

Use and abuse of anti-arbitration injunctions: strategies in dealing with anti-arbitration injunctions

ASA Below 40 Seminar: Court assistance in international arbitration –how to use it wisely and efficiently
Anti-suit and anti-arbitration injunctions: where do we stand today?

23 May 2014

Genevieve Poirier

Skadden

Beijing
Boston
Brussels
Chicago
Frankfurt
Hong Kong

Houston
London
Los Angeles
Moscow
Munich
New York

Palo Alto
Paris
São Paulo
Seoul
Shanghai
Singapore

Sydney
Tokyo
Toronto
Washington, D.C.
Wilmington

Anti-arbitration injunctions

- What are they?
- Where do they come from?
- Guerrilla tactic or protection of the arbitral process?
- Strategies in dealing with anti-arbitration injunctions.

Just what is an anti-arbitration injunction?

Who does it affect?

Decision of a local court enjoining

- the parties
- the Tribunal
- third parties
- the arbitral institution

from initiating or continuing with the arbitration; and/or

invalidating the arbitral process;

suspending enforcement;

in some cases taking the form of a retrospective refusal to recognise the jurisdiction of the Tribunal

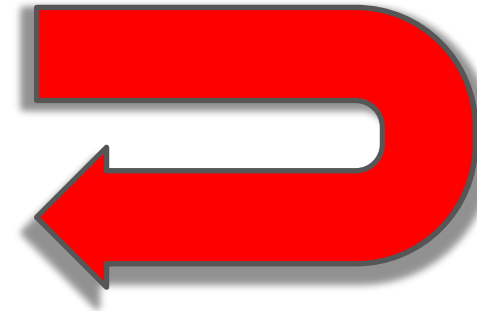
Courts that issue anti-arbitration injunctions

- USA
 - Canada
 - England
 - India
 - Bangladesh
 - Hong Kong
 - Pakistan
 - The Caribbean
- Ethiopia
 - Brazil
 - Indonesia

Courts that refuse

- Switzerland
- France

- Civil jurisdictions generally but see:



A guerrilla tactic: *Uncertainty / Delay / Avoidance / Cost*

Saipem v. Petrobangla

Himpurna California Energy v. Indonesia

Salini Costruttori v. The Federal Democratic Republic of Ethiopia

- What is the practical effect of an anti-arbitration injunction?
- Can or should the arbitration proceed in the face of injunction?
 - contempt
 - local penalties
 - potential annulment of any award
 - difficulties in enforcement
 - violation of public policy

A protection of the arbitral process?

CIRCUMSTANCES MERITING THE COURT'S INVOLVEMENT?

- concurrent proceedings on the same or similar issues
- no valid agreement to arbitrate
- non-signator(ies) to the arbitration agreement
- exclusive jurisdiction clause in favour of litigation

A JUSTIFIABLE INTERFERENCE?

- where proceedings are vexatious, oppressive, or an abuse
- where application made without delay
- in 'exceptional' circumstances

Why should a party be forced to appear before and challenge the jurisdiction of a Tribunal where it has not consented to arbitrate?

STRATEGIES

At the hearing of the injunction

- Challenge the grounds –has the local test been met?
- NY Convention –the international framework, principle of non-interference
- Kompetenz-Kompetenz
- Proper recourse for the Court is to refuse to recognise award
 - *Generally ex parte*

Challenge to the Injunction

- Seek to lift the injunction on the basis of the above
 - *time and cost*
 - *likelihood of alternative outcome?*

Anti-anti arbitration Injunction

- Confirm jurisdiction of the Tribunal in the place of likely enforcement / where assets are held
- Enjoin original applicant to withdraw its local action
 - *Is there a suitable jurisdiction?*

STRATEGIES

Remedies from the Tribunal

- Tribunal to consider own jurisdiction
- Damages
- Costs sanction
- Move the place of the hearing
 - *practical considerations: commercial considerations, witnesses, assets, enforcement*

Is it an expropriation?

- BIT claim (as in *Saipem*)
 - *Difficulty in demonstrating an 'asset'*
 - *Time and cost*

Pre-empt the injunction

- Consider your opponent / the seat / the likely place of enforcement
 - is your arbitration at risk?
 - what steps can be taken before any injunction is granted?

**PRACTICAL TIPS, EXPERIENCES, PITFALLS, ANECDOTES?
COMMENTS FROM THE FLOOR**

Skadden

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates