiliarity of some legal systems with these measures, the majority felt that the Model Law presented an opportunity to harmonize legal practices by expressly providing for their use. The Working Group stated that “[a]nti-suit injunctions [are] designed to protect the arbitral process and it [is] legitimate for arbitral tribunals to seek to protect their own process”.<sup>82</sup> Finally, the Working Group took into account that the issuance of anti-suit injunctions by arbitrators seemed to have been implicitly accepted during the Working Group’s previous session, particularly in cases in which the arbitration was to be governed by the UNCITRAL Arbitration Rules. The wording of the new draft Art. 17 was therefore modified for further consideration as follows:

“Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm [or to prejudice the arbitral process itself].”

At its forty-third session (Vienna, 3-7 October 2005), the Working Group re-examined the issue in light of the UNCITRAL Commission’s expectation that the Group would be able to present its proposal for the revision of Art. 17 of the Model Law for the adoption by the Commission at its session in 2006. The Working Group re-examined the wording of the Article as agreed upon during its previous session, and in particular the phrase “or to prejudice the arbitral process itself”, with a view to clarifying

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81. *Ibid.*, para. 77.

82. *Ibid.*, para. 77.

the arbitrators' power to issue anti-suit injunctions and other measures intended to prevent the obstruction and delay of the process.<sup>83</sup> In addition to the criticisms that had already been expressed at the previous session, another issue was raised concerning the appropriateness of dealing with anti-suit injunctions in articles on provisional measures. Some felt that such injunctions are not always of a provisional nature, and relate to the issue of the jurisdiction of the tribunal, "which [is] a matter not to be confused with the granting of an interim measure".<sup>84</sup> Against this background, in addition to the considerations raised during the previous session, it was noted that arbitral tribunals are "increasingly faced with tactics aimed at obstructing or undermining the arbitral process".<sup>85</sup> At the end of the session, the wording as elaborated in the previous session was retained, so that the new draft which was finally adopted enables the arbitrators to order a party to:

"Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or to prejudice the arbitral process itself."

With the new draft of Art. 17 of the UNCITRAL Model Law, the Working Group has chosen to recognize the arbitrators' power to issue anti-suit injunctions in order to protect the integrity of the arbitral process against the parties' obstructive tactics. Since the mission of the Working Group is to foster consensus and harmonization in response to the needs of international practitioners, its work on Art. 17 provides another indication of the general acceptance that anti-suit injunctions may be issued by arbitrators.

#### IV. THE ADVISABILITY OF THE ISSUANCE OF ANTI-SUIT INJUNCTIONS BY ARBITRAL TRIBUNALS

The question of arbitral anti-suit injunctions is not restricted to the arbitrators' power to issue such measures. A further question is often raised, that of the advisability of such measures in the context of international arbitration. A first approach considers that anti-suit injunctions are never advisable. Another approach limits such measures to situations in which a party has committed a fraud or otherwise engaged in abusive behavior in order to revoke the arbitration agreement. In practice, the advisability of anti-suit injunctions by arbitrators can be assessed only on a case-by-case basis, depending on whether such measures provide the appropriate response to the parties' procedural behavior in the presence of an arbitration agreement.

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83. "Report of the Working Group on Arbitration and Conciliation on the work of its forty-third session" (Vienna, 3-7 October 2005) UNCITRAL, 43rd Sess., UN Doc. A/CN.9/589 (12 October 2005).

84. *Ibid.*, para. 23.

85. *Ibid.*

1. *Are Anti-suit Injunctions Always Unadvisable?*

The view has sometimes been expressed that anti-suit injunctions are, in all situations, unadvisable and illegitimate, irrespective of their purpose and the authority issuing them:

“Anti-suit injunctions are not to be encouraged in any type of litigation. In the context of international arbitration, they constitute even more of a nuisance. This conclusion, which may seem somewhat abrupt, applies, in my opinion, regardless of the purpose of the anti-suit injunction and regardless of the authority that issues such injunction.... In all ... situations, anti-suit injunctions, are, in my view, illegitimate.”<sup>86</sup>

This position is limited to the sole question of the legitimacy of anti-suit injunctions, including when they are issued by arbitrators. The rationale behind it is the negative impact that such measures may have on the arbitration, namely the aggravation of the dispute, the undermining of the procedure’s environment, the dispersal of the dispute in different fora, or the retaliatory measures that may be taken in the form of anti-anti-suit injunctions by national courts in response to anti-suit injunctions issued by arbitral tribunals.<sup>87</sup>

The focal point, under this approach, is the danger of competing arbitral and judicial orders in parallel proceedings, such conflicting measures being considered as an extreme occurrence in almost every case. As a practical matter, however, it overlooks the genuine difficulty with which arbitrators may be confronted when a party, in the presence of an arbitration agreement, opts for disruptive tactics by bringing its dispute before domestic courts.

2. *Should the Issuance of Anti-suit Injunctions Be Limited to Situations in Which a Party Has Committed a Fraud or Otherwise Engaged in Abusive Behavior in Order to Revoke the Arbitration Agreement?*

Under a second approach, arbitral anti-suit injunctions are inappropriate but could be conceived in limited cases where a party has engaged in abusive conduct:

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86. Philippe FOUCHARD, “Anti-Suit Injunctions in International Arbitration: What Remedies?”, in *Anti-Suit Injunctions in International Arbitration*, *op. cit.*, fn. 1, p. 153.

87. For an example of anti-anti-suit injunctions rendered after the termination of the arbitral proceeding, see *Karaha Bodas Company L.L.C. (KBC) v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara a.k.a. (Pertamina)*, Civil Action H01-0634 S.D. Texas, Houston Div., 17 Mealey’s Int’l Arb. Rep. (June 2002) E1; United States District Court, Fifth Circuit, dated 18 June 2003, *Yearbook XXVIII* (2003) p. 945. For commentaries on this case, see E. GAILLARD, references at fns. 2 and 3. See also Michael E. SCHNEIDER, “Court Actions in Defence Against Anti-Suit Injunctions”, in *Anti-Suit Injunctions in International Arbitration*, *op. cit.*, fn. 1, p. 41; Konstantinos D. KERAMEUS, “Anti-suit Injunctions in ICSID Arbitration”, in *Anti-Suit Injunctions in International Arbitration*, *op. cit.*, fn. 1, p. 131, at p. 137.

“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....

In our opinion, in the absence of a clear 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.”<sup>88</sup>

Thus, to the extent that arbitral anti-suit injunctions would be justified only in cases of fraud or abusive conduct, the presumption remains against the issuance of such measures. Further, under this view, even in such exceptional circumstances, utmost care should be exercised by arbitrators in issuing anti-suit injunctions “as the effect of these anti-suit injunctions may be more harmful than the problem they are seeking to resolve”.<sup>89</sup>

The focal point, under this approach, is the nature of the parties’ procedural conduct in resorting to domestic courts, the threshold for arbitral anti-suit injunctions being thus extremely high. The advisability of arbitral anti-suit injunctions, however, cannot solely depend on the characterization of the parties’ procedural attitude. Depending on the circumstances of each case, arbitral anti-suit injunctions may be unadvisable notwithstanding a party’s abusive conduct. Conversely, there may be situations in which the issuance of such measures is advisable where the recalcitrant party has committed no fraud or abuse of procedure.<sup>90</sup>

### 3. *Possible Factors to Take into Account for the Issuance of Anti-suit Injunctions by Arbitral Tribunals*

The advisability of arbitral anti-suit injunctions is distinct from the question of the arbitrators’ power to issue such measures. Recognizing that such measures are within the arbitrators’ judicial power is not a reason to believe that, in every situation, the response to a recalcitrant party who submits the dispute covered by an arbitration agreement to the domestic courts or to another arbitral tribunal will be the issuance of

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88. Laurent LÉVY, *op. cit.*, fn. 4, pp. 125-126.

89. *Ibid.*, pp. 128-129.

90. For examples of such situations, see *supra*, Part III.

an anti-suit injunction.<sup>91</sup> Different factors may be considered in order to determine whether such measures are, in fact, advisable.

The arbitrators may first take into account the effectiveness of their order in the case at hand. It may be argued, in this respect, that arbitral anti-suit injunctions are not an effective means of resolving the situation created by a recalcitrant party seeking relief before the domestic courts, to the extent that the arbitrators' order is not, in and of itself, enforceable before those courts. It may also be objected that the issuance of anti-suit injunctions by the arbitrators may cause, or be confined in, a chain of contradictory orders issued in parallel proceedings. On the other hand, an order issued by the arbitral tribunal to the parties to comply with the arbitration agreement reflects a power deriving from the arbitrators' judicial role, that can be exercised either by way of an order for specific performance or by equivalent, in the form of damages for the breach of the arbitration agreement.<sup>92</sup> Should a party to an arbitral proceeding breach its obligation to comply with the arbitration agreement, including after an order has been issued by the arbitrators, it may be sanctioned through monetary damages. As a result, the breach of an anti-suit injunction does not necessarily remain unsanctioned. The question of whether or not a party should be ordered to cease its disruptive conduct and comply with its previous undertakings is an issue that should be decided by the arbitrators alone in light of all of the circumstances of the case. In that context, a recalcitrant party's fraudulent conduct or abusive behavior is not, in and of itself, a triggering factor for the issuance of an anti-suit injunction, but it can be taken into account by the arbitral tribunal either for the issuance of such measures in the course of the arbitral proceeding or for the award of damages at the end of the arbitral process.

The arbitrators may also consider the desirability of anti-suit injunctions as a means to alert a recalcitrant party. The parties would indeed be expected to comply with their obligations under the arbitration agreement all the more that they have received a clear indication and have been cautioned by the arbitrators, including by way of an anti-suit injunction, against the possible consequences of breaching such obligations. Being nothing more than a prerogative within the arbitrators' judicial powers, anti-suit injunctions may thus have an edifying effect, that of reminding the parties of their voluntary acceptance of international arbitration for the resolution of their dispute, and protecting the integrity of the arbitral process.

As a practical matter, the issuance of anti-suit injunctions, as for any other judicial power conferred upon the arbitrators, must therefore be decided in light of the circumstances of each case. Such circumstances may include, but are not limited to,

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91. For example, in *Himpurna California Energy Ltd. v. Republic of Indonesia*, the arbitral tribunal ruled that it was not appropriate for it to order Indonesia to cause its two wholly-owned and controlled entities, PLN and Pertamina, to withdraw their pending actions before the Indonesian courts, because it did not consider appropriate "to issue orders reactive to unilateral initiatives which may or may not be of any consequence" (Interim Award dated 26 September 1999, *Yearbook XXV* (2000) p. 112, at p. 119).

92. See *supra*, Part II.

whether or not the relief is necessary<sup>93</sup> or urgent,<sup>94</sup> or if a party would suffer an irreparable harm.<sup>95</sup>

V. THE LEGAL REGIME OF THE ISSUANCE OF ANTI-SUIT INJUNCTIONS BY ARBITRAL TRIBUNALS

1. *Can an Arbitral Tribunal Issue an Anti-suit Injunction at any Stage of the Arbitral Proceeding?*

Arbitral anti-suit injunctions being measures designed to protect the integrity of the arbitral process, they can presumably be issued at any stage of the arbitral proceeding. This assumption, however, begs the question of whether or not the arbitrators may issue anti-suit injunctions before they have ruled on their jurisdiction.

Before an arbitral tribunal has ruled on its own jurisdiction, it should be in a position to direct the parties not to act in any way that would jeopardize its prima facie jurisdiction until such time as it has formed its own judgment on its jurisdiction and established in a final manner whether it has been established on the basis of an existing and valid arbitration agreement and whether the scope of that agreement includes the dispute that has been brought before it. After such a determination has been made, the

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93. For example, in *Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar*, ASEAN ID Case No. ARB/01/1, the tribunal refused to grant an anti-suit injunction arguing that the party did not demonstrate the necessity of such measure (Procedural Order No. 2 dated 27 February 2002, 8 ICSID Rep. (2005) p. 456 at p. 461). In *Ceskoslovenska Obchodni Banka (CSOB) v. Slovak Republic*, ICSID Case No. ARB/97/4, the tribunal's refusal to issue an injunction was justified by the fact that there were no reasons to assume that the national court would not stay the proceedings if duly informed of the existence of the ICSID proceeding (Procedural Orders No. 2 and 3 dated 9 September 1998 and 5 November 1998, *op. cit.*, fn. 35). In *Société Générale de Surveillance S.A. (SGS) v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, the tribunal's refusal to order the stay of the pending Pakistani proceedings was justified on the fact that those proceedings had already concluded (Procedural Order No. 2 dated 16 October 2002, *op. cit.*, fn. 20). In *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, the tribunal expressly stated that the "Claimant has failed to show that provisional measure is either necessary or urgent to protect those rights" (Procedural Order No. 3 dated 18 January 2005, *op. cit.*, fn. 47, paras. 12 and 18).

94. See, e.g., the order rendered in the Singapore arbitration quoted *supra*, fn. 78. In ICC case No. 11761 (2003) (unpublished, reported by Michael W. BÜHLER and Thomas H. WEBSTER, *Handbook of ICC Arbitration, Commentary, Precedents, Materials* (Sweet & Maxwell 2005) p. 294), the tribunal refused to grant the measure because it considered that the requesting party did not show that the measure was "essential to do justice between the parties" (because it did not seek immediate relief when the other party commenced the proceedings before the domestic courts, preferring to file an objection in those proceedings) and because of the stage reached in the national proceedings.

95. See, e.g., *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Procedural Order dated 6 September 2005, *op. cit.*, fn. 16, para. 46. See also the case discussed in relation to the anti-suit injunction ordered by the arbitral tribunal in the arbitration conducted pursuant to the Arbitration Rules of the Zurich Chamber of Commerce, *supra*, fn. 67.



issuance of anti-suit injunctions is even less problematic.<sup>96</sup> Indeed, once it has been established that there is an arbitration agreement, that it is valid and that the dispute is within the scope of such agreement, there can be no doubt that a party's procedural conduct consisting in bringing the same dispute before domestic courts is in breach of the arbitration agreement and the tribunal's jurisdiction and can be sanctioned as such.

2. *Should an Anti-suit Injunction Be Issued by Way of an Award or of a Procedural Order?*

The form of an order enjoining the parties to comply with the arbitration agreement depends on various factors, among which the stage of the arbitral proceeding at which disruptive tactics may be employed (for example, whether or not the tribunal has ruled on its jurisdiction) or the type of measure decided (recommendation or binding order; specific performance or award of damages; measure of a temporary or permanent effect).<sup>97</sup>

Against this background, it may reasonably be argued that measures of a procedural nature may be addressed through procedural orders. Similarly, before a tribunal has ruled on its jurisdiction and established that it has been constituted on the basis of an existing and valid arbitration agreement, any measure designed to safeguard its prima facie jurisdiction would be taken in the form of a procedural order. The form of an award, which by definition has a permanent nature and finally binds the parties (with the corresponding protection offered by international conventions such as the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards), would be more appropriate for measures designed to definitively sanction a party's disruptive conduct, such as an award of damages. The form of the decision is therefore a question to be decided on a case-by-case basis, depending on the circumstances of each case and the type of party conduct being sanctioned by the arbitral anti-suit injunction.

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96. See Emmanuel GAILLARD, "Reflections on the Use of Anti-Suit Injunctions in International Arbitration", *op. cit.*, fn. 2, p. 214.

97. See, e.g., Michael W. BÜHLER and Thomas H. WEBSTER, *op. cit.*, fn. 94 (forming the view that a permanent injunction would necessarily be made through a final award).