

**PERVASIVE PROBLEMS IN  
INTERNATIONAL ARBITRATION**

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## CHAPTER 10: REFLECTIONS ON THE USE OF ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION

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- I. Introduction
- II. The Varied Use of Anti-Suit Injunctions in International Arbitration
- III. The Inadequacy of Anti-Suit Injunctions in International Arbitration

### I. INTRODUCTION

**10-1** Traditionally, anti-suit injunctions, a well-known device in common law systems, are issued upon the request of a party that the other party be enjoined from initiating or from proceeding with a legal action in a different jurisdiction.<sup>1</sup> Courts in civil law countries are increasingly willing, in certain circumstances, to enjoin a party to suspend or terminate an action brought in another country.<sup>2</sup>

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<sup>1</sup> In English law, the seminal case was *Cohen v Rothfield* [1919] 1 KB 410, in which the Court of Appeal ordered a party to withdraw an action commenced in Scotland. Originally designed to prevent foreign litigation that was “oppressive or vexatious,” this practice has become a method for enforcing the English view of the most convenient forum. The criteria for the granting of such an injunction were laid out by the Privy Council in the *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] 1 AC 871. In the United States, the practice was intended to avoid “an irreparable miscarriage of justice.” See, e.g., *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F. 2d 909, 927 (D.C. Cir. 1984). On the evolution of the criteria applied in common law systems, see, e.g., Jonathan Arkins, “Borderline Legal: Anti-Suit Injunctions in Common Law Jurisdictions”, 18(6) *J Int’l Arb* 603 (2001); Horatia Muir-Watt, note under House of Lords, 13 December 2001, 2003 *Rev. Crit. DIP* 116.

<sup>2</sup> Examples of anti-suit injunctions can be found in the following civil law jurisdictions: for Quebec, see Superior Court of Quebec, Civil Chamber, July 9, 1999 and Court of Appeal of Quebec, November 29, 1999 in the matter of *Lac d’Amiante du Canada Ltée et 2858-0702 Quebec Inc. v Lac d’amiante du Québec Ltée*, discussed by Stewart Shackleton in 3 *IntALR* N-6 (Jan. 2000). For Germany, see Markus Lenenbach, “Antisuit Injunctions in England, Germany and the United States: Their Treatment Under European Civil Procedure and The Hague Convention”, 20 *Loy LA. Int’l & Comp LJ* 257 (1998). For France, see Cass. 1e civ., November 19, 2002, *Banque Worms v Epoux Brachot et autres*, which upheld, in the context of an international bankruptcy, the decision of a French judge to order a creditor to stop a real property seizure proceeding brought in Spain against the debtor’s building, 2003 *Dalloz* 797, note by G. Kairallah; *Gaz. Pal.*, June 25-26, 2003, at 29, note by M.-L. Niboyet. For Brazil, see Curitiba Court of First Instance, June 3, 2003, *Companhia Paranaense de Energia (COPEL) v UEG Arancaria Ltda*, 21 *Revista de Direito Bancário e de Mercado de Arbitragem* 421 (2003). More generally, for Latin American countries see Horacio Grigera Naón, “Competing Orders

These measures are commonly requested to preclude parasite litigation of a dispute before a different court, whether because the first court seized has issued a ruling or because its decision is pending. Violations of such injunctions may result in heavy penalties connected to the notion of contempt of court. The court that retains its jurisdiction or anticipates that it will do so thus seeks to protect its jurisdiction or, more generally, the jurisdiction of the forum it deems to be the most appropriate.<sup>3</sup>

**10-2** The introduction of anti-suit injunctions into international arbitration is a recent trend. Directed at arbitral proceedings or at court proceedings surrounding an international arbitration, they vary in their form and are requested either in an attempt to disrupt the arbitral process or, to the contrary, to try to protect it.<sup>4</sup> It is however anti-suit injunctions aimed at preventing an arbitral tribunal from hearing a claim or obstructing the enforcement of an arbitral award that have seen the most spectacular development in recent years, prompting a debate on the adequacy of anti-suit injunctions in international arbitration.

## II. THE VARIED USE OF ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION

**10-3** In the context of international arbitration, anti-suit injunctions are generally issued either during the arbitral process in order to prevent an arbitral tribunal from hearing the claim or, at the end of the arbitral process, to obstruct the enforcement of the arbitral award.

**10-4** When they are requested during the course of arbitral proceedings, anti-suit injunctions are usually directed against the parties in the form of an order to suspend or terminate the arbitral proceedings.<sup>5</sup> They may, however, be also

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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 Publication 335 (2005).

<sup>3</sup> See Emmanuel Gaillard, “Introduction”, in *IAI Series on International Arbitration No. 2, Anti-Suit Injunctions in International Arbitration 1* (Emmanuel Gaillard ed., Juris Publishing, 2005); see also Emmanuel Gaillard, “Il est interdit d’interdire: Réflexions sur l’utilisation des anti-suit injunctions dans l’arbitrage commercial international”, 2004 *Rev. Arb.* 47.

<sup>4</sup> For anti-suit injunctions in favour of international arbitration, see Axel Baum, “Anti-Suit Injunctions Issued by National Courts To Permit Arbitration Proceedings”, in *Anti-Suit Injunctions in International Arbitration*, *supra* note 3, at 19. See also the discussion below on *KBC v. Pertamina*.

<sup>5</sup> See Julian Lew, “Anti-Suit Injunctions Issued by National Courts To Prevent Arbitration Proceedings”, in *Anti-Suit Injunctions in International Arbitration*, *supra* note 3, at 25; Mathieu de

directed against the arbitral tribunal itself, with the consequence that the tribunal is, either explicitly or implicitly, denied the power to rule on its own jurisdiction. The following cases illustrate the diversity of the situations where the injunction requested by one party and ordered by the courts attempts to reach the other party as well as the members of the tribunal.<sup>6</sup>

**10-5** In *Hubco v WAPDA*, a dispute arose between the Hubco Corporation and the Water and Power Development Authority of Pakistan (WAPDA) regarding a US\$ 1.8 billion project to construct a power station in Pakistan. The disputed contracts contained an arbitration clause under which disputes had to be resolved by ICC arbitration in London. After an arbitral proceeding was commenced in July 1998 concerning the method of calculating the price of the electricity produced, WAPDA, deeming certain contracts to be illegal and claiming that they had been obtained by fraud and corruption, presented these questions to the Pakistani courts and asked them to order the claimant to suspend the arbitration. The courts granted this request and, in a judgment dated 14 June 2000, the Supreme Court of Pakistan upheld their decision, finding that the allegation of corruption rendered the matter non-arbitrable.<sup>7</sup>

**10-6** Similar mistrust towards arbitration and conversely favourable approach towards anti-suit injunctions were displayed in *SGS v Pakistan*, an investment arbitration case involving the Swiss corporation SGS and the Government of Pakistan. SGS filed a claim under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) on the basis of the bilateral investment protection treaty between Switzerland and Pakistan, requesting a finding that Pakistan had violated its obligations under the treaty. The Government of Pakistan requested an order from its own courts enjoining SGS to suspend the arbitral proceeding, on the basis of the arbitration agreement contained in the underlying contract and providing for local arbitration in

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Boissésou, "Anti-Suit Injunctions Issued by National Courts at the Seat of the Arbitration or Elsewhere", *id.*, at 65; José Carlos Fernández Rozas, "Anti-Suit Injunctions Issued by National Courts. Measures Addressed to the Parties or the Arbitrators", *id.*, at 73.

<sup>6</sup> For other examples, see the Interim Award of May 14, 2001 in ICC Case No. 8307, reported in *Anti-Suit Injunctions in International Arbitration*, *supra* note 3, at 307; see also the cases discussed in the articles cited at footnote 5; the report of the *Four Seasons/Consortio Barr* case in Grigera Naón, *supra* note 2, at 337 *et seq.*

<sup>7</sup> See the transcript of the judgment of the Supreme Court of Pakistan published in 16 *Arb Int* 439 (2000). The dispute is reported to have subsequently settled, see Louise Barrington, "Hubco v. WAPDA: Pakistan Top Court Rejects Modern Arbitration", 11 *Am. Rev. Int'l Arb.* 385 (2000).

Pakistan. By order of July 3, 2002, the Supreme Court of Pakistan granted this request, essentially finding that the bilateral treaty did not bind Pakistan.<sup>8</sup>

**10-7** The Arbitral Tribunal, however, disregarded the effect of this order and ordered for its part that Pakistan, as the respondent State in the arbitration, not take any step to initiate a complaint for contempt; in the alternative, it ordered that Pakistan

take all steps to inform the [Pakistani] Court of the current standing of this proceeding and of the fact that this Tribunal must discharge its duty to determine whether it has the jurisdiction to consider the international claim on the merits.<sup>9</sup>

It further recommended that the local arbitration initiated in Pakistan be stayed until such time as the Tribunal could determine in a final manner whether or not it had jurisdiction.

**10-8** A similar chain of decisions was issued in the ICC arbitration between *Salini Costruttori S.p.A. and the Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*.<sup>10</sup> By contrast to the *SGS v Pakistan* case, the orders issued by the local courts in *Salini* were directed to the Claimant as well as to the Arbitral Tribunal.<sup>11</sup> At the early stages of the arbitral proceeding, the Respondent, a State entity in Ethiopia, obtained a series of decisions by the

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<sup>8</sup> “SGS [...] is hereby restrained from taking any step, action or measure to pursue or participate or to continue to pursue or participate in the ICSID arbitration.” (para. 77). The decision was published in 19 *Arb Int* 179 (2003) with a commentary by Lau, “Note on *Société Générale de Surveillance SA v. Pakistan, through Secretary, Ministry of Finance*”.

<sup>9</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Procedural Order No. 2 dated October 16, 2002, published in *Anti-Suit Injunctions in International Arbitration*, *supra* note 3, at 213.

<sup>10</sup> *Salini Costruttori S.p.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority* (hereinafter “*Salini*”), Award regarding the Suspension of the Proceedings and Jurisdiction dated December 7, 2001, excerpts in 21 *ASA Bull.* 59 (2003) and full text in 20(3) *Mealey’s IAR* A1 (2005) with a commentary by Frédéric Bachand, “Must An ICC Tribunal Comply With An Anti-Suit Injunction Issued By The Courts Of The Seat Of Arbitration?”, at 47; see also Reza Mohtashami, “In Defense of Injunctions Issued By The Courts of the Place of Arbitration: A Brief Reply to Professor Bachand’s Commentary on *Salini Costruttori S.p.a. v. Ethiopia*”, 20(5) *Mealey’s IAR* 44 (2005); see also the full text of the *Salini* award in *Anti-Suit Injunctions in International Arbitration*, *supra* note 3, at 227.

<sup>11</sup> For another example of an injunction against the members of the tribunal by the courts of Venezuela, resulting in the resignation of the Venezuelan member of the tribunal so as to avoid being held in contempt of court, see the report of the *Four Seasons/Consortio Barr* case in Grigera Naón, *supra* note 2, at 339.

Ethiopian courts, amongst which the Supreme Court's "temporary injunction against the Arbitral Tribunal ordering the suspension of the arbitration proceedings with immediate effect."<sup>12</sup> The Respondent had taken steps to serve the order on the arbitrators.<sup>13</sup> The Respondent had also commenced a separate action before the Federal First Instance Court of the Federal Democratic Republic of Ethiopia for the purposes of obtaining a judgment that the Tribunal lacked jurisdiction over the arbitration. That Court issued an order "enjoining the Claimant from proceeding with the arbitration pending its decision on the Tribunal's jurisdiction."<sup>14</sup>

**10-9** In the Award it rendered on the Suspension of the Proceedings and Jurisdiction on 7 December 2001, the Tribunal decided not to give effect to the decisions issued by the Ethiopian courts and to pursue the arbitral proceedings. Unlike the Tribunal's decision in *SGS v Pakistan*, which was in essence an anti-suit injunction to the Respondent State, the Award in *Salini* addressed the effect of an anti-suit injunction on the Tribunal's power to proceed with the arbitration and on its jurisdiction over the dispute:

The Arbitral Tribunal accords the greatest respect to the Ethiopian courts. Nevertheless, [...] the Tribunal considers that it is not bound to suspend the proceedings as a result of the particular injunctions issued by the Federal Supreme Court and the Federal First Instance Court and that, in the particular circumstances of the case, it is under a duty to proceed with the arbitration.<sup>15</sup>

The grounds for the Tribunal's decision were (a) its primary duty to the parties to ensure that their arbitration agreement is not frustrated; (b) its duty to make every effort to render an enforceable award; and (c) that a State or State entity cannot resort to the State's courts to frustrate an arbitration agreement. The Tribunal held in particular that,

<sup>12</sup> *Salini*, *supra* note 10, at para. 76.

<sup>13</sup> *Ibid.*, at para. 83. In its submissions, the Respondent threatened that, under the provisions of the Ethiopian Code of Civil Procedure, a court could attach the property of, or sentence for contempt of court, any person breaching a temporary injunction, *id.*, at para. 78. It also submitted that the Arbitral Tribunal was under the obligation to comply with the injunction and that, if it did not,

"the arbitrators would be in contempt of court and would then be unwilling to travel to Ethiopia [the seat of the arbitration], preventing them from fulfilling their functions under the ICC Rules and necessitating their replacement.",

*id.*, at para. 81.

<sup>14</sup> *Ibid.*, at para. 88.

<sup>15</sup> *Ibid.*, at para. 124.

[i]n the event that the arbitral tribunal considers that to follow a decision of a court would conflict fundamentally with the tribunal's understanding of its duty to the parties, derived from the parties' arbitration agreement, the tribunal must follow its own judgment, even if that requires non-compliance with a court order. To conclude otherwise would entail a denial of justice and fairness to the parties and conflict with the legitimate expectations they created by entering into an arbitration agreement. It would allow the courts of the seat to convert an international arbitration agreement into a dead letter, with intolerable consequence for the practice of international arbitration more generally.<sup>16</sup>

**10-10** In the context of post-arbitral proceedings, anti-suit injunctions are sought by the losing party as a means to obstruct the enforcement of the arbitral award. One of the most spectacular illustrations is found in *KBC v Pertamina*, in which both an anti-suit injunction and an anti-anti-suit injunction were ordered by Indonesian and American courts respectively. The dispute in that case arose between the Indonesian national company Pertamina and KBC as the contractor over the construction and development of a geothermal plant in Indonesia. After the project was suspended by the Indonesian Government, KBC commenced an arbitral proceeding in Switzerland pursuant to the UNCITRAL rules, on the basis of arbitration clauses in the disputed contracts. In December 2000, the Arbitral Tribunal ordered Pertamina to pay KBC US\$ 260 million in damages.<sup>17</sup> After an action before the Swiss courts to set aside the award was rejected in April 2001 for untimely payment of court costs, Pertamina filed a request to annul the award in the Central District Court of Jakarta in March 2002, along with a request for an injunction prohibiting KBC from enforcing the award abroad. KBC had in fact obtained, in December 2001, the recognition of the award in the United States by the United States District Court for the Southern District of Texas, which granted summary judgment in favour of KBC.<sup>18</sup> On April 1, 2002, the Indonesian court provisionally granted Pertamina's motion for an injunction and prohibited KBC from attempting to enforce the award in any country. On August 27, 2002, the

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<sup>16</sup> *Ibid.*, at paras. 142-143. For a critical view of this decision, see Eric Schwartz, "Do International Arbitrators Have a Duty to Obey the Orders of Courts at the Place of the Arbitration? Reflections on the Role of the *Lex Loci Arbitri* in the Light of a Recent ICC Award", in *Liber Amicorum in honour of Robert Briner*, supra note 2, at 795.

<sup>17</sup> *Karaha Bodas Co. LLC (KBC) v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and PT, PLN (Persero)*, Decision of 18 December 2000, 16(3) *Mealey's IAR C-2* (2001).

<sup>18</sup> *In the matter of an arbitration between Karaha Bodas Co LLC (KBC) v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, 190 F. Supp. 2d 936 (S.D. Tex. 2001).

Central Jakarta District Court annulled the award, finding that it was contrary to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) and Indonesian arbitration law. The court also issued a permanent injunction forbidding KBC from enforcing the award abroad, under penalty of having to pay a fine of US\$ 500,000 per day.<sup>19</sup>

**10-11** After Pertamina asked the Indonesian Courts to annul the award and enjoin its enforcement, KBC hastened to move the U.S. Courts to force Pertamina to suspend its request for an injunction in Indonesia. On March 29, 2002, the United States District Court in Texas granted a temporary restraining order requiring Pertamina to withdraw its request for an injunction made to the Court in Jakarta. After the Indonesian Court granted the provisional injunction forbidding KBC from enforcing the arbitral award, KBC asked the District Court to find Pertamina in contempt. On April 2, 2002, the Texas Court again ordered Pertamina to withdraw its request in the Indonesian Court and found Pertamina in contempt. Although Pertamina then asked (over the objection of a sister company) to suspend proceedings before the Indonesian Court, the Indonesian Court rejected the request and decided to annul the arbitral award and prohibit its enforcement in the United States. Thereafter, on 26 April 2002, the Texas District Court once again reaffirmed its decision to grant summary judgment to KBC.<sup>20</sup>

**10-12** This case illustrates the counterproductive nature of anti-suit injunctions rendered by both the Indonesian Courts and the U.S. District Court on the basis of an overbroad understanding of their judicial power and on the presumption that their respective decisions had an absolute extraterritorial effect. However, the effectiveness of the Indonesian and the US orders outside Indonesia and the United States was far from clear. Each party was faced with a different anti-suit injunction (in the United States for Pertamina and in Indonesia for KBC) and with substantial financial penalties in different countries (Pertamina being held in contempt of the Texas District Court, while KBC appeared to be confronted with “draconian enforcement penalties” in Indonesia as a result of the Indonesian

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<sup>19</sup> The Jakarta court’s decision of 27 August 2002 is available on <http://www.mealeysonline.com> (document #05-021125-013Z). In a positive development, the Indonesian Supreme Court overturned the Jakarta Court’s decision on 23 November 2004, finding that the lower court had no “authority to examine and adjudicate” on the dispute between the companies. Unfortunately, it appears that the text of the Court’s decision is not available, although it was reported in the media.

<sup>20</sup> See *Karaha Bodas Co. LLC (KBC) v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, 335 F.3d 357, 360-63 (5th Cir. 2003). For the decision on appeal, see below, III.

injunction<sup>21</sup>). The decision by the Texas Court had little effect in Indonesia where it is probable that it would not have been recognized or enforced, in the same way as the Indonesian injunction had little effect in the US.<sup>22</sup>

**10-13** In light of these examples and the variety and complexity of the circumstances in which anti-suit injunctions are requested and issued by national courts, the recurrently debated question is whether and to what extent anti-suit injunctions should be permitted in international arbitration, even if they are ordered in support of international arbitration. In this respect, the *Pertamina* case is of particular interest as it reflects both the doctrine of judicial intervention (as viewed by both the Indonesian Courts whose decisions were hostile to international arbitration and to the resulting award, and by the U.S. District Court whose decisions were aimed at preserving the enforceability of the award) and that of judicial self-restraint (as viewed, on appeal, by the U.S. Fifth Circuit Court of Appeals). The latter doctrine, as will now be discussed, could persuasively be set as the applicable standard in relation to the parties' increasing temptation to have recourse to anti-suit injunctions in international arbitration.

## II. THE INADEQUACY OF ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION

**10-14** The approach adopted by the courts in the above examples show that anti-suit injunctions are inefficient—and possibly harmful—in the context of international arbitration. They show that, faced with such measures, courts in other countries may be tempted to retaliate by forbidding the party targeted by the injunction from complying with the first court's decision enjoining it from going forward in the form of anti-anti-suit injunctions.<sup>23</sup>

**10-15** By contrast to the position taken by the U.S. District Court in *KBC v Pertamina* enjoining Pertamina from relying on the Indonesian decision and finding the company in contempt, the U.S. Fifth Circuit Court of Appeals, faced with an appeal from the District Court decision, reversed the preliminary injunction and the contempt order against Pertamina by adopting a measured

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<sup>21</sup> See Order, *supra* note 18, at 4.

<sup>22</sup> On this decision in general, see Emmanuel Gaillard, "The Misuse of Anti-Suit Injunctions", *NYLJ*, August 1, 2002.

<sup>23</sup> See Philippe Fouchard, "Anti-Suit Injunctions in International Arbitration – What Remedies?", in *Anti-Suit Injunctions in International Arbitration*, *supra* note 3, at 153. For another example of conflicting injunctions, see the report of the *Four Seasons/Consortio Barr* case in Grigera Naón, *supra* note 2, at 337.

approach and underscoring the fundamental notion that the courts of any enforcement jurisdiction have discretion to enforce a foreign arbitral award regardless of any surrounding decisions rendered by the courts of other countries.<sup>24</sup>

**10-16** In accordance with the general approach used by American Courts in such situations, the Court of Appeals' reasoning focused on the balance of domestic judicial interests regarding the prevention of vexatious or oppressive litigation and the protection of the court's jurisdiction against concerns of international comity.<sup>25</sup> As regards the first principle, the Court analyzed the effects that the Indonesian decision annulling the award would be likely to have in the United States in order to determine whether the litigation in Indonesia was "vexatious or oppressive" and determined that none of the factors that usually contribute to vexatiousness and oppressiveness were at play in the case at hand. The Court concluded, in remarkable fashion given the controversy on the issue,<sup>26</sup> and citing the *Chromalloy* case,<sup>27</sup> that

an American court and courts of other countries have enforced awards, or permitted their enforcement, despite prior annulment in courts of primary jurisdiction.<sup>28</sup>

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<sup>24</sup> *Karaha Bodas Co LLC (KBC) v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, 335 F.3d 357 (5th Cir. 2003).

<sup>25</sup> On these aspects of the decision, see Emmanuel Gaillard, "'KBC v. Pertamina': Landmark Decision on Anti-Suit Injunctions", *NYLJ*, October 2, 2003. See also Emmanuel Gaillard, "Anti-suit injunctions et reconnaissance des sentences annulées au siège: une évolution remarquable de la jurisprudence américaine", 130 *JDI (Clunet)* 1105 (2003).

<sup>26</sup> See, e.g., in favour of the enforcement of awards annulled in their country of origin, David Rivkin, "The Enforcement of Awards Nullified in the Country of Origin: The American Experience", in *ICCA Congress Series no. 9, Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* 528 (1999). For a critical view, see Eric Schwartz, "A Comment on Chromalloy: Hilmarton à l'américaine", 14(2) *J Int'l Arb* 125 (1997); Dana Freyer, Hamid Gharavi, "Finality and Enforceability of Foreign Arbitral Awards: From 'Double Exequatur' to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity", 13 *ICSID Rev.-FILJ* 101 (1998). On the position taken by the courts of other countries, see, e.g. Emmanuel Gaillard, "The Enforcement of Awards Set Aside in the Country of Origin", 14 *ICSID Rev.-FILJ*. 16 (1999).

<sup>27</sup> *Chromalloy Aeroservices v Arab Republic of Egypt*, 939 F. Supp. 907 (DDC 1996) (enforcing in the United States an award annulled in Egypt). The French courts took the same action in a related case: Paris Court of Appeals, 14 January 1997, *République arabe d'Égypte v Société Chromalloy Aero Services*, 1997 *Rev. Arb.* 385.

<sup>28</sup> *Pertamina*, 335 F.3d at 367. This is also what the Hong Kong Courts did in the *Pertamina* case (see *Karaha Bodas Co. LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, High Court of the Hong Kong Special Administrative Region, 27 March 2003, 2003 HKCU Lexis

In other words,

other enforcement courts can and sometimes do conduct their own independent analyses of substantive challenges to the enforcement of the foreign award.<sup>29</sup>

**10-17** As regards the interests of international comity, the Court observed that [t]he doctrine of [international] comity contains a rule of ‘local restraint’ which guides courts reasonably to restrict the extraterritorial application of sovereign power<sup>30</sup>.

The Court further held that,

even if the Indonesian court acted wrongly in its decision to annul the Award as a purported court of primary jurisdiction under the New York Convention, we need not directly address the propriety of that court’s injunction and annulment. Contrary to the district court’s conclusions, legal action in Indonesia, regardless of its legitimacy, does not interfere with the ability of U.S. courts, or courts of any other enforcement jurisdictions for that matter, to enforce a foreign arbitral award.<sup>31</sup>

Thus, the Fifth Circuit recognized that its response to a possibly illegitimate anti-suit injunction by a foreign court did not need to entail issuing a similar injunction itself.

**10-18** This reasoning begs the question, more generally, of whether anti-suit injunctions (including anti-anti-suit injunctions) are justified when they are issued in order to protect international arbitration or whether judicial self-restraint is a virtue in all circumstances. The Fifth Circuit’s response to this question is that no justification should be found, while issuing an anti-suit injunction, in the fact that it is rendered in favour of arbitration: although it “empathiz[ed] with the district court and shar[ed] its frustrations at the acts of Pertamina and its counsel” who requested and obtained the Indonesian anti-suit injunction and annulment judgment, the Court justifiably concluded that

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378. The decision is based on the debatable ground that the Indonesian Courts did not have jurisdiction to annul the award, although the outcome is justified). More recently, on 9 December 2004, the Court of Queen’s Bench of Alberta also recognized the December 2000 award (*see* 20(1) *Mealey’s IAR* 6 (2005)).

<sup>29</sup> *Pertamina*, 335 F.3d at 367-68.

<sup>30</sup> *Ibid.* at 371.

<sup>31</sup> *Ibid.* at 372.

[t]he [1958 New York] Convention already appears to allow for some degree of forum shopping, and, as with many treaties, the efficacy of the Convention depends in large part on the good faith of its sovereign signatories. Upholding the district court's injunction could only further exacerbate the problem, diplomatically if not legally as well.<sup>32</sup>

In other words, although anti-anti-suit injunctions may appear to be the appropriate response to counter a court order aimed at obstructing arbitral proceedings or the enforcement of an arbitral award, they may exacerbate, rather than solve, the problems created by anti-suit injunctions by triggering an escalation of injunctions that lead to the frustration of the arbitral process as a whole.

**10-19** Principles of international arbitration law further suggest that, as far as national courts are concerned, self-restraint is the proper response in all circumstances to the parties' attempt to bypass the arbitration agreement through an abusive recourse to the local courts. Indeed, anti-suit injunctions negate the very basis of arbitration, that is, the parties' consent to submit their disputes to arbitration.<sup>33</sup> When a party consents to an arbitration agreement, it undertakes to refer disputes that may arise with the other party to arbitration, to take part in the proceedings in good faith and to carry out the award that will be rendered.<sup>34</sup> As a result, when a party requests that a court issues an anti-suit injunction to prevent an arbitral tribunal from hearing a claim or to obstruct the enforcement of an arbitral award, it too may be said to fail to honour its commitment to be bound by the arbitration agreement.

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<sup>32</sup> *Ibid.* at 375-76.

<sup>33</sup> On this issue, see, e.g., Grigera Naón, *supra* note 2, at 339-340; see also the Award in *Salini*, *supra* note 10 and accompanying text.

<sup>34</sup> See, e.g., the Interim Award of May 14, 2001 in ICC Case No. 8307, *supra* note 6, at 313:

[...] 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 commences 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. In such a case, according to Art. II § 3 of the New York Convention which has been ratified by [country X], the judicial court has the obligation to refer the matter to the arbitral tribunal. 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.

**10-20** At the stage of the enforcement of an arbitral award, each legal system is equally entitled to sovereign rights and to the discretion to recognize and enforce foreign arbitral awards on the basis of its own standards of review. The temptation to use anti-suit injunctions cannot be justified by the fact that it is issued in favour of the arbitral process. By definition, each measure is restricted in the scope of its effects to the legal system in which it is issued. As a result, the only viable alternative ensuring the efficiency of international arbitration is that each legal system should decide for itself and on the basis of its own standards of public policy whether or not to recognize and enforce foreign arbitral awards.

**10-21** By the same token, at the stage of the arbitral proceeding, judicial self-restraint is the most appropriate standard in light of the arbitral tribunal's jurisdiction to rule on its own jurisdiction, *i.e.* the bedrock principle of competence-competence. It is indeed critical that the jurisdiction of the arbitral tribunal to determine its own jurisdiction be safeguarded and that the courts of any given legal system do not encroach on the jurisdiction of an arbitral tribunal. In other words, until such time as the award is rendered, the courts of different countries should limit their intervention on the basis that the arbitral tribunal has *prima facie* jurisdiction. Conversely, arbitral tribunals should be given the opportunity to fully exercise their power to rule on their own jurisdiction, either by way of a positive order to the parties to comply with their contractual commitments until such time as the tribunal has been in a position to determine its own jurisdiction (as in the *SGS v Pakistan* case) or by way of a final decision on the issue of whether an anti-suit injunction should be given effect as regards the tribunal's jurisdiction to rule on its own jurisdiction (as in the *Salini v Ethiopia* case).<sup>35</sup> In that context, the arbitral tribunal itself may issue an order to the parties that could be characterized as an 'anti-suit injunction': the arbitral tribunal would then be acting within the confines of its power, derived from the parties' arbitration agreement, to direct the parties not to act in any way that would jeopardize its *prima facie* jurisdiction until such time as the tribunal 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 that determination is made, the issuance by the arbitral tribunal of an anti-suit injunction is even less problematic. Yet, after the arbitral tribunal issues an award, the courts of each legal system recover their discretion to determine whether that award meets the enforcement conditions of the law and

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<sup>35</sup> See also Laurent Lévy, "Anti-Suit Injunctions Issued by Arbitrators", in *Anti-Suit Injunctions in International Arbitration*, *supra* note 3, at 115.

standards applicable in that country. This is the necessary counterpart for the arbitrators' license to decide first on their own jurisdiction.<sup>36</sup>

**10-22** Against this background, national courts should ensure the lowest level of interference in the arbitration by limiting the possibility for the parties to resort to such devices as anti-suit injunctions, which may or may not be legitimate in the context of ordinary judicial matters, but which, when transposed automatically into the realm of international arbitration, are inappropriate.

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<sup>36</sup> On the arbitral tribunal's power of first determination of its jurisdiction, see Emmanuel Gaillard, "Prima Facie Review of Existence, Validity of Arbitration Agreement", NYLJ, December 1, 2005; 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*, *supra* note 2, at 311.