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TABLE OF CONTENTS

ARTICLES

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UPHOLDING ARBITRAL INTEGRITY: A CASE FOR COURT-ORDERED ANTI-SUIT INJUNCTIONS IN AID OF ENFORCING FOREIGN-SEATED ARBITRATION AGREEMENTS

by Chris Lai

I. INTRODUCTION

By entering into a valid arbitration agreement, parties are making a positive promise to resolve their disputes by arbitration and a negative promise not to bring proceedings in another forum. However, when disputes materialize eventually, it is not uncommon for a recalcitrant party to commence litigation before a national court in an attempt to gain procedural and substantive legal advantages. Depending on the factual matrix at hand, the other party may have several options, one of which is seeking an anti-suit injunction from a competent court.

An anti-suit injunction is a remedy typically granted in common law jurisdictions, such as England and Wales, the United States, Singapore, and Hong Kong, to recognize the negative promise of the arbitration agreement and hence to restrain a party from instituting or continuing proceedings in a foreign court. Courts readily grant this remedy when exercising their supervisory powers over arbitrations seated within their jurisdictions.

Yet it remains unclear whether this remedy should also be made available outside of the seat. This question came into the limelight in 2023, when the English High Court and Court of Appeal had to deal with three high-profile anti-suit applications made separately by Deutsche Bank,[1] Commerzbank,[2] and UniCredit,[3] respectively, to enjoin Russian court proceedings brought in breach of the same dispute resolution arrangement: (i) arbitration agreements stipulating International Chamber of

[1] SQD v. QYP [2023] EHWC (Comm) 2145, *rev'd*, Deutsche Bank AG v. RusChemAlliance LLC [2023] EWCA (Civ) 1144 (Eng.).

[2] Commerzbank AG v. RusChemAlliance LLC [2023] EWHC (Comm) 2510 (Eng.).

[3] G v. R [2023] EWHC (Comm) 2365 (Eng.).

Commerce (ICC) arbitration with a Paris seat and (ii) English law governing the underlying contracts without a stipulation as to the law governing the arbitration agreements. The remedy was granted to Deutsche Bank and Commerzbank as the courts in these two cases held that England was considered the "proper forum" for such applications. On the other hand, UniCredit's application was refused on the ground that an English anti-suit injunction was not necessary as the seat, France, could offer "substantial justice" to the applicant.

These contrasting decisions not only illustrate the difficulty in applying English jurisdictional rules to international arbitration, but also prompt us to consider the greater question: should national courts issue anti-suit injunctions to enforce international commercial arbitration agreements that specify foreign seats? This article argues in the affirmative. It starts by comparing in general terms the types of remedies available to a party in response to the counterparty's breach of the arbitration agreement, and then justifies that court-ordered anti-suit injunction is the most effective enforcement tool of all. Then it takes a deeper dive into the rules in selected jurisdictions for the grant of anti-suit injunctions in support of international arbitration. Next it analyzes the English courts' recent decisions on the three anti-suit injunction applications in aid of arbitrations with a foreign seat. Thereafter the article consolidates the previous discussions and justifies the legitimacy of court-ordered anti-suit injunctions as effective means to give effect to foreign-seated arbitration agreements. It finally concludes with some remarks on the topic.

II. MEANS OF ENFORCING INTERNATIONAL ARBITRATION AGREEMENTS

A. *Who Enforce International Arbitration Agreements?*

As noted, valid arbitration agreements impose positive and negative effects, namely the parties' duty to partake cooperatively and in good faith in the arbitration of disputes in accordance with the arbitration agreements at hand; and the parties' duty not to shift the forum for the resolution of disputes away from the arbitral tribunal to a national court or any other forum that has not been agreed to by the

parties.[4] That being said, these duties are merely empty promises unless enforceable by authoritative decision-makers. The following delineates the roles played by (i) national courts and (ii) arbitral tribunals, arbitral institutions, and emergency arbitrators, in enforcing international arbitration agreements.

1. National courts

The positive and negative effects of arbitration agreements are in fact directed predominantly at national courts in the sense that they are the primary actors who are expected to take active steps to ensure parties' compliance with the agreed arbitral processes.

The positive effect arises from the parties' arbitration agreement itself and is apparent from the wording of international conventions.[5] Article II(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") requires Contracting States to "recognize" written agreements by which parties undertake "to submit to arbitration" specified disputes.[6] Of note is that the duty to arbitrate is expressed in the form of giving effect to the parties' agreement by requiring "recognition" of that agreement, rather than by laying down generically or independently the parties' "obligation to arbitrate."[7] Article II(3) of the New York Convention further states that the court of a Contracting State when seized with a matter which is subject to an arbitration agreement "shall . . . refer the parties to arbitration . . . ."[8] Similar wording can be found in national arbitration laws

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[4] *See, e.g.*, GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION §§ 8.01–8.02 (3d. ed. 2009).

[5] *Id.* § 8.02[A].

[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter New York Convention], art. II, June 10, 1958, 330 U.N.T.S. 38, 7 I.L.M. 1046; *cf.* Protocol on Arbitration Clauses, art. 1, Sept. 24, 1923, 1 27 L.N.T.S. 157 [hereinafter Geneva Protocol] ("Each of the Contracting States [recognizes] the validity of an agreement . . . by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract . . . .").

[7] BORN, *supra* note 4, § 8.02[A][1].

[8] New York Convention, art. II(3); *cf.* Geneva Protocol, art. 4 ("The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article I applies and including an arbitration agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application

of jurisdictions that adopted the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law").[9]

The negative effect is also manifested from Articles II(1) and (3) of the New York Convention and national arbitration laws. As will be explained below, the courts are to recognize and enforce a valid arbitration agreement, by requiring the suspension or the dismissal of the national court litigation of arbitrable disputes. There is no discretion left for Contracting States to take any other action contrary to their obligation to refer the parties to arbitration.[10]

2. Arbitral Tribunals, Arbitral Institutions and Emergency Arbitrators

Arbitral tribunals and institutions also have an important role to play in the recognition and enforcement of arbitration agreements.

Borrowing the words of the Swiss Federal Tribunal, "the principal effect of an arbitration agreement is not to exclude the jurisdiction of the state courts, but to transfer the right of decision to an arbitral tribunal."[11] In many legal systems, the tribunal's right of decision includes the right to consider and resolve the disputes regarding its own jurisdiction (*kompetenz-kompetenz*), *e.g.*, validity and existence of

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of either of them to the decision of the arbitrators.").

[9] U.N. COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 8(1), U.N. Sales No. E.08.V.4 (2008) [hereinafter UNCITRAL Model Law] ("A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests . . . refer the parties to arbitration . . . .").

[10] For the position of the United States, *see*, *e.g.*, *CLMS Mgmt. Servs. LP v. Amwins Brokerage of Ga., LLC*, 8 F.4th 1007, 1014–15 (9th Cir. 2021) ("[New York Convention, art. II(3)] is addressed directly to domestic courts, mandates that domestic courts 'shall' enforce arbitration agreements, and 'leaves no discretion to the political branches of the federal government whether to make enforceable the agreement-enforcing rule it prescribes.'"). For the English position, *see*, *e.g.*, *Lonrho Ltd v. Shell Petroleum Co.* (Eng. High Court, 1978), *reprinted in* 4 Y.B. COMM. ARB. 321 (1979) ("The effect of §1 [of the English Arbitration Act 1975, implementing New York Convention, article II(3)] is to deprive the court of any discretion whether a claim within a non-domestic arbitration agreement should be arbitrated or litigated. . . . The Section is mandatory."). And for Singapore's position: *Tomolugen Holdings Ltd v. Silica Investors Ltd.* [2015] SGCA 57 [42] (Sing.) ("When [New York Convention, art. II(3)] was formulated in the 1950s, it sought principally to achieve the limited goal of preventing Contracting States from refusing to recognise the validity of arbitration agreements.").

[11] Tribunale federale [TF] [Federal Supreme Court] Oct. 2, 1931, 57 DECISIONI DEL TRIBUNALE FEDERALE SVIZZERO [DTF] I 295, 305 (Switz.).

the arbitration agreement.[12] As a result, national courts generally have no power to decide such jurisdictional disputes until the award is rendered.[13] This is reinforced by the rules of the arbitral institutions to which the parties have agreed to refer their disputes. These institutional rules oftentimes amplified the parties' agreement on the exclusivity of arbitration. For instance, under Article 22.2 of the London Court of International Arbitration (LCIA) Rules (2020), "the parties shall be treated as having agreed not to apply to any state court or other legal authority for any order available from the Arbitral Tribunal (if formed) under Article 22.1" unless the parties have agreed otherwise in writing.[14]

But what if the recalcitrant party has brought litigation before the formation of the tribunal (or even before the commencement of any arbitration)? The aggrieved party, apart from resorting to the court system, may have an added or alternative option to use the emergency arbitration service if provided by the arbitral institution. Major institutions such as the ICC, the International Centre for Dispute Resolution (ICDR), the LCIA, the Hong Kong International Arbitration Center (HKIAC), and the Singapore International Arbitration Center (SIAC) are now equipped with an infrastructure by which an aggrieved party can apply for urgent interim remedies (including an anti-suit injunction) ahead of the constitution of a tribunal. Upon receipt of a request for an emergency arbitration, the institution will within the next few days appoint an emergency arbitrator, who will in turn issue a decision five to 15 days later.[15] However, the status of emergency arbitrators and the enforceability of their decisions remain unclear as the New York Convention and many national laws have yet to explore or address the status of emergency arbitrators and their

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[12] BORN, *supra* note 4, § 8.03[B][3].

[13] *Id.*

[14] London Court of International Arbitration (LCIA) Rules (2020), art. 22.2.

[15] *See*, *e.g.*, Hermann J. Knott & Martin Winkler, *The Arbitrator and the Arbitration Procedure*, *Emergency Arbitration Securing advantages at an early stage*, in AUSTRIAN Y.B INT'L ARB. 166 (Christian Klausegger et al., eds., 2022).

decisions.[16] Only a few national arbitration laws have, in response, amended the definition of tribunals to include emergency arbitrators,[17] or created *sui generis* mechanisms for enforcing emergency arbitrators' orders.[18]

B. *What Remedies Can Aggrieved Parties Obtain to Enforce Arbitration Agreements?*

Having set out above the respective responsibilities of national courts, arbitral tribunals, arbitral institutions, and emergency arbitrators for enforcing international arbitration agreements, the following compares some of the remedies that the aggrieved party can obtain from them, namely (i) a dismissal or stay of proceedings; (ii) an affirmative order compelling arbitration; (iii) an anti-suit injunction; (iv) damages for breach of the obligation not to refer the dispute to courts; and (v) non-recognition of judgments resulting from the breach of the arbitration agreement.[19]

1. Dismissal or Stay of Proceedings

National courts of all New York Convention contracting states, irrespective of whether or not they have been designated as the arbitral seat, are required under Article II(3) of the New York Convention to dismiss or stay proceedings before them if they have been brought in breach of an arbitration agreement.[20]

Many national arbitration laws, chiefly of common law jurisdictions, expressly provide for a mandatory stay of the proceedings.[21] Other states, mostly civil law

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[16] *See* BORN, *supra* note 4, § 17.02[A][5].

[17] *See*, *e.g.*, International Arbitration Act 1994, § 2(1) (Sing.) [hereinafter Singapore International Arbitration Act]; Arbitration Act 1996, s 2(1) (N.Z.); Arbitration Act 2005, § 2(1) (Malay.); International Arbitration Act 2017, § 2 (Fiji).

[18] *See*, *e.g.*, Arbitration Ordinance, (2011) Cap. 609, § 22(b) (H.K.) [hereinafter Hong Kong Arbitration Ordinance] ("Any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court."); Amazon.com NV Inv Holdings LLC v Future Retail Ltd (2022) 1 SCC 209 (India) (holding that emergency order/award rendered in India-seated arbitration is an order of "tribunal" under § 17 of Indian Arbitration and Conciliation Act and is enforceable).

[19] *See* BORN, *supra* note 4, § 8.01.

[20] *Id.* § 8.03[C][1].

[21] *See*, *e.g.*, RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION

jurisdictions, require national courts to go further to dismiss the proceedings entirely.[22] Notwithstanding the seemingly different approaches taken by common law and civil law jurisdictions, putting aside issues of local procedural laws, both stay and dismissal of proceedings possess more or less the same goal, i.e., to prevent the substantive merits of an arbitrable dispute from being heard by the national court in question.[23]

One caveat to the availability of a stay or dismissal is that frequently the recalcitrant party would, for tactical reasons, initiate the proceedings at the court of its home state or other states which may not reliably respect the negative effects of international arbitration agreement.[24] Should this be the case, the aggrieved party may wish to consider other enforcement options instead.

2. Affirmative Order Compelling Arbitration

US courts, by virtue of §§ 4, 206 and 303 of the Federal Arbitration Act (the "FAA"), are under a "nondiscretionary duty to grant a timely motion" to affirmatively compel

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§§ 2.1(a)–(b) (Am. L. Inst. 2023) [hereinafter RESTATEMENT] (arbitration agreement enforced by stay or order compelling arbitration); Arbitration Act 1996, c. 23, § 9(4) (Eng.) [hereinafter English Arbitration Act 1996] ("[A] court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."); Singapore International Arbitration Act 1994, § 6(2) ("The court to which an application has been made in accordance with subsection (1) is to make an order, upon such terms or conditions as the court thinks fit, staying the proceedings . . . unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed."); and Hong Kong Arbitration Ordinance, § 20(5) ("If the court refers the parties in an action to arbitration, it must make an order staying the legal proceedings in that action.").

[22] *See*, *e.g.*, Code de procédure civile [C.P.C.] [Civil Procedure Code] art. 1448(1) (Fr.) ("*Lorsqu'un litige relevant d'une convention d'arbitrage est porté devant une juridiction de l'Etat, celle-ci se déclare incompétente sauf si le tribunal arbitral n'est pas encore saisi et si la convention d'arbitrage est manifestement nulle ou manifestement inapplicable*."); Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 1032(1) (Ger.) ("*Wird vor einem Gericht Klage in einer Angelegenheit erhoben, die Gegenstand einer Schiedsvereinbarung ist, so hat das Gericht die Klage als unzulässig abzuweisen, sofern der Beklagte dies vor Beginn der mündlichen Verhandlung zur Hauptsache rügt, es sei denn, das Gericht stellt fest, dass die Schiedsvereinbarung nichtig, unwirksam oder undurchführbar ist.*"); Bundesgesetz über das Internationale Privatrecht [IPRG] [Federal Act on Private International Law], Dec. 18, 1987, art. 7 (Switz.) ("*Haben die Parteien über eine schiedsfähige Streitsache eine Schiedsvereinbarung getroffen, so lehnt das angerufene schweizerische Gericht seine Zuständigkeit ab . . . .*").

[23] *See* BORN, *supra* note 4, § 8.03[C][1]–[2].

[24] *Id.* § 8.02[C].

a party to participate in US-seated and foreign-seated arbitrations.[25] It is essentially an order of specific performance of the positive obligation to arbitrate.[26] This remedy can be a "positive work-around" to a dismissal or stay, which may be difficult or virtually impossible to obtain from the court where the litigation is brought in violation of the arbitration agreement. However, the legitimacy of such affirmative court orders is questionable. First and foremost, the US is the only major exception to the general unavailability of this remedy in New York Convention contracting states and UNCITRAL Model Law states.[27] Second, affirmatively ordering arbitration in a foreign seat arguably amounts to judicial overstep in the arbitral process or creates conflicts with the laws of the foreign seat.[28]

Alternatively, the aggrieved party may attempt to request this affirmative order from the arbitral tribunal if it has already been formed. Some institutional rules expressly provide tribunals with this power. For example, Article 22.1(ix) of the LCIA Rules authorizes tribunals "to order compliance with any legal obligation . . . or specific performance of any agreement (including any arbitration agreement . . .) . . ."[29] Other tribunals (*ad hoc* or under other institutional rules) may also be allowed by the parties, by the applicable substantive law, or by the law of the seat to order specific performance of a contract;[30] and, by analogy, to compel arbitration per the arbitration agreement. The reality, however, is that parties are unlikely to have agreed on a tribunal's power to compel arbitration in the first place. Absent parties'

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[25] InterGen NV v. Grina, 344 F.3d 134, 142 (1st Cir. 2003); *see also* Tierra Verde Escape, LLC v. Brittingham Group, LLC, No. 1:16-CV-100, 2017 WL 3699554 (W.D. Mich. Aug. 28, 2017) (compelling arbitration in Hong Kong); Strategic Asset Grp., LLC v. Shabanets, No. 8:18-cv-01384, 2018 WL 8131760 (C.D. Cal. Sept. 4, 2018) (ordering parties to arbitrate in Russia).

[26] *See*, *e.g.*, Boykin v. Fam. Dollar Stores of Mich., LLC, 3 F.4th 832, 837 (6th Cir. 2021) (finding that § 4 of the FAA "allows a plaintiff to file a contract claim seeking the specific performance of an arbitration contract").

[27] *See* BORN, *supra* note 4, § 8.02[C].

[28] *Id.*

[29] LCIA Arbitration Rules (2020), art. 22.1(ix).

[30] REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 9.51 (Nigel Blackaby et al., eds., 7th ed. 2023).

agreement, the tribunal, falling back to national laws, is unlikely to grant this order unless the applicable substantive law is US law, or the arbitration is seated in the US.

In any event, as the saying goes, "you can lead a horse to water, but you cannot make it drink." Therefore, fundamentally speaking, an order for specific performance of an arbitration agreement, be it ordered by a court or an arbitral tribunal, is simply "impracticable, since a party cannot be compelled to arbitrate if it does not wish to do so."[31]

3. Anti-Suit Injunction

Originating from the common law system,[32] since 1911, the English courts have exercised the jurisdiction to enjoin foreign proceedings brought in breach of an agreement to arbitrate.[33] An anti-suit injunction presents a "negative workaround" to a stay or dismissal, whereby jurisdiction A, approached by the aggrieved party, restrains the recalcitrant party from commencing or continuing proceedings in jurisdiction B. Anti-suit injunctions can be granted on an interim or final basis. A final anti-suit injunction usually takes the form of requiring the recalcitrant party to take steps necessary to discontinue proceedings in jurisdiction B.[34]

Whilst intended to preclude the litigation from proceeding in the foreign court, anti-suit orders target the parties to the foreign proceedings, but not the foreign court itself.[35] Perhaps unfamiliar with the nature of the remedy, civil law courts were conventionally skeptical about the legitimacy of anti-suit injunctions, which they considered as interference with the sovereign and judicial processes of another

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[31] REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 1.14 (Nigel Blackaby et al. eds., 6th ed. 2015).

[32] *See*, *e.g.*, Emmanuel Gaillard, *Anti-suit Injunctions Issued by Arbitrators*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS 235 (Albert Jan van den Berg ed., 2008).

[33] Pena Copper Mines Ltd v. Rio Tinto Co., [1911] All E.R. 209 (C.A.) (Eng.).

[34] *See*, *e.g.*, ZHD v. SQO [2021] EWHC (Comm) 1262 (Eng.); VTB Bank (PJSC) v. Mejlumyan [2021] EWHC (Comm) 3053 (Eng.); Daiichi Chuo Kisen Kaisha v. Chubb Seguros Brasil SA [2020] EWHC (Comm) 1223 (Eng.).

[35] GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 567 (6th ed. 2018).

nation. The Court of Justice of the European Union (the "CJEU") decided in *Turner v. Grovit* that intra-European Union ("EU") anti-suit injunctions (*i.e.*, those issued by one EU court in relation to legal proceedings in another EU court) should generally not be issued.[36] Otherwise, mutual trust established by the jurisdictional rules applicable between member states' courts, namely Regulation 44/2001 (the "Brussels I Regulation"), which was superseded by Regulation 1215/2012 (the "Brussels I Regulation Recast"), would be undermined.

Nevertheless, it is an overstatement to state that the possibility of intra-EU anti-suit injunctions is completely foreclosed. In the context of arbitration, the CJEU in *Allianz v. West Tankers* has retained a limited possibility for anti-suit injunction to be granted.[37] This is where the recalcitrant party seizes the court of a member state B for the sole purpose of determining the validity of an arbitration agreement providing for a member state A seat, as opposed to seizing the member state B for some substantive civil proceedings where the validity of the arbitration agreement is only a preliminary or incidental issue to be determined.[38]

Outside of the intra-EU setting, courts in France,[39] Brazil,[40] Russia,[41] and other civil law jurisdictions have reportedly moved away from their once-held reservations about anti-suit injunctions and issued certain orders restraining foreign litigation and/or arbitration.

Gaining greater acceptance aside, court-ordered anti-suit injunctions are more

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[36] Case No. C-159/02, Turner v. Grovit, 2004 E.C.R. I-3565, ¶ 27.

[37] Case No. C-185/07, Allianz SpA v. West Tankers Inc., 2009 E.C.R. I-00663, ¶ 20.

[38] RICHARD FENTIMAN, INTERNATIONAL COMMERCIAL LITIGATION ¶ 16-137 (2d ed., 2015).

[39] *See*, *e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 19, 2002, Bull. civ. I, No. 275 (Fr.).

[40] *See*, *e.g.*, Companhia Paranaense de Energia (COPEL) v. UEG Arancaria Ltda (Curitiba Ct. of First Instance, June 3, 2003), *reprinted in* 21 REVISTA DE DIREITO BANCÁRIO DO MERCADO DE CAPITAIS E DA ARBITRAGEM 421 (2003) (Braz.).

[41] *See*, *e.g.*, Opredeleniye Verkhovnogo Suda Rossiĭskoĭ Federatsii "Uraltransmash v. RTS PESA Bydgoshch" ot 9 dekabr' 2021 [Decision of the Supreme Court of the Russian Federation "JSC UralTransMash v. PESA" of Dec. 9, 2021].

useful than orders compelling arbitration. Not only can the anti-suit applicant use the injunction as a "shield" to defend the arbitral process already commenced or to be commenced, but the injunction can also be used as a "sword" to achieve the end goal of stopping the recalcitrant party's litigation when the anti-suit applicant, for whatever reason, is not even minded to commence arbitration. Ultimately, an anti-suit injunction is grounded on the arbitration agreement's negative obligation, which is "not extinguished by the fact that neither party intends to initiate proceedings under the agreement."[42] As the UK Supreme Court explained, the immunity from litigation conferred by arbitration agreements is "a right enforceable independently of the existence or imminence of any arbitral proceedings."[43]

If the aggrieved party has already commenced arbitration or is indeed minded to proceed with arbitration, under various arbitral rules, anti-suit injunctions can be granted by tribunals on an interim or final basis,[44] or emergency arbitrators on an interim basis.[45] But arbitral anti-suit injunctions suffer from at least three drawbacks. First, there are concerns surrounding the enforceability of provisional arbitral anti-suit injunctions that are issued in the form of mere orders (as opposed to interim awards). Orders, issued speedily with fewer formalities, are by default less enforceable as they do not fall within the definition of awards under the New York Convention, although some national arbitration laws now provide that arbitral tribunals' orders granting provisional measures are enforceable to the same extent as interim awards of provisional measures.[46] Second, it has been deemed controversial

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[42] Richard Fentiman, *Antisuit Injunctions and Arbitration Agreements*, 72 CAMBRIDGE L.J. 521, 524 (2013).

[43] Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35 [28] (Lord Mance) (Eng.).

[44] *See* Starlight Shipping Co v. Tai Ping Insurance Co [2007] EWHC (Comm) 1893 [24]–[30] (Eng.).

[45] *See*, *e.g.*, INT'L CHAMBER OF COM., REPORT OF THE ICC COMMISSION ON ARBITRATION AND ADR TASK FORCE ON EMERGENCY ARBITRATOR PROCEEDINGS 41 (2019); JOHN CHOONG ET AL., A GUIDE TO THE SIAC ARBITRATION RULES ¶ 13.06 (2d ed. 2018) ("In the exercise of such powers, SIAC tribunals (including emergency arbitrators) have . . . (b) issued an anti-suit injunction prohibiting a party from commencing a court action or another arbitration.").

[46] *See*, *e.g.*, UNCITRAL Model Law, art. 17H(1); English Arbitration Act 1996, § 42(1); Swiss Private

for injunctions to be granted by arbitral tribunals, which are constituted by private agreement and hence lack the sovereign authority to police court proceedings in a national court.[47] Third, connected to the second point, arbitral anti-suit orders or awards lack the coercive power that is present in court-ordered anti-suit injunctions. The US and English courts can hold the recalcitrant party in contempt and subject them to compensatory and criminal sanctions,[48] whereas, arbitral authorities can at most impose civil consequences.

4. Damages

Where specific performance of arbitration agreements cannot be obtained, or where the foreign proceedings cannot be stopped, the aggrieved party has the option of claiming monetary damages against the recalcitrant party for their breach of the undertaking not to litigate.

As to who the relevant decision-maker is, court decisions in various jurisdictions, *e.g.*, the US,[49] England,[50] and Switzerland,[51] have awarded damages to this end or indicated the possibility of doing so. Some other authorities, however, have stated that the question of whether there has been a breach of the arbitration agreement falls within the jurisdiction of an arbitral tribunal, not the court.[52]

Above all, damages for violation of an arbitration agreement are an uncertain means of enforcement due to the difficulty and the speculation required to ascertain

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International Law Act, art. 183(2).

[47] *See* Laurent Lévy, *Anti-Suit Injunctions Issued by Arbitrators*, *in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 115, 126 (Emmanuel Gaillard ed., 2005); *see also* BORN, *supra* note 4, § 17.02[G][4][j].

[48] *See* Walter W. Heiser, *Using Anti-Suit Injunctions to Prevent Interdictory Actions and to Enforce Choice of Court Agreements*, 2011 UTAH L. REV. 855 (2011); DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS ¶ 12-114 (Lord Collins of Mapesbury & Jonathan Harris eds., 16th ed. 2023) [hereinafter DICEY].

[49] *See*, *e.g.*, Gabbanelli Accordions & Imp., LLC v. Gabbanelli, 575 F.3d 693, 695 (7th Cir. 2009).

[50] *See*, *e.g.*, Schifffahrtsgesellschaft Detlev von Appen GmbH v. Voest Alpine Intertrading GmbH [1997] 2 Lloyd's Rep. 279 (Eng.).

[51] *See*, *e.g.*, Bundesgericht [BGer] [Federal Supreme Court] Feb. 11, 2010, 4A_444/2009 (Switz.).

[52] *See*, *e.g.*, Shaw Group Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 122 n.3 (2d Cir. 2003); THOMAS H. OEHMKE & JOAN M. BROVINS, COMMERCIAL ARBITRATION § 15:11 (3d ed. 2015 & Supp. 2022).

the quantum of damages.[53] Moreover, damages are inherently inadequate to remedy or to disincentivize a breach because "[an arbitration agreement's] very nature requires the parties to have their disputes determined in arbitration."[54]

5. Non-Recognition of Judgments

The last option open to the aggrieved party who has not waived its right to arbitrate is to challenge the court judgment obtained by the recalcitrant party in its recognition and enforcement stage. The Swiss[55] and Singaporean[56] courts have made it clear that recognizing and enforcing such a judgment would run counter to Articles II(1) and II(3) the New York Convention.[57] Courts in other jurisdictions, *e.g.*, the US,[58] England,[59] and France,[60] have similarly refused to recognize foreign judgments made in violation of a valid arbitration agreement.

The position in the EU is slightly complicated. Some authorities have previously suggested that, under the old Brussels I Regulation, EU member states' courts were not allowed to deny recognition of another member state's judgment which was rendered in breach of a valid arbitration agreement protected by the New York

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[53] OT Africa Line Ltd v. MAGIC Sportswear Corp [2005] EWCA (Civ) 710 [33] (Eng.) ("[D]amages will not be easily calculable and can indeed only be calculated by comparing the advantages and disadvantages of the respective fora. This is likely to involve an even graver breach of comity than the granting of an antisuit injunction.").

[54] *Starlight Shipping* [2007] EWHC (Comm) 1893 [12].

[55] See, e.g., Bundesgericht [BGer] [Federal Supreme Court] Dec. 19, 1997, 124 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 83, 86-87 (Switz.).

[56] *See*, *e.g.*, WSG Nimbus Pte v. Bd of Control for Cricket in Sri Lanka [2002] 3 SLR 603 (Sing.).

[57] *See* BORN, *supra* note 4, § 8.03[C][5].

[58] *See*, *e.g.*, Iraq Middle Mkt. Dev. Found. v. Harmoosh, 947 F.3d 234, 237 (4th Cir. 2020) ("[A] court may decline to recognize a foreign judgment if '[t]he proceeding in the foreign court was contrary to an agreement between the parties under which the dispute was to be settled out of court.'").

[59] *See*, *e.g.*, AdActive Media Inc. v. Ingrouille [2021] EWCA (Civ) 313 [57] (Eng.) (holding that a US judgment "cannot be enforced in England" when US proceedings were brought in violation of arbitration agreement).

[60] *See*, *e.g.*, Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., June 15, 2006, 05/05404 (Fr.) (refusing to enforce judgment of Italian court that exercised jurisdiction despite arbitration clause that was not manifestly null and void or incapable of being performed).

Convention.[61] Recital 12 and Article 73(2) of the Brussels I Regulation Recast now stipulate that the regulation is prevailed over by the New York Convention, but the specific question regarding a member state's ability to deny recognition of the judgment resulting from a breach of an arbitration agreement remains unaddressed.[62]

C. *Most Effective Enforcement Tool: Court-Ordered Anti-Suit Injunctions*

Comparing the various enforcement tools above, despite not without problems (comity-related issues in particular), anti-suit injunctions ordered by national courts appear to be the most promising of all in enforcing international arbitration agreements.

First, under the present international arbitration framework, national courts still have better "regulatory teeth" than arbitral tribunals and emergency arbitrators. Second, a request for a stay or dismissal is of limited use if the court in question is systemically biased towards the recalcitrant party or unlikely to honor obligations prescribed by the New York Convention. Third, damages and non-recognition of judgments are inadequate remedies as they are not directly geared towards stopping the recalcitrant party's litigation from proceeding. Fourth, an order compelling arbitration, whilst aimed at bringing the recalcitrant party back to the arbitral arena, is relatively alien to most legal systems and is fundamentally difficult to enforce. Fifth, unlike an anti-suit injunction, an order compelling arbitration does not accommodate a situation where the aggrieved party's intended outcome is to simply restrain the recalcitrant party's litigation, rather than to commence an arbitration themselves.

III. COMPARATIVE ANALYSIS OF US AND ENGLISH RULES FOR COURT-ORDERED ANTI-SUIT INJUNCTIONS IN SUPPORT OF INTERNATIONAL ARBITRATION

As discussed in Section 2.2.3, anti-suit injunctions have conventionally been associated with common law jurisdictions. This section focuses on analyzing the

[61] *See* BORN, *supra* note 4, § 8.03[C][5].

[62] *Id.*

rules applicable in two leading jurisdictions, the US and England, in relation to court-ordered anti-suit injunctions in support of international arbitration.

A. *United States*

The applicable US legal regime on the enforcement of international arbitration agreements is principally federal. It comprises the New York Convention, the Inter-American Convention on International Commercial Arbitration, the FAA, and federal case law interpreting the conventions and the FAA.[63] The power of federal courts to "enjoin federal litigation in favor of arbitration is . . . well-established."[64]

1. Overview

According to the *Restatement of the Law, The US Law of International Commercial and Investor-State Arbitration* (the "Restatement"), a US court may enjoin a party to an international arbitration agreement from initiating or maintaining litigation before another court if (i) the relevant court has the jurisdiction; (ii) the prerequisites for issuing anti-suit injunction to enforce international arbitration agreements are met; and (iii) the court chooses to exercise its discretion to grant the injunction.

2. Jurisdiction

It is important to note that when an anti-suit injunction is to be commenced as a freestanding action, the relevant US court must have subject matter jurisdiction and personal jurisdiction.

Subject matter jurisdiction under section 203 of the FAA is established when the arbitration agreement is subject to the New York Convention.[65] It has been confirmed that US courts can issue an anti-suit injunction to prevent a party from pursuing a

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[63] RESTATEMENT, *supra* note 20, § 2.2, Reporters' Notes.

[64] Amaprop Ltd. v. Indiabulls Fin. Servs. Ltd., No. 1:10 -cv-1853 (PGG), 2010 WL 1050988, at *4 (S.D.N.Y. Mar. 23, 2010).

[65] RESTATEMENT, *supra* note 20, § 2.29 Reporters' Notes; Albaniabeg Ambient Sh.p.k. v. Enel S.p.A., 169 F. Supp. 3d 523, 529 (S.D.N.Y. 2016) ("[C]ourts in this [c]ircuit have found Section 203 jurisdiction where a party seeks to compel arbitration, enjoin or stay an arbitration proceeding, or enjoin a proceeding 'in aid of arbitration.'").

lawsuit in a foreign court in violation of a valid international arbitration agreement.[66]

Personal jurisdiction over the recalcitrant party, again, is required because the anti-suit injunction enjoins that party, not the foreign court. Generally, a US district court has personal jurisdiction over a defendant who has sufficient minimum contacts with the state in which the court sits so that the lawsuit does not offend the due process standard of "traditional notions of fair play and substantial justice."[67] When foreign parties are before a US court sitting in its federal question jurisdiction, the court may have personal jurisdiction over a foreign defendant when (i) the case arises under federal law (such as that arising from the FAA); (ii) the foreign defendant lacks sufficient contacts with any single state to subject it to personal jurisdiction in any state; and (iii) the foreign defendant has sufficient contacts with the US as a whole to comport with constitutional notions of due process.[68]

3. Prerequisites

There are three perquisites that need to be satisfied: first, the international arbitration agreement must be enforceable; second, the party being enjoined is bound by the agreement; and third, the claims in the other litigation are within the scope of the agreement.[69]

In terms of enforceability, the international arbitration agreement generally only needs to be compliant with the requirement under secion 2 of the FAA and Article II(1) of the New York Convention of being "in writing."

However, if the recalcitrant party asserts defenses to enforceability, different laws will apply depending on the nature of the challenge. In short, issues regarding the existence of arbitration agreements would be determined either by the law indicated

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[66] China Trade & Dev. Corp. v. M.V. Choon Yong, 837 F.2d 33, 35 (2d Cir. 1987); Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 16 (1st Cir. 2004).

[67] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[68] *See*, *e.g.*, Monsanto Co. v. Syngenta Seeds, Inc., 443 F. Supp. 2d 636, 647 (D. Del. 2006); URS Corp. v. Lebanese Co. for the Dev. & Reconstruction of Beirut Cent. Dist. SAL, 512 F. Supp. 2d 199, 215 n.20 (D. Del. 2007).

[69] RESTATEMENT, *supra* note 20, § 2.29.

by the choice-of-law rules of the forum or by federal common law.[70] Questions about validity and scope of arbitration agreements are governed by (i) the law to which the parties have subjected the arbitration agreement; (ii) in the absence of such a choice of law, the law of the seat of arbitration; or (iii) in the absence of a designation of the seat, the law indicated by the choice-of-law rules of the forum.[71]

4. Discretion

Courts in different circuits are split on how to exercise discretion.[72] Two general trends can be noted. "Conservative" courts emphasize international comity and are reluctant to grant anti-suit injunctions, which would only be granted if they are necessary to uphold an essential policy;[73] whereas "liberal" courts would also grant anti-suit injunction more generally to avoid vexatious litigation, including the risk of duplicative judgments.[74]

Regardless of the approach the courts adopt, the factors relevant to the discretionary stage are as follows: (i) the seat of the arbitration; (ii) whether the other court is likely to rule on the enforceability of the agreement in a timely manner; (iii) whether the other court has a substantially greater interest in ruling on the enforceability of the arbitration agreement; (iv) whether circumstances exist that raise substantial and justifiable doubt about the integrity of the other court with respect to the litigation in question; and (v) other principles applied by the forum court in determining whether to grant injunctive relief.

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[70] *Id.* § 2.13, Reporter's Notes. For different approaches adopted by different courts, *see*, *e.g.*, Soto v. State Indus. Prods., Inc., 642 F.3d 67, 73 (1st Cir. 2011); U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., 241 F.3d 135, 147 (2d Cir. 2001).

[71] RESTATEMENT, *supra* note 20, §§ 2.13-2.14.

[72] *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION ch. 15 (3d ed. 2017).

[73] Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 359-360 (8th Cir. 2007).

[74] *Id.*

(i) Seat of Arbitration

The strongest case for the courts to issue an anti-suit injunction is when the US is the arbitral seat, where US courts are uniquely interested in enforcing the international arbitration agreement and "comity considerations [are] less important."[75] Indeed, the majority of cases in which US courts granted anti-suit injunctions to enforce arbitration agreements concerned a US seat.[76]

If the seat of the arbitration is not in the US, the case for an anti-suit injunction is weaker but the courts will continue to consider the other factors.[77]

(ii) Other Factors

Courts will consider whether a foreign court is competent or better positioned to determine the enforceability of the arbitration agreement than the US court. For instance, it would be difficult for the court considering the motion to say that the recalcitrant party is attempting to "evade [an] important public policy" by litigating in another court which is situated in a New York Convention contracting state.[78] If a foreign court has already ruled on the enforceability of an arbitration agreement, US courts will consider whether that ruling has preclusive effect on the issue, thereby preventing them from granting the anti-suit injunction.[79]

On the flip side, the courts will also ascertain whether there are substantial and

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[75] RESTATEMENT, *supra* note 20, § 2.29, Reporter's Notes.

[76] *See*, *e.g.*, Deutsche Mex. Holdings S.A.R.L. v. Accendo Banco, S.A., No. 1:19-cv-8692 (AKH), 2019 WL 5257995, at *1 (S.D.N.Y. Oct. 17, 2019) (New York seat and New York specified as exclusive forum for court actions); Espiritu Santo Holdings, LP v. L1bero Partners, No. 1:19-cv-3930-CM, 2019 WL 2240204, at *1 (S.D.N.Y. May 14, 2019) (same); WTA Tour, Inc. v Super Slam Ltd., 339 F. Supp. 3d 390, 406 (S.D.N.Y. 2018) (New York seat); Alstom Chile S.A. v. Mapfre Compania De Seguros Generales Chile S.A., No. 1:13-cv-2416 (LTS) (DCF), 2013 WL 5863547, at *1 (S.D.N.Y. Oct. 31, 2013) (New York seat); Bailey Shipping Ltd. v. Am. Bureau of Shipping, No. 1:12-cv-5959 (KPF), 2013 WL 5312540, at *9 (S.D.N.Y. Sept. 23, 2013) (New York seat); Travelport Glob. Distrib. Sys. B.V. v. Bellview Airlines Ltd., No. 1:12-cv-3483 (DLC), 2012 WL 3925856, at *2 (S.D.N.Y. Sept. 10, 2012) (U.S. seat); Stolt Tankers BV v. Allianz Seguros, S.A., No. 1:11-cv-2331 (SAS), 2011 WL 2436662, at *3 (S.D.N.Y. June 16, 2011) (New York seat); *Amaprop*, 2010 WL 1050988, at *3 (New York seat).

[77] RESTATEMENT, *supra* note 20, § 2.29 Reporters' Notes.

[78] Answers in Genesis of Ky., Inc. v. Creation Ministries Int'l, Ltd., 556 F.3d 459, 471 (6th Cir. 2009).

[79] RESTATEMENT, *supra* note 20, § 2.29, Reporter's Notes.

justifiable doubts about the integrity of the foreign court where the litigation is pending. Given that anti-suit injunctions are usually requested at an early stage of the arbitration (if any), as opposed to the award-enforcement stage, US courts are unlikely to be in possession of much information about the foreign court system.[80] Nonetheless, there is nothing to prevent the courts from forming an opinion on the regularity of the foreign court proceedings, albeit with caution.[81]

B. *England*

1. Overview

The UK Supreme Court in the seminal case *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP* ("*Ust-Kamenogorsk*") clarified that the basis for English courts to grant an anti-suit injunction to enforce an arbitration agreement is not their powers in support of arbitral proceedings under section 44 of the Arbitration Act 1996.[82] By way of background, section 44 of the Arbitration Act 1996 only applies if arbitral proceedings are afoot,[83] only allows courts to grant injunctions on an interim basis,[84] and only applies if the arbitrators and arbitral institutions have no power or are unable for the time being to act effectively.[85] However, powers conferred thereunder are exercisable even if the arbitral seat is foreign or unspecified.[86]

Instead, the correct basis was held to be the English High Court's general power to grant injunctions, interim or final, under section 37 of Senior Courts Act 1981. The court can issue anti-suit injunction to restrain foreign proceedings in breach of an arbitration agreement in all cases in which it appears to the court to be "just and

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[80] *Id.*

[81] *See*, *e.g.*, E. & J. Gallo Winery v. Andina Licores, S.A., 446 F.3d 984 (9th Cir. 2006).

[82] *Ust-Kamenogorsk* [2013] UKSC 35.

[83] English Arbitration Act 1996, § 44(1).

[84] *Id.* § 44(2)(e).

[85] *Id.* § 44(5).

[86] *Id.* § 2(3)(b).

convenient" to do so, regardless of whether there are actual or proposed arbitral proceedings.

At the outset, a claimant who seeks an anti-suit injunction on the basis of an arbitration agreement must show that there is "a high degree of probability" that there is an arbitration agreement, and it governs the dispute in question before the foreign court.[87] An English court must then be satisfied that: first, it has the requisite jurisdiction; and second, it can appropriately exercise its discretion to actually grant the anti-suit injunction.[88]

The court must have personal jurisdiction over the recalcitrant party. In international arbitration where the recalcitrant party is usually not within the UK, the injunction applicant must be able to show that (i) England is the arbitral seat[89] or (ii) English law is the governing law of the arbitration agreement.[90]

Even if the jurisdictional requirements are met, the courts still have the residual discretion to decide whether to exercise or withhold its jurisdiction to grant the anti-suit injunction. At this discretionary stage, the English court must consider whether it is required by comity to decline to exercise the jurisdiction due to a lack of "sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails."[91]

The following analyses the differing approaches applied to anti-suit applications based on (i) England being the seat and (ii) English law being the governing law of the arbitration agreement.

2. England Being the Seat

Courts are keen on exercising discretion to grant anti-suit injunctions where arbitration agreements provide for an English seat. They have consistently confirmed

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[87] *See* DICEY, *supra* note 47, ¶ 12-148; Michael Wilson & Partners v. Emmott [2018] EWCA (Civ) 51 (Eng.).

[88] *See* Star Reefers Pool Inc. v. JFC Group Ltd. [2012] EWCA (Civ) 14 (Eng.).

[89] Civil Procedure Rules (CPR), r. 62.5(c)(ii) (Eng.).

[90] CPR, Practice Direction 6B, ¶ 3.1(6)(c) (Eng.).

[91] *See* Airbus Industrie GIE v. Patel [1999] 1 AC 119 (Eng.).

that it is irrelevant to determine whether England is the proper forum. The reason is that parties have chosen an English seat because of English court's readiness to exercise its supervisory powers, including the grant of anti-suit injunctions.[92] In the case of injunctions to enforce arbitration agreements, it has been said that "comity has little if any role to play."[93]

As a result, upon proof of a valid agreement referring disputes to England-seated arbitration, the aggrieved party has *prima facie* entitlement to an anti-suit injunction, unless outweighed by convincing reasons,[94] *e.g.*, the foreign proceedings are at an advanced stage or there is a risk of conflicting decisions.[95]

3. English Law Being the Governing Law of the Arbitration Agreement

Alternatively, a party can approach the English court for permission to serve the claim for anti-suit injunction out of England on the recalcitrant party on the basis that the arbitration agreement is governed by English law (the "governing law jurisdiction gateway"). In this case, however, the English court must additionally consider whether England is "clearly or distinctly the appropriate forum" (the "proper forum") to determine the claim for an anti-suit injunction.[96]

Once the court is satisfied that England is the proper forum to hear the anti-suit application, it is likely to step up to exercise jurisdiction, especially when it is apparent that the English law-governed arbitration agreement is not respected by the foreign court in which the recalcitrant party has decided to commence litigation. As Lord Mance justified in *Ust-Kamenogorsk*:

> In some cases where foreign proceedings are brought in breach of an arbitration clause . . ., the appropriate course will be to leave it to the foreign court to recognise and enforce the parties' agreement on forum. But in the

[92] *See* Enka Insaat ye Sanayi AS v. OOO "Insurance Company Chubb" [2020] UKSC 38 [184] (Eng.).

[93] *Id.*

[94] Donohue v. Armco Inc [2001] 1 UKHL 64 [24] (Lord Bingham P) (Eng.); *Ust-Kamenogorsk* [2013] UKSC 35 [25].

[95] The Angelic Grace [1995] 1 Lloyd's Rep. 87 (Eng.).

[96] *See*, *e.g.*, VTB Capital v. Nutritek Int'l [2012] EWCA (Civ) 808 (Eng.); Spiliada Maritime Corp. v. Cansulex Ltd [1987] AC 460 (Eng.).

> present case the foreign court has refused to do so, and done this on a basis which the English courts are not bound to recognise and on grounds which are unsustainable under English law which is accepted to govern the arbitration agreement. In these circumstances, there was every reason for the English courts to intervene to protect the prima facie right of AESUK to enforce the negative aspect of its arbitration agreement with JSC.[97]

On a separate note, in 2020, the UK Supreme Court's decision in *Enka v. Chubb* has restated the English law's approach to determine what law applies to an arbitration agreement as follows: (i) the law governing the arbitration agreement will be the law expressly chosen by the parties; (ii) absent any choice specific to the arbitration agreement, then the choice of law to govern the substantive contract will be implied to govern also the arbitration agreement, unless this might render the arbitration agreement invalid, in which case another law might be deemed to govern (the "validation principle"); and (iii) if there is no choice of governing law whatsoever, then the arbitration agreement will be governed by the law with which it is most closely connected, which is usually the law of the seat.[98]

As a result, where the parties have chosen a foreign seat but have not made an express choice of law for the arbitration agreement, currently under the rule in *Enka*, the court's jurisdiction to grant anti-suit injunctions will be highly dependent on the parties' express choice of English law governing the substantive contract.[99]

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[97] *Ust-Kamenogorsk* [2013] UKSC 35 [61].

[98] *Enka* [2020] UKSC 38.

[99] Whilst not strictly within the scope of this article, it is worth briefly mentioning that the English approach to determining the governing law of the arbitration agreement will change imminently. As part of the recent reform of the Arbitration Act 1996, the Law Commission (England & Wales) recommended that the *Enka* decision be overridden by a new rule that straightforwardly provides that the law governing the arbitration agreement is (i) the law that the parties expressly agree applies to the arbitration agreement or (ii) where no such agreement is made, the law of the seat of the arbitration in question. For further details, see LAW COMMISSION, REVIEW OF THE ARBITRATION ACT 1996: FINAL REPORT AND BILL ¶¶ 12.77-12.78 (Law Com No 413, 2023), *available at* https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/ uploads/sites/30/2023/09/Arbitration-final-report-with-cover.pdf.

If the Law Commission's Arbitration Bill is passed by the UK Parliament, the English courts' jurisdiction to grant anti-suit injunctions will almost exclusively turn on the fact that England is the seat. The possibility of using the governing law jurisdiction gateway may be restricted to a situation where the parties have chosen a foreign seat but specified English law to be the governing law of the arbitration

4. What About a Foreign Seat?

There is a paucity of English case law and commentaries dealing with the question of whether the courts have a proper basis to grant anti-suit injunctions to support the enforcement of arbitration agreements that provide for a foreign seat.

Apart from the trio of recent cases (which will be analyzed later in this article), there is only one case that has addressed the issue cursorily. In *Malhotra v. Malhotra*,[100] the contract in question provided for Geneva-seated arbitration and English governing law. The Court decided not to grant an anti-suit injunction to enjoin certain Indian proceedings on the ground that these were not subject to the agreement to arbitrate. There was, however, no broader discussion in the decision as to whether an anti-suit injunction can ever be granted in aid of a foreign-seated arbitration, or if so, on what basis.

C. *Observations*

All in all, the US and English rules on the granting of anti-suit injunctions for the enforcement of international arbitration agreements are broadly similar. The courts must (i) be reasonably satisfied the agreements to be enforced are valid; (ii) have the requisite jurisdiction over the recalcitrant party; and (iii) consider it appropriate, on the facts of the case, to exercise the discretion to issue the anti-suit injunctions.

However, the most apparent distinction between the US and the English systems is that the courts' power and jurisdiction to issue anti-suit injunctions in support of international arbitration in the US originates from the arbitration statute, whereas in England the grant of anti-suit injunctions for the enforcement of arbitration agreements is governed by general law.

Another distinguishing point is the location of the seat. Under US law, this is all but one factor to consider. In contrast, English authorities have so far only positively established that courts would readily issue anti-suit injunctions if the arbitration

agreement.

[100] Malhotra v. Malhotra [2012] EWHC (Comm) 3020 (Eng.).

agreements were England-seated, leaving a vacuum regarding the treatment of foreign-seated agreements.

IV. LESSONS FROM A TRIO OF RECENT ENGLISH CASES

Having discussed the relative effectiveness of anti-suit injunctions as an enforcement tool and the US and English rules for court-ordered anti-suit injunctions in support of international arbitration, this section discusses how the same factual matrix involving identical foreign-seated arbitration agreements has recently led to the English courts' diverging decisions in the anti-suit applications made by Deutsche Bank, Commerzbank, and UniCredit. Observations will then be drawn from this trio of cases.

A. *Facts*

These three cases concern Deutsche Bank, Commerzbank and UniCredit (together the "Banks") respectively. The Banks, on behalf of the German construction company Linde, issued certain bonds to RusChemAlliance to guarantee advance payments made by RusChemAlliance to Linde in connection to a construction project in Russia (the "Bond(s)"). Each of the Bonds contained an arbitration agreement stipulating Paris-seated ICC arbitration. While the parties had expressly provided that English law governed the Bonds, the law applicable to the arbitration agreement was not specified.

Linde stopped its work amidst Russia's invasion of Ukraine in 2022 and the subsequent roll-out of financial sanctions. RusChemAlliance then terminated its contract with Linde and demanded payments under the guarantees. The Banks refused to pay due to the sanctions imposed.

In mid-2022, RusChemAlliance commenced litigation in a Russian court against the Banks, alleging serious doubts that the dispute would be fairly resolved in states (including France) that apply sanctions against Russia. In response, in the latter half of 2023, the Banks applied to the English courts for interim anti-suit injunctions to restrain RusChemAlliance from prosecuting the cases in Russia.

B. *Deutsche Bank: England Provides Justice Unobtainable in France*

1. First Instance: SQD *v.* QYP

The English High Court refused Deutsche Bank's anti-suit injunction application at the first instance. To start with, Justice Bright was satisfied that a valid arbitration exists, and that, applying *Enka*, the arbitration agreement is governed by English law absent an express choice to this end.[101] However, in light of the seat being in France, he went to express concerns about the English courts not being the proper forum to issue the anti-suit injunction.[102]

First, Justice Bright held that *Ust-Kamenogorsk* and *Enka* had not anticipated a situation where the seat of the arbitration was outside England. As such, the fact that the arbitration is foreign-seated leads to an "exceptional circumstance" that militates against the grant of an anti-suit injunction.[103]

Second, acknowledging the decision in *Ust-Kamenogorsk*, he noted that the English courts' ability to grant anti-suit injunctions to enforce arbitration agreements did not originate from their powers under section 44 of the Arbitration Act 1996 to grant interim relief in support of Englandor foreign-seated arbitrations.[104] Even if the court were to exercise power under the Arbitration Act 1996, it would still have to assess the appropriateness to grant such relief in connection with a foreign-seated arbitration "if to do so might give rise to a 'conflict' or 'clash.'"[105]

Third, Justice Bright deemed it relevant to understand the applicable legal regime in France in relation to court-ordered anti-suit injunctions. He provided three alternative hypothetical scenarios with corresponding courses of action: (i) if the French court would grant an interim anti-suit injunction to Deutsche Bank, it might

[101] SQD v. QYP [2023] EHWC (Comm) 2145 [17](i)–(ii)].

[102] *Id.* [17](viii).

[103] *Id.* [36].

[104] *Id.* [42].

[105] *Id.* [45].

be "unlikely to be appropriate" for the English court to grant it; (ii) if anti-suit injunctions could be sought from the French court but, for some reasons, would be practically difficult to obtain on an interim basis, it might be "potentially appropriate" for the English court to step in; and (iii) if French courts could not grant anti-suit injunctions, it might be "important to understand why."[106]

As the foreign law evidence put in by Deutsche Bank showed that it would be impossible to obtain anti-suit injunctions in France,[107] the Court ultimately proceeded with (iii) and examined the reasons for this impossibility. Justice Bright found that "French law has a philosophical objection" to anti-suit injunctions,[108] which are simply "not in the French legal toolkit" as they "contradict the fundamental principle of freedom of legal action."[109] The French dislike for foreign anti-suit injunctions was further underlined by the fact that French courts might issue an anti-suit injunction to restrain a foreign court's anti-suit injunction.[110]

Fourth, Justice Bright analyzed the emergency arbitrator provisions contained in the ICC Rules (2021). Article 29.7 states that the provisions "are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures . . . pursuant to [the ICC Rules]." He construed Article 29.7 to infer that it is the court of the seat (*i.e.*, the French court) to be naturally competent and have the necessary jurisdiction.[111]

After all, Justice Bright circled back to the utmost importance of seat. The fact that the arbitration agreement is governed by English law does not necessarily mean

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[106] *Id.* [77]–[78].

[107] SQD v. QYP [2023] EHWC (Comm) 2145 [79].

[108] *Id.* [82].

[109] *Id.* [83].

[110] *Id.* [84].

[111] *Id.* [89].

that England is the proper forum for the grant of an anti-suit injunction.[112] He reasoned that an English interim anti-suit injunction in the instant case would be inconsistent with the approach taken by the court and the law of the seat.[113] Also, he stressed that parties, having chosen Paris as the seat, "must be taken to have done so knowing the French courts will not grant [anti-suit injunctions]."[114]

2. On Appeal: *Deutsche Bank AG v RusChemAlliance LLC*

Having considered fresh evidence from Professors Claude Brenner and Louis d'Avout on the content of French law, the Court of Appeal allowed Deutsche Bank's appeal, granting permission to serve out and granting the anti-suit injunction.

First, the Court of Appeal held that an English anti-suit injunction to enforce an arbitration agreement could not be viewed as being contrary to French public policy. Whilst a French court is unable to grant the anti-suit injunction as part of its domestic toolkit, French case law has shown that the court would recognize an anti-suit injunction granted by a foreign court which has such injunctions as part of its own toolkit,[115] given that the foreign court has indirect jurisdiction based on (i) its connection with the dispute, (ii) compliance with international substantive and procedural public policy, and (iii) the absence of fraud against the law.[116]

Second, England was the proper forum for Deutsche Bank to apply for the anti-suit injunction. Granted, the English court could readily exercise its supervisory power to grant anti-suit injunctions to enforce arbitration agreements with an English seat. The Court of Appeal held that that would not be the only situation where England is the proper forum. Ultimately, an English court is to "identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends

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[112] *Id.* [92].

[113] SQD v. QYP [2023] EHWC (Comm) 2145 [95].

[114] *Id.* [96].

[115] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 14, 2009, Bull. civ. I, No. 207 (Fr.).

[116] Deutsche Bank AG v. RusChemAlliance LLC [2023] EWCA (Civ) 1144 [30(3)].

of justice."[117] Here, it was just for England to hear the anti-suit application since such a claim would not be entertained in France, "not because of any hostility to the concept, but because of a lack of domestic procedural rules permitting them."[118]

C. *Commerzbank: International Legal Order Takes Precedence*

In *Commerzbank AG v. RusChemAlliance*,[119] the High Court granted anti-suit injunction to Commerzbank, refusing to follow the *Deutsche Bank* first instance decision which, at that time, had just been handed down.

After finding that there existed a Paris-seated ICC arbitration agreement and that it was governed by English law (again, by reference to the choice of English law for the Bond), Justice Bryan immediately posited his view that "overall, it is just and convenient to grant an injunction" under section 37 of the Senior Courts Act 1981.[120]

The Court only then embarked on the preliminary question of jurisdiction. Justice Bryan held that England was the proper place to bring the anti-suit injunction application.[121]

First, the Bond and the arbitration agreement therein, were governed by English law.[122] English law, therefore, was "no stranger to this dispute".[123]

Second, English law provided a juridical advantage in the form of an anti-suit injunction which the French courts do not. Unlike the *Deutsche Bank* decisions, Justice Bryan touched on the relevance of the New York Convention to England and France as contracting states.[124] As submitted by Commerzbank's counsel, even if French courts may take a dim view of anti-suit injunctions, "it would be remarkable

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[117] *Id.* [37] (citing *Spiliada Maritime* [1987] AC at 475–84).

[118] *Deutsche Bank* [2023] EWCA (Civ) 1144 [41].

[119] Commerzbank AG v. RusChemAlliance [2023] EWHC (Comm) 2510.

[120] *Id.* [20]–[23].

[121] *Id.* [28].

[122] *Id.* [28(a)].

[123] *Id.* [63].

[124] *Id.* [34].

to suggest that such a stance would outweigh the pro-arbitration policy of a signatory to the New York Convention of giving effect to the parties' agreement to arbitrate."[125]

Third, neither Russia nor France were the proper places to obtain the anti-suit injunction. Expert evidence provided by Professor Mathias Audit stated that the French courts would consider themselves in lack of jurisdiction to grant any pre-arbitration interim relief to enforce the arbitration agreement.[126]

On the whole, Justice Bryan held that the fact that the seat of the putative arbitration is in Paris did not amount to an "exceptional circumstance" which could outweigh the three factors mentioned above.[127] The resulting anti-suit injunction would present "no clash or conflict with law of the seat."[128] The Court also adopted Professor Audit's view that French courts would "welcome, within the French legal order, an anti-suit injunction" issued by the English courts to enforce the arbitration agreement.[129] Two points raised by Professor Audit received the Court's particular attention: (i) France, a pro-arbitration jurisdiction, would not see the anti-suit injunction as a contradiction to its conception of international public order because the purpose of such foreign relief was to safeguard arbitrations within its own jurisdiction and (ii) French courts' refusal to recognize such anti-suit injunction would also be tantamount to them acting against the EU and French public policy, *i.e.*, sanctions rules, which the Russian litigation was aimed at undermining.[130]

D. *UniCredit: England Is Not the Only Forum to Achieve Justice*

In *G v. R*,[131] the Court refused UniCredit's anti-suit injunction application on the

[125] Commerzbank AG v. RusChemAlliance [2023] EWHC (Comm) 2510 [37(3)].

[126] *Id.* [58(b)].

[127] *Id.* [29], [60], [66(2)–(3)]

[128] *Id.* [72].

[129] *Id.* [58].

[130] *Id.* [54].

[131] G v. R [2023] EWHC (Comm) 2365.

ground that England had no jurisdiction to hear the claim.[132]

Sir Nigel Teare (sitting as High Court Judge) held that the governing law jurisdictional gateway could not apply. Applying *Enka* differently, it was found that a French seat meant that the so-called "French substantive rules applicable to international arbitration"[133] would negate the presumption that the choice of English law for the Bonds would apply to the arbitration agreement.

The Court went on to explain that, even if the gateway was applicable, the English court would still not be the proper forum as it was not "the only forum where substantial justice can be done."[134] The arbitral tribunal seated in France could award damages for breach of the arbitration agreement, despite the questionable enforceability of such award in Russia.[135] The fact that damages are a less effective remedy than an anti-suit injunction does not mean that substantial justice could not be achieved.[136]

Perhaps most remarkably, confronted with UniCredit's submission that Russia departed from its obligation as a New York Convention contracting state by permitting litigation in violation of an international arbitration agreement, the Court noted that "whilst that is a striking development, . . . it does not assist me in excluding that substantial justice cannot be done in Paris."[137]

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[132] *Id.* [48]. Note that this decision was appealed to the Court of Appeal and the UK Supreme Court. After the author's submission of this paper to the Young ITA Writing Competition 2023–2024 on January 15, 2024, the Court of Appeal handed down its judgment on February 2, 2024, allowing UniCredit's appeal and granting an injunction to require RusChemAlliance to discontinue the Russian proceedings ([2024] EWCA (Civ) 64). RusChemAlliance's appeal to the UK Supreme Court was later dismissed on April 23, 2024 (UKSC 2024/0015). *See* https://www.supremecourt.uk/watch/uksc-2024-0015/decision.html.

[133] *See* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 20, 1993, Bull. civ. I, No. 372 (Fr.); Dallah Real Est. & Tourism Holding v. Ministry of Religious Aff. [2011] 1 AC 763 (Eng.); Kabab-Ji v. Kout Food Grp. [2022] All E.R. 911 [88]–[89] (Eng.).

[134] G v. R [2023] EWHC (Comm) 2365 [37].

[135] *Id.* [39].

[136] *Id.* [41]–[44].

[137] *Id.* [46].

E. *Taking Stock of the Decisions*

The English courts' decisions above shed some light on the arguments for and against the grant of court-ordered anti-suit injunctions in aid of enforcing foreign-seated arbitration agreements. Before moving on, it is instructive to first examine these decisions in a cross-sectional manner with respect to the weight accorded respectively to (i) the foreign seat, (ii) the forum, and (iii) the international legal order.

1. Importance of the Foreign Seat

On one end of the spectrum, the *Deutsche Bank* (High Court) and *UniCredit* decisions take a view that the seat sets the "ceiling" for the variety of remedies for the enforcement of the arbitration agreement. If the foreign seat does not offer anti-suit injunction as an option, then the forum court should follow suit and take a non-interventionist approach.

Sitting in the middle is the *Deutsche Bank* (Court of Appeal) decision. The court of the foreign seat, albeit without the power to grant an anti-suit injunction itself, may recognize anti-suit injunctions if granted properly according to the law of the forum court. If this is the case, the forum court will not offend the foreign seat by issuing an anti-suit injunction because it is generally compliant with the seat's national policy.

On the other end, the *Commerzbank* decision presents a directly opposite approach. There is no reason why the court of the foreign seat will not recognize the anti-suit injunction issued by the forum court. The foreign seat has an interest in such anti-suit injunction, which directs disputes wrongfully brought before a third state back to the supervisory jurisdiction of the foreign seat.

2. Role of the Forum Court

The *UniCredit* decision reflects a narrow vision of the role of the forum court. As long as the court of the foreign seat can offer some form of remedies for a breach of the arbitration agreement, the forum court is not the only place that offers substantial justice. Hence, the forum court will not be able to intervene just because its anti-suit injunction is a more effective remedy than those available at the foreign seat.

The approach taken in the *Deutsche Bank* (High Court and Court of Appeal)

decisions assigns a greater responsibility to the court of the forum. The forum acts as a safety net and fills in the gap left by the foreign seat. It can step in to grant an anti-suit injunction to enforce foreign-seated arbitration agreement to the extent that it does not clash with the regime in place at the foreign seat.

3. Relevance of the International Legal Order

The *UniCredit* decision represents a localized approach. Even where the three jurisdictions in question (the forum, the foreign seat and the third state) are all New York Convention Contracting States, the forum is still expected to defer to the foreign seat in relation to the enforcement of the arbitration agreement.

A global approach is implicitly advocated in the *Commerzbank* decision, where the New York Convention shall be construed in such a way as to allow the forum to take independent steps to uphold foreign-seated arbitration agreements. After all, the grant of such anti-suit injunctions furthers the New York Convention's aim, *i.e.*, to increase the transnational enforceability of arbitration agreements.

V. JUSTIFYING THE LEGITIMACY OF COURT-ORDERED ANTI-SUIT INJUNCTIONS IN AID OF ENFORCING FOREIGN-SEATED ARBITRATION AGREEMENTS

This section crystalizes the foregoing analysis and puts forward a positive case that national courts should not hesitate to grant anti-suit injunctions to restrain foreign litigation brought in violation of foreign-seated arbitration agreements.

To begin with, not merely is it inaccurate to say that anti-suit injunctions are not accepted outside of the common law sphere,[138] it would also be an overstatement to say that a request for an anti-suit injunction when "the seat of the arbitration . . . is outside the jurisdiction is a novel feature."[139] There have been decided cases in offshore jurisdictions, such as Bermuda and the British Virgin Islands, where courts have granted interim anti-suit injunctions in aid of enforcing foreign-seated arbitration agreements.[140] In Singapore, the High Court in *R1 International Pte Ltd v.*

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[138] *See supra* Section II.B.3.

[139] SQD [2023] EHWC (Comm) 2145 [46].

[140] *See* IPOC Int'l Growth Fund Ltd v. OAO "CT-Mobile" LV Finance Grp. [2007] CA (Bda) 2 Civ (Berm.)

Lonstroff AG also did not exclude altogether the grant of an interim injunction to enforce a foreign-seated arbitration agreement.[141] However, regarding permanent anti-suit injunctions, the Court hesitated and said that "[a]ny such extension of power would have the potential to affect more situations than simply those concerned with arbitration and therefore policy considerations would come into play" because "Singapore should not be an international busybody; it is only when strong reasons are present that the courts would intervene."[142]

But why should it not be an "international busybody?" New York Convention contracting states, if satisfied that the arbitration agreement at hand is valid, have international obligations under Article II(3) not to do anything other than refer parties to arbitration.[143] The obligation under Article II(3) extends beyond ordering a stay or dismissal of litigation,[144] and is reinforced by granting an anti-suit injunction of such nature:[145] "Whereas [Article II(3)] identifies the duty which rests on the court seized of court proceedings to stay those proceedings and to refer the parties to arbitration, it contains nothing which vests in that court exclusive jurisdiction to enforce that arbitration agreement."[146] Furthermore, this obligation applies to courts when faced with both locally and foreign-seated international arbitration agreements.[147] Therefore, Article II(3) should be construed to allow courts to grant anti-suit injunctions in aid of the enforcement of foreign-seated arbitration agreements.

(holding by the Bermuda Court of Appeal that an injunction could be granted to enforce a Swedish arbitration clause); Finecroft Ltd. v. Lamane Trading Corp. [2006] ECSC J0106-1 (Virgin Is.).

[141] [2014] SGHC 69, [53].

[142] *Id.* [54]–[55].

[143] *See supra* Section II.A.1.

[144] *See supra* Section II.B.1.

[145] *See* GEORGE A. BERMANN, INTERNATIONAL ARBITRATION AND PRIVATE INTERNATIONAL LAW 318 (2017).

[146] The Front Comor [2005] EWHC (Comm) 454 [56] (Eng.).

[147] *See* John P. McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COM. 735, 748–749 (1971); Jan Paulsson, *The New York Convention in International Practice: Problems of Assimilation*, *in* THE NEW YORK CONVENTION OF 1958, at 100, 103–04 (ASA Special Series No. 9, 1996).

In response, one may say that, fundamentally, the New York Convention as an international treaty demands a heightened level of mutual trust and comity among contracting states. This is because courts of different jurisdictions will easily reach diverse decisions on validity or enforceability of an arbitration agreement, arbitrability of disputes and violation of policies, given the complexity of the relevant applicable law issues.[148] On this view, it is not ideal to end up in a situation where one state issues an anti-suit injunction and the "targeted" state issues an anti-arbitration injunction in response.[149]

Nevertheless, it has been said that international comity should play a diminished role in the enforcement of arbitration agreements. First, even jurisdictions that do not grant anti-suit injunctions for breach of arbitration agreements would be prepared to award damages,[150] and it is difficult to see why an award of damages against the recalcitrant party who has gone before a foreign court in violation of an agreement to arbitrate would be any less offensive to international comity than imposing an injunction on that party barring it from having that recourse in the first place.[151] Second, it is equally offensive to international comity to deny recognition and enforcement of a foreign judgment[152] on the ground that the recalcitrant party has obtained the positive result by breaching their obligations under the agreement to arbitrate.[153]

In any event, in the case of a court-ordered anti-suit injunction in aid of the enforcement of arbitration agreements, the national court is not doing so for egotistic

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[148] Marco Stacher, *You Don't Want to Go There—Antisuit Injunctions in International Commercial Arbitration* 23 ASA BULL. 640, 648 (2005).

[149] Emmanuel Gaillard, *Reflections on the Use of Anti-suit Injunctions in International Arbitration*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 201 (Loukas Mistelis & Julian Lew eds., 2006).

[150] *See supra* Section II.B.4.

[151] *See* BERMANN, *supra* note 145, ¶ 321; Marco Stacher & Michael Feit, *Parallel Proceedings and Lis Pendens*, *in* ARBITRATION IN SWITZERLAND: THE PRACTITIONERS GUIDE 1414 (Manuel Arroyo ed., 2013).

[152] *See supra* Section II.B.5.

[153] *See* Bermann, *supra* note 145, ¶ 321; Stacher & Feit, *supra* note 151.

reasons to protect its own jurisdiction. Instead, the anti-suit injunction is aimed at safeguarding the jurisdiction of the arbitral tribunal.[154] Accordingly, it should make no difference whether this anti-suit injunction is issued by the court of the seat or by a court of another state.

The counterargument to this end would be that the seat has been chosen by the parties in the arbitration agreement for a reason. If a seat with no recourse to anti-suit injunctions is chosen, this lacuna is part of the "package" to which the parties have agreed.[155] Nonetheless, the "bigger package" that the parties have signed up for, indirectly, was the New York Convention framework.[156] The recalcitrant party should be aware that their contractual obligation not to litigate has been "internationalized" and can be recognized and enforced by way of an anti-suit injunction outside of the seat.[157]

VI. CONCLUSION

In a nutshell, a court-ordered anti-suit injunction is an effective and legitimate tool to enforce international arbitration agreements. Despite the importance of the arbitral seat's supervisory power, courts of jurisdictions other than the seat should feel more comfortable granting anti-suit injunctions to restrain proceedings brought in violation of the agreement to arbitrate. This does not contradict and is in line with the transnational pro-arbitration spirit of the New York Convention, which prevails over local and regional laws and policy considerations.

With this in mind, in order to maximize the enforceability of international arbitration agreements, national courts need *sui generis* rules to determine their jurisdiction to grant such anti-suit injunctions, rather than relying on rules that are catered to litigation.

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[154] THOMAS RAPHAEL, ANTI-SUIT INJUNCTION ¶ 7.50 (2d ed. 2019); OLIVIER LUC MOSIMANN, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL COMMERCIAL ARBITRATION 34 (2010).

[155] *See* RAPHAEL, *supra* note 154, ¶ 7.49; *see also supra* Sections IV.E.1–IV.E.2.

[156] *See supra* Section IV.E.3.

[157] *See supra* Section IV.C.

Should the court be satisfied that an international arbitration agreement, irrespective of the location of the seat, is *prima facie* enforceable under Article II(1) and (2), there should be a rebuttable presumption for the granting of an anti-suit injunction to restrain the recalcitrant party from bringing or continuing the court proceedings in order to minimize the risk of irreparable harm caused by the *prima facie* breach of the arbitration agreement.

Any requirement for a court to be the best forum or a better forum than the seat is unnecessarily stringent. Whilst the assessment of other factors (as in the US approach)[158] can be helpful in ascertaining whether a particular recalcitrant party has a clear connection with the forum where the anti-suit injunction is sought, it is submitted that comity-related considerations should not be taken into account in the court's balancing exercise because, save for some limited exceptions, it is the arbitral tribunal (not a court) who should have the first say about the existence and validity of an international arbitration agreement.[159]

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[158] *See supra* Section III.A.4.

[159] *See supra* Section II.A.2.

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Table of Contents

Articles

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