

Obstruction of Arbitration: Anti-arbitration Injunctions

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Obstructing arbitrations

Informal methods, e.g.:

- Commercial and political pressure
- Refusal to participate in good faith
- Actions against the tribunal

Formal methods

- Injunctions against parties
- Injunctions against arbitrators and/or institution

Anti-arbitration injunctions

Different times and methods:

- Before an arbitration is commenced
- During the arbitration
- After an award has been issued

When and where is the injunction sought?

- Seat or elsewhere?

Anti-arbitration injunctions

Anti-anti and anti-anti-anti and so on (with huge fines, jail threatened, etc.)

Increasing frequency?

- Parallel proceedings (increase of investor-state arbitrations)
- Role of States

Anti-arbitration injunctions

A type of anti-suit injunction

Well-recognized in most common law jurisdictions

Civil law?

Anti-arbitration injunctions

Raise basic questions concerning

- the source of a tribunal's power (law of seat?)
- the effect of annulment at seat (can annulled awards be enforced in other places?)

But parallel proceedings have real effects

- deprive a party of its bargained for dispute resolution agreement
- provide real leverage to the obstructive party (time, money, uncertainty, distraction, etc.)

Anti-suit injunctions

Common law:

- legitimate means of restraining a party from bringing proceedings in a particular forum in breach of agreement
- *in personam* jurisdiction -- contempt sanction
- Examples of bases for anti-arbitration injunctions:
 - invalid arbitration agreement
 - partial arbitrators
 - repudiation or termination of arbitration agreement

Anti-suit injunctions

English law:

- finding of oppressive or vexatious intent *not* necessary (2002 *Donohue v. Armco*)
- should grant an injunction against foreign proceedings unless there is a strong reason that the defendant should not be ordered to adhere to its contractual promise

Anti-suit injunctions

English law:

- ECJ in *Turner v. Grovit*: such measures are fundamentally inconsistent with the Brussels Convention -- the court first seised of a dispute must decide upon its own substantive jurisdiction
- English Court of Appeal in *Through Transport v. New India*: English court need not accept decision on validity of arbitration agreement by court first seised

Anti-suit injunctions

US law -- split among Courts of Appeal

- All treat as extraordinary remedy
- All require:
 - identity of parties (although not exact)
 - resolution of the action to be protected is dispositive of the action to be enjoined

Anti-suit injunctions

Conservative/Restrictive Approach (2nd, 3rd, 6th, DC) (E.g., 2004 *Paramedics v. GEMS-IT*)

- gatekeeping with a strong preference for concerns of international comity
- only when the strongest equitable factors favor
 - (a) protection of the court's own jurisdiction and
 - (b) the prevention of evasion of the jurisdiction's most compelling public policies

Anti-suit injunctions

Liberal/Lax Approach (5th, 7th, 9th)

- frustrate a public policy of the forum issuing the injunction;
- be vexatious or oppressive;
- threaten the court's *in rem* jurisdiction; or
- prejudice other equitable considerations

2003 *KBC v. Pertamina*

Anti-suit injunctions

Totality of the circumstances approach (1st)

(2004 *Quaak v. KPMG*)

- Comity requires a heightened level of scrutiny
- But court should not overly weigh preservation of jurisdiction and compelling national policies -- rather look at totality of factual circumstances

Legality/Legitimacy

When and where brought? Seat or elsewhere?

New York Convention

- Article II(3) (court shall refer to arbitration unless ...)
- Article V(1)(a)

National law

- Competence-competence provisions
- UNCITRAL Model Law Art. 5 ("in matters governed by this Law, no court shall intervene except where so provided in this Law")

Washington Convention Article 26 ("consent to such arbitration to the exclusion of any other remedy")

Contractual agreement, incorporated institutional rules, and terms of reference

Are anti-arbitration injunctions effective?

Anti-anti and so on -- escalation

Tribunals can ignore (e.g., 2001 ICC *Salini v. Ethiopia*)

Strong but limited effect of contempt

- Where? Personal jurisdiction?
- Against sovereigns?

Parties do respond (e.g., Indonesian party/gov't in *Pertamina*)

Comity and “collateral damage” -- who’s role is it to protect and promote private international law?

Alternative responses to obstructive parallel actions

Restraint -- rely on enforceability/annulment

Provisional measures from the tribunal

- Authority?
 - *MINE v. Guinea* (panel “recommends” withdrawal of parallel actions -- will “take into account”)
 - *E-Systems v. Iran* (recognizing panel’s inherent authority to protect jurisdiction)
- Persuasive effects

Negative procedural rulings?

- Violate fair/equal treatment?

Costs/Damages/Indemnity in arbitration

- ICC costs awards including costs of ancillary proceedings

Others?