

# Anti-suit injunctions in protection of arbitral proceedings: useful weapon or disruptive nuisance

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ASA Below 40 Seminar: Court assistance in international arbitration – how to use it wisely and efficiently

Third session: Anti-suit and anti-arbitration injunctions: where do we stand today?

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# Anti-Suit Injunction

What is it?

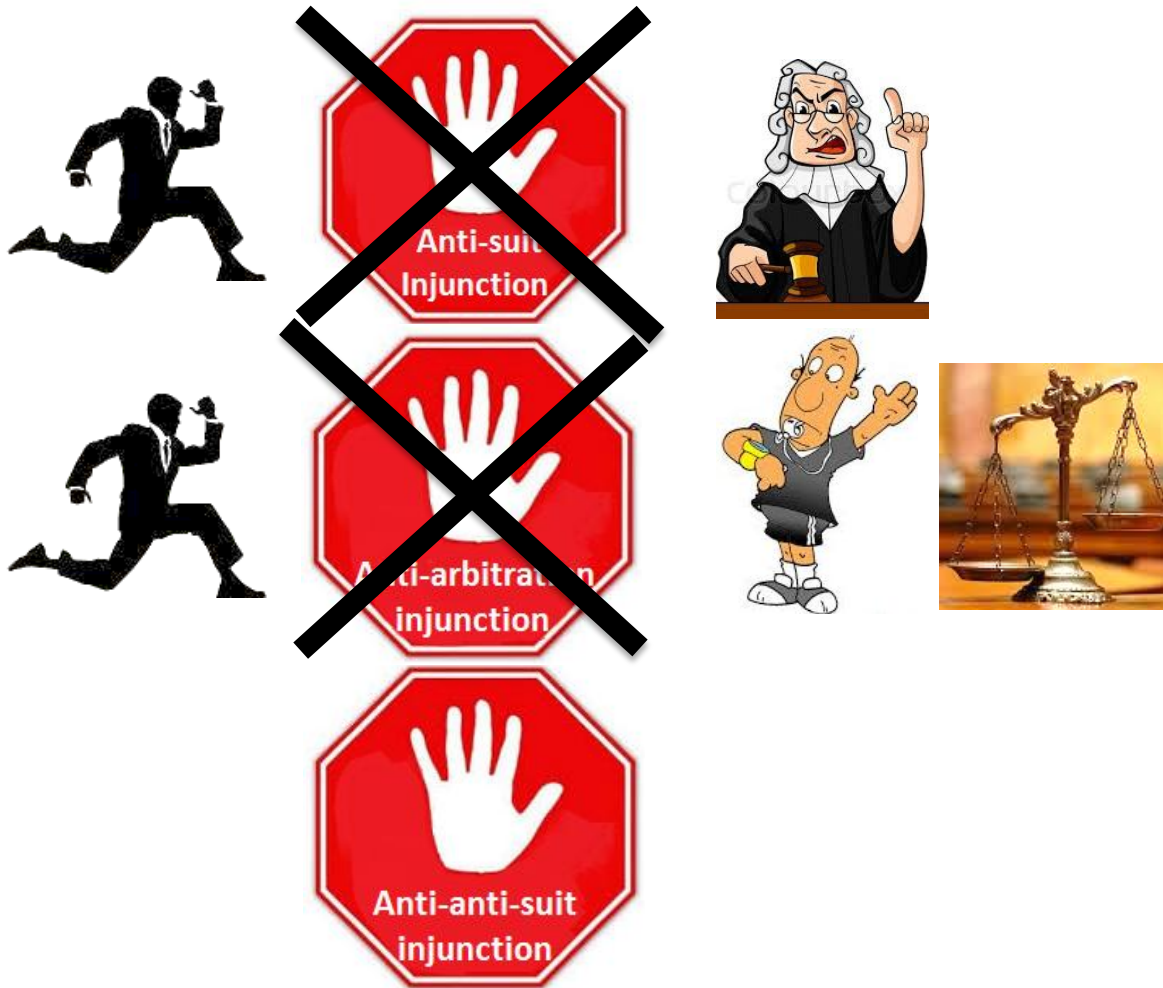
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- ⇒ No precisely defined term
- ⇒ Important: directed against a party (and not against the foreign court/arbitral tribunal)
- ⇒ The term covers different types of injunctions at different stages of the proceedings

# Anti-Suit Injunction

## Types (Overview)



# Anti-Suit Injunction

## Types (Overview)



issued by:

- a state court
- or
- an arbitral tribunal

# Anti-Suit Injunctions by State Courts

## Are they permitted?

- Common law jurisdictions:
  - Developed by English courts (originally in the domestic litigation context)
  - Typically available in common law jurisdictions (e.g. UK, USA, Canada, Singapore, Australia)
  - Rationale: Enforcement of the arbitration agreement (i.e. the negative obligation to refrain from litigation)
  - Requirements vary from jurisdiction to jurisdiction
- Civil law jurisdictions:
  - Typically not available and not enforceable in civil law jurisdictions
  - Rationale: Violation of the foreign court's "competence-competence" and of the foreign state's sovereignty
  - Examples (Switzerland?, Germany?, France?, Any other experiences?)
  - Some civil law jurisdictions have issued anti-arbitration orders (e.g. Brazil, Ethiopia, Indonesia, see Gary Born, 2. ed. 2014, § 8.04 [A])

⇒ Development in case law needs to be carefully followed

# Anti-Suit Injunctions by State Courts

## Are they permitted? (cont'd)

- EU Law
  - *Allianz SpA v. West Tankers Inc.* (2009)
    - Landmark decision regarding anti-suit injunctions in aid of arbitration
    - English court issued an anti-suit injunction restraining a party from initiating court proceedings in Italy brought in violation of an arbitration agreement
    - European Court of Justice (ECJ) held that
      - The present question does not fall under the arbitration exception of the Brussels I Regulation (Council Regulation (EC) No. 44/2001)
      - It is "***incompatible with [the Brussels I Regulation]*** for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement" (emphasis added)
- West Tankers-practice also applies under the Lugano Convention (i.e. with regard to EFTA Member States)



# Anti-Suit Injunctions by State Courts

## Are they permitted? (cont'd)

- Consequences of the (controversial) West Tankers Case
    - Anti-suit injunctions in aid of arbitration are not available where two EU/EFTA Member State courts are involved
    - Available in principle where only one EU/EFTA Member State court is involved (subject to the applicable national law)
  - Note: recast Brussels I Regulation (EU Regulation No. 1215/2012)
    - Enters into force as of 10 January 2015
    - Arbitration remains excluded (Art. 1(2)(d))
    - Anti-suit injunctions are not specifically addressed (also see "Whereas-Clause" (12))
- ⇒ It is up to the ECJ to clarify whether court ordered anti-suit injunctions remain unavailable in the EU

# Anti-Suit Injunctions by State Courts

## Useful weapon or disruptive nuisance?

- Arguments for
  - Efficient tool to preserve the parties' agreement to arbitrate
  - Prevent parallel proceedings and forum shopping
  - Avoid conflicting decisions
  - Enhance the efficiency of proceedings
  - Prevent delays and costs
- Arguments against
  - Generally disruptive tool opening yet another door for court interference
  - Violate the foreign court's jurisdiction (even though they are not directed against the foreign state), its "competence-competence", international law (e.g. the system and spirit of the NYC) and the principle of comity
  - Superfluous in view of the principles of *lis pendens*, *res judicata* and the rules on recognition and enforcement of foreign decisions
  - May trigger anti-anti-suit injunctions etc. and lead to litigation deadlock



# Anti-Suit Injunctions by State Courts

Useful weapon or disruptive nuisance? (cont'd)

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Given the uncertainties associated with their availability and enforcement,  
which differ in each jurisdiction:

**In what situations (if at all) is it advisable to apply for court ordered anti-suit injunctions?**



# Anti-Suit Injunctions by Arbitral Tribunals

## An effective alternative?

- Are they permitted?
- Procedural order or award?
- Effectiveness (sanctions for non-compliance and enforcement)?
- Any relevance of the West Tankers case law?
  - Arbitrators are not bound by the Brussels I Regulation/Lugano Convention
  - However: In October 2013, the Supreme Court of Lithuania in *Gazprom v. Republic of Lithuania* requested a preliminary ruling from the ECJ on whether a EU Member State governed by the Brussels I Regulation can refuse enforcement of an arbitral award [of an SCC panel] that contains an anti-suit injunction. Decision of the ECJ is pending.
- Concurrent or alternative claim for damages for breach of the arbitration agreement?

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useful weapon or disruptive nuisance

**What are your views?**

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