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Anti-Suit and Anti-Arbitration Injunctions, A Comparative Analysis of Pakistan, India and U.K

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Abstract

This article provides a comparative study of anti-suit and anti-arbitration injunctions in Pakistan, India and the UK. Anti-suit injunctions are equitable, in personam remedies that prevent parties from engaging in parallel proceedings in court in violation of an arbitration agreement, which protects arbitral jurisdiction. Under the Specific Relief Act, such remedies are regularly granted by U.K courts under Section 37 of the Senior Courts Act 1981, while the Indian courts have adopted the Modi Entertainment test, the Pakistani courts are primarily based on the doctrine of inherent jurisdiction because of the statutory restrictions under the Specific Relief Act. On the other hand, anti-arbitration injunctions put a stop to the arbitral procedure. Pakistani courts have traditionally granted arbitral awards based on the traditional civil litigation principles of balance of convenience and irreparable loss, though the awards are controversial because they may undermine the autonomy of the arbitral process and the principles of Kompetenz-Kompetenz and separability. Under English and Indian law, however, such relief is only available in exceptional circumstances where an arbitration agreement is unenforceable, ineffective or a sham. The chapter also explores the growing jurisdiction of arbitral tribunals to grant injunctive relief under the rules of the arbitral institutions and under Article 17 of the UNCITRAL Model Law. Finally, it calls for the adoption of UNCITRAL standards in the statute and for judicial restraint in order to create an arbitration-friendly legal environment.

Keywords: Kompetenz-Kompetenz, Anti Suit Injunction, Anti Arbitration Injunction, Entertainment, UNCITRAL, Arbitral Jurisdiction

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Introduction

If a party to an arbitration agreement initiates court proceedings with respect to an arbitration matter, then the other party may apply for a stay of the proceedings pursuant to section 34 of the Arbitration Act in favour of the arbitration. The defendant also may request an "anti-suit" injunction prohibiting the plaintiff from filing or pursuing a parallel action in any other domestic or foreign court if the court grants the stay. If the court denies the stay, then the plaintiff can obtain an anti-arbitration injunction to prevent the arbitration proceedings from being filed or continued against him. A previous application seeking a stay before requesting for an anti-arbitration injunction is not required in order to obtain an anti-arbitration injunction. The Pakistani law doesn't have any special provision on these two reliefs. They are therefore primarily a product of judicial interpretation, in terms of their availability and the principles on which they are applied.

The article first discusses anti-suit injunctions and its lack of any known case in Pakistan, which has issued anti-suit injunction against foreign proceedings. It also explores whether or not anti-suit injunction would be

recognized in Pakistan, India and England in future. The first section on this chapter would discuss anti-suit injunctions and its absence in Pakistani jurisprudence in view of its possible recognition in these future times to come. The second part looks into the anti-arbitration injunctions and analyses how the courts in Pakistan, India and U.K apply the grounds for granting anti-arbitration injunctions in domestic and foreign proceedings and how much anti-arbitration injunctions prove to be judicial interference in the arbitral process. The chapter culminates with a proposed ideal way forward for Pakistan, India and U.K keeping in mind the nature and purpose of arbitration.

Anti-Suit Injunctions

An anti-suit injunction would traditionally be an injunction issued by a court to prevent a party from commencing or continuing a proceeding before another court, including a foreign court. If the parties have agreed to arbitrate their disputes at a specific arbitral forum but one party commences or threatens to commence proceedings in an alternative forum, the issue of an anti-suit injunction arises in this context and the question is whether courts in Pakistan, India and U.K have the jurisdiction to issue an anti-suit injunction? This will be especially relevant when proceedings are conducted in a foreign court. Civil-law and common-law jurisdictions have different concepts of judicial sovereignty and of the more or less significant role of private rights, and thus very different approaches to anti-suit injunctions. In civil-law systems, more often, it is suggested that the court which has jurisdiction over a case should have exclusive jurisdiction to decide the case. It is based on judicial sovereignty, which usually outweighs the private rights of the parties and the expedient of parallel proceedings. As a consequence, any proceedings brought in violation of an arbitration clause are deemed to have the primary jurisdiction of the court in which they are filed and an anti-suit injunction issued by another court is found to be of no effect.

An anti-suit injunction may also be applicable if one party challenges an arbitral award and the award creditor attempts to enforce the award in another county or state (*Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2003; *Sabah Shipyard (Pakistan) Ltd. v. Islamic Republic of Pakistan*, 2007; *O.N.G.C. v. Western Co. of North America*, 1987). Anti-suit injunctions can thus be applied in arbitration in four different circumstances: (Strong, 2018, pp. 172–173)

a) A party can apply for an anti-suit injunction by a court to ensure compliance with the arbitration provision.

b) A party can apply to the court for an anti-arbitration injunction to stop the arbitration process from starting or being continued.

c) A party may seek an anti-suit injunction in favor of its jurisdiction from the arbitral tribunal. (Ibid, Chapter 9)

d) A party may obtain the relief of an anti-suit injunction from a court in order to prevent concurrent proceedings for the enforcement *of a foreign arbitral award.*

A court order to enforce an arbitration clause, in the form of an anti-suit injunction, is thus judicial approval of arbitration. An anti-arbitration injunction, on the other hand, puts the parties on trial based on the invalidity of the arbitration agreement (Groskie, 2012, p. 296). It therefore has a negative impact on arbitral proceedings and it is not intended to secure arbitration (Ibid, p. 309). Instead, it protects the basic rights of a party to seek judicial remedy if the arbitration agreement is ‘void or inoperative or incapable of being performed’ as defined in Article II (3) of the NYC (Bansal & Agarwal, 2015, p. 620). In these cases, the court may stop the arbitration proceeding from continuing if it would be "vexatious or oppressive litigation (Strong, 2018, p. 163).

Under common-law, on the other hand, there is a greater focus on the practical justice of the transaction, and

implementing the rights of the parties as set out in their contract. The issues of foreign judicial sovereignty and comity are used sparingly and subordinate in a situation where they compete with private justice (Raphael, 2008, pp. 15–17). An anti-suit injunction is granted in personam against the foreign proceedings themselves (and not against the foreign court) (*Turner v. Grovit & Others*, 2002), based on this. The New York Convention does not grant a Contracting State court the power to issue anti-suit injunctive relief barring any proceedings brought by a court of another Contracting State, which is in contravention of the arbitration agreement. It instead calls for the case before the court and the parties to be referred to arbitration upon the existence of an arbitration agreement, in lieu of being "null and void, inoperative or incapable of being performed (Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, art. II(3)).

The Pakistani courts have never issued an injunction prohibiting proceedings before a foreign court, or an anti-suit injunction. This is backed up by section 58(b) of Specific Relief Act, 1877 which bars the granting of an injunction by a court against a court which is not subordinate to the court granting the injunction. In addition, there are signs in the Pakistani jurisprudence that allows for such jurisdiction if (and only if) circumstances exist to allow for such jurisdiction. In the revenue matter, an injunction was issued to stop suit from being pending or launched against a landlord in other courts in Pakistan pending appeals, which had been filed in the High Court. The court did not have to deal with arbitration, but still found that they had the inherent jurisdiction to restrain proceedings before a foreign court if their decision would affect or prejudice the determination before the court (*Ahmad Din and Others v. Faiz Ali and Others*, 1954).

The same was later followed by the Sindh High Court in *HBCO case* (*Hub Power Co. v. WAPDA*, 1999) wherein the Court restrained parties from initiating or continuing proceedings before a Civil Judge in Lahore in the context of arbitral proceedings, holding that those proceedings had been instituted deliberately to impede the exercise of the High Court's jurisdiction. The injunction was issued to prevent further abuse of process and to protect the integrity of the judicial process. In *Nadeem Ghani v. United Bank Limited* (*Mills Ltd., Kohat v. Waqar Ahmad Chaudhry*, 1972), the defendant commenced proceedings against the plaintiff before the English courts, following which the plaintiff instituted proceedings in Pakistan seeking an injunction to restrain the foreign proceedings. The Sindh High Court declined to interfere with the English proceedings, holding that they had been lawfully instituted pursuant to the parties' agreement by which the plaintiff had submitted to the jurisdiction of the English courts. The Court further observed that the plaintiff's application did not appear to have been made bona fide and that restraining proceedings in England, which had commenced before the Pakistani proceedings, would constitute an improper exercise of the discretion under section 56 of the Specific Relief Act, 1877. The court held that the plaintiff consequently failed to establish a prima facie case, the balance of convenience did not favour him, and no irreparable loss was shown to arise from continuation of the English proceedings. Accordingly, the application under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure for restraining the English proceedings was dismissed (*Riaz-ur-Rehman Khan v. Lufthansa German Airlines*, 2002).

In Pakistan National Shipping Corporation case (Pakistan National Shipping Corporation & Others v. Coniston Limited, 2020), the Sindh High Court declined to grant anti-suit injunctions in favour of plaintiff with the observations that the plaintiffs failed to prove a prima facie case, balance of convenience and irreparable loss for an anti-suit injunction and Defendant No. 1 was not within its personal jurisdiction. As to the law for granting or refusing anti-suit injunctions, the Court stated that an anti-suit injunction is an equitable, in personam judicial order that must be granted with great caution and only in the clearest case of oppression or injustice, and that it must be an indispensable prerequisite for the granting of an anti-suit injunction that the defendant be personally subject to the jurisdiction of the court under Sections 19 and 20 of the C.P.C. Adopting Modi Entertainment Network and others v. W.S.G Cricket PTE. Ltd. (AIR 2003 SC 117), the Court laid down three principles which are as follows: (a) the defendant must be amenable to the personal jurisdiction of the court; (b) refusal of the injunction would frustrate the ends of justice and injustice would be allowed to continue; and (c) The Principle of Comity - respect for the Court in which the commencement or continuance of

action/proceeding is sought to be restrained - must be borne in mind. Resultantly, the court dismissed the applications filed by plaintiff seeking anti-suit injunctions and application for rejection of plaintiff filed by the defendant no.1

Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

In England, the High Court has a wide degree of inherent jurisdiction to grant injunctions where it is "just and convenient" to do so as provided by Section 37 of the Senior Courts Act 1981 (the Senior Courts Act). It is generally the case that an arbitration clause in the agreement of the parties will be recognised by the English courts. The court can stop litigation in England u/s 9 of the Act where an arbitration clause exists; and an anti-suit injunction could be issued to prevent a party to an arbitration agreement funding foreign litigation. It will likewise generally be granted to preserve a claimant's legal or equitable rights where the proceedings violate an arbitration agreement (or jurisdiction clause) and not as to the foreign court, which of course cannot be the subject of an injunction by the English court. Furthermore, in a non-contractual case, the court may also prohibit the foreign court proceedings that are considered vexatious, oppressive or unconscionable.

The arbitration provision is invoked, for example, to get a court order prohibiting enforcement of proceedings in violation of an arbitration agreement, known as an anti-suit injunction. The power under s 37 is broader, which is not subject to the terms and conditions of section 44 of the Arbitration Act (Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP, 2013). But the general power contained in section 37 must be used judiciously, particularly if any arbitration is in progress or being called into existence under the terms and provisions of the Arbitration Act (Ibid, 60). This rationale has been followed in the recent case of in Southport Success S.a. v Tsingshan Holding Group Co Ltd ([2015] EWHC 1974 (Comm)). that also clarified that the correct basis for an application for an anti-suit injunction is section 37 of the Senior Courts Act 1981 and not section 44 of the Arbitration Act. This applies even where arbitral proceedings are ongoing. Such injunctions can only be used where proceedings to challenge an award are commenced in a country that is not party to Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation) (countries outside the EU).

As a result of the Court of Justice ruling in Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc. (Case C-185/07), if a party brings legal proceedings in the courts of another member state of the EU in breach of an arbitration agreement, the English courts cannot grant anti-suit injunctions to interrupt those proceedings. It is for the relevant member state to recognise and enforce arbitration agreements. Moreover, it was held to be contrary to the Brussels Regulation (Council Regulation (EC) No. 44/2001, 2000; Regulation (EU) No. 1215/2012, 2012). Therefore, anti-suit injunctions can no longer be issued by courts if the foreign proceedings in-question were commenced in the courts of a member state of the Brussels Regulation or the Lugano Convention (Lugano Convention, 2007). This was confirmed in Shashoua & Ors v Sharma ([2009] EWHC 957 (Comm)) where Cooke J stated that the West Tankers ruling is not applicable to proceedings commenced in a non-EU member state court.

The High Court of Justice Queen's Bench Division Commercial Court (Atlas Power Ltd. & Others v. National Transmission and Despatch Co. Ltd., 2018) issued anti-suit injunctions permanently restraining NTDC from challenging a Partial Final Award in an LCIA arbitration in Lahore, Pakistan or any jurisdiction other than England and Wales on the ground that the seat of the Arbitration is London. In this case, the arbitration arose under PPAs containing Article XVIII, including s.18.3 providing for LCIA arbitration and permitting arbitration to be conducted in London in specified circumstances. The LCIA Court had determined London to be the seat under Article 16.1 of the 1998 LCIA Rules, and the Arbitrator subsequently confirmed London as the seat. NTDC nevertheless commenced proceedings in Lahore on 7 July 2017 seeking to declare the Partial Final

Award null and void and to set it aside; on 10 July 2017 the Lahore Civil Court suspended the Award pending the Pakistani proceedings, although that order was subsequently suspended. The Court held, following C v D [2008] 1 Lloyd's Rep. 239, that selection of the seat constitutes a choice of forum for remedies attacking an award: an agreement as to the seat is analogous to an exclusive jurisdiction clause, so a claim concerning the existence or scope of the arbitrator's jurisdiction or the validity of an interim or final award is to be made only in the courts of the designated seat. The Court also endorsed the reasoning made in C v D [2007] 2 Lloyd's Rep 367, that where an award had been issued, an attempt in another jurisdiction to invalidate it constituted an especially clear breach

In a famous English commercial insurance case titled Catlin Syndicate Limited (underwriting as XL Catlin Syndicate 2003), XL Insurance Company SE v. Weyerhaeuser Company ([2018] EWHC 3609 (Comm)), the petitioner sought a final order restraining Weyerhaeuser from pursuing proceedings under the Layer 4 Policy before the District Court in the State of Washington, on the basis that the parties had agreed to refer the relevant disputes to arbitration in London. The High Court of Justice (England and Wales), Commercial Court observed that Washington law led to the same result as English law and that there was no true ambiguity requiring resolution against arbitration and held, to the standard required on a final hearing by restraining the Weyerhaeuser from pursuing proceedings before the District Court in the State of Washington. Importantly, the order was directed to Catlin to enforce what it had agreed, and not to the District Court in Washington. The England and Wales High Court, Commercial Court in case titled as The River Rock Securities Limited v. JSC International Bank of St Petersburg, ([2020] EWHC 3324 (Comm)) granted interlocutory anti-suit injunctions restraining the Russian Bank from pursuing its claims and proceedings pending before the courts of St Petersburg Russia on the ground that the underlying claims were duly covered by the arbitration agreements and the dispute was arbitrable. Moreover, the Court restrained the bank from taking steps within England to enforce in consequence of expected Russian court judgment arising out of such proceedings

There are other instances of English Court decisions wherein it declined anti-suit injunctions on different grounds. The English Commercial Court in Ecobank Transnational Incorporated v. Mr Thierry Tanoh ([2015] EWHC 1874 (Comm)) refused to grant anti-suit injunctions on the ground that the claimant (EcoBank) neither made resort to the English court timely nor it initiated arbitration by causing an inordinate delay in approaching the English Court. Similarly, the High Court of Justice, Queen's Bench Division Commercial Court also refused to issue anti-suit injunction in case titled as Essar Shipping Ltd v Bank of China Ltd. ([2015] EWHC 3266 (Comm)) on the ground that an injunction is an equitable relief, and therefore may be denied when there is dilatoriness or unconscionable conduct, and comity is a factor, therefore the ESL failed to act in a timely fashion based on those principles.

Another interesting development in recent case law is the issuance of an anti-suit injunction against a non-party to the arbitration agreement who commences vexatious and oppressive parallel proceedings. In Joint Stock Asset Management Company Ingosstrakh Investments v BNP Paribas SA ([2012] EWCA Civ 644) the Court of Appeal ruled that a third party (Party 1) colluded with a party to the arbitration agreement (Party 2) in commencing parallel proceedings, with the intention of harassing the counter-party to the arbitration agreement. The Supreme Court dismissed the appeals against the conclusion of courts in Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP (AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC, 2013) and ruled that courts have jurisdiction to issue final anti-suit injunctions to prevent a party from initiating or proceeding foreign courts proceedings in violation of an arbitration agreement even where there is no actual, proposed or intended arbitration.

Most applications for anti-suits protection are brought by a party who argues that they have entered into an arbitration or jurisdiction agreement and that the other party has initiated or is intending to bring proceedings in breach of that arbitration or jurisdiction agreement(QBE Europe SA/NV v. Generali España de Seguros y Reaseguros, 2022, para. 9). The Application for an anti-suit injunction is subject to the principles summarised

by Foxton J which are as follows:

a) The existence of a foreign proceedings/arbitration proceedings agreement or a forum clause where the importer was seeking an anti-suit injunction was established to a high degree of probability;

b) The jurisdiction to grant such injunction should be exercised with caution;

c) The end of justice is the touchstone – the party seeking the anti-suit injunction must demonstrate to the court 'to a high degree of probability' that the end of justice demands that the anti-suit injunction be granted;

d) The court will ordinarily rely on the existence of an applicable forum clause or arbitration agreement as a balance of probabilities, having first established that there is one, to grant an anti-suit injunction unless the party resisting the claim can demonstrate Occasionally, it is not uncommon that there are conflicting jurisdictions and/or arbitration provisions among the contractual documents, which will apply when considering clause

These principles of how such competing clauses are construed are expressed in Tyson International Co Ltd v GIC Re, India, Corporate Member Ltd ([2025] EWHC 77 (Comm), paras. 65–70). As concerns point (d), there is the possibility of seeking a 'quasi-contractual' anti-suit injunction, which restricts the anti-suit injunction defendant's ability to enforce, for example, an insurance contract to which the anti-suit injunction defendant is not a direct party, where the insurance policy contains an arbitration agreement, such as where the anti-suit injunction defendant has acted in the foreign forum under a statutory direct right of action under foreign law.

Of course, not all actions in foreign courts will be stayed, for instance an action for security may be pursued, which might include arresting a vessel, exercising a lien, etc. The fact that the claimant sought to go beyond reasonable security for the arbitration proceedings, beyond helping the proceedings to be conducted in England and Wales, and/or beyond obtaining relief, which supports enforcement at the substantive stage of the proceedings (such as provision and/or acceptance of the contractual performance sought) suggests that there was a breach of the arbitration clause which the English court would be willing to forbid (Aquavita International SA v. Indagro SA, 2022, paras. 18–21). It was held in case titled Aggeliki Charis Compania Maritima SA v. Pagnan SpA (The Angelic Grace) (Aggeliki Charis Compania Maritima SA v. Pagnan SpA, 1995, p. 96) that delay in seeking the injunction and/or voluntary submission to the jurisdiction of the foreign court can preclude the right to obtain such an injunction, which must be sought promptly and before the foreign proceedings are too far advanced

In addition, the English courts have previously granted anti-suit relief in order to restrain the breach of an arbitration agreement against a party, which is subject to its personal jurisdiction irrespective of the fact that the seat of arbitration was outside England. In UniCredit Bank GmbH v. RusChem Alliance LLC ([2024] UKSC 30), the arbitration under the UniCredit arbitration agreement was to be held in France, but the agreement did not state, which law should govern the arbitration agreement itself. The issue on appeal before the Supreme Court was whether the English court had jurisdiction to grant the anti-suit injunctions in support of a foreign-seated arbitration. The Supreme Court had to decide whether (i) the arbitration agreements in the performance bonds were governed by English law and (ii) England was the proper place. The Supreme Court held that English law governed the arbitration agreements. The Court considered its earlier decision in Enka v Chubb [2020] UKSC 38 in which it had analysed the principles determining what system of law governs an arbitration agreement where the law applicable to the underlying contract differs from the law of the seat. The Court emphasised and applied its earlier reasoning that, where the arbitration agreement is silent and the law governing the main contract and seat are different, the contract's governing law should generally be construed as applying to the arbitration agreement. The UniCredit case, however, was decided before the enactment of S.6 into English law, which turns around the rule that English law would govern an arbitration agreement, which

required a foreign seat but made no reference to the applicable law in the arbitration clause in an English governed contract.

In some cases, the injunction respondent will have already obtained an anti-suit injunction in a foreign jurisdiction against the injunction applicant in England or there may be evidence that the injunction respondent may be likely to seek to bring an anti-suit measure against the injunction applicant in a foreign jurisdiction. If so, the injunction applicant in England may seek an anti-suit injunction from a foreign court, what is known as an anti-anti-suit injunction from the court of England. The order could be requested from the English court either as an injunction in its own right or (most frequently) in conjunction with making an anti-suit injunction application. In applying for an anti-anti-suit injunction, the courts will follow the same principles as in applying for an anti-suit injunction; but comity principles should mean the court proceeds with greater caution in the case of an anti-anti-suit injunction (Renaissance Securities (Cyprus) Ltd. v. Chlodwig Enterprises Ltd. & Others, 2023, paras. 51–53; Sabah Shipyard v. Government of Pakistan, 2002; Ecom Agroindustrial Corp. Ltd. v. Musharaf Composite Textile Mill Ltd., 2013).

The jurisdiction and Power to award anti-suit injunctions.

Anti-suit injunctions have been in existence since the early 1500s (Arkins & Joseph, 2005, pp. 308–381; Raack, 1986, p. 539; Stacher, 2005, p. 640; Bermann, 1990, pp. 589, 593; Hartley, 1987). In the context of arbitration, the main common law jurisdictions also explicitly make provision for such a stay of court proceedings where proceedings are commenced in contravention of a valid arbitration agreement. There is a specific provision in England for such a stay in Section 9 of the English Arbitration Act. In contrast, civil law jurisdictions typically offer for the total cancellation of proceedings and go extra than just merely halting proceedings (Born, 2012; Born, 2012, pp. 1115–1116). Anti-suit injunctions supporting arbitration are based on the idea that courts enjoy concurrent jurisdiction and should take an active role in facilitating the arbitration process. In India, however, the power to issue anti-suit injunctions has been mainly evolved from the ‘inherent powers of the court (Rajshree Sugars & Chemicals Ltd. v. Axis Bank Ltd., 2008; Enercon (India) Ltd. v. Enercon GmbH, 2014, para. 45; Vivek Rai Gupta v. Niyati Gupta, 2012, para. 6) and not from the provisions of Section 9 of the IAA.

Anti-Suit Injunctions in accordance with the Model Law.

The Working Group agreed that the power to issue anti-suit injunctions is vested in Article 17(2)(b) of the Model Law. If Article 17(2)(b) is to be interpreted as granting such power to an arbitral tribunal, the same would be available to the court under Section 9 of the IAA. As examined in Chapter 2, the court’s authority to grant interim measures should correspond with that of the arbitral tribunal, including in respect of the categories of measures that the tribunal is empowered to grant. This would also be in line with the implementation of the Model Law's Article 17J. Domestic courts can, by way of interim measures, indirectly order a stay in the proceedings before another court if this is necessary to protect or facilitate the arbitral process (Demirkol, 2016, p. 392). This is especially pertinent to the availability of relief in the context of the ‘specific features of international arbitration’. If there is an agreement to arbitrate a dispute, a court ought not to hear the case if it has been filed in violation of that agreement. Instead, they should strive to enforce the agreement of the parties and facilitate the arbitral proceedings in line with the purposes of the NYC and the Model Law.

Jurisdiction for Granting Anti-Suit Injunctions.

The theory of the seat of the court would suggest that, in the absence of a specific forum provision, the court at the seat would be the logical forum for granting the anti-suit injunction, subject to its jurisdiction in the case. Therefore, if a court at the seat possesses the jurisdiction contemplated by Article 17-J of the Model Law, the court can issue an anti-suit injunction only in the event that it has that personam jurisdiction. The jurisdiction of the court, without in personam jurisdiction, would have to be enforced in the defendant's jurisdiction and would be subject to possible limitations based on the doctrine of comity (Airbus Industrie GIE v. Patel, 1999; Gujarat

NRE Coke Ltd. & Another v. Gregarious Estates, 2012). Therefore, it is considered sensible that one should apply to the court having in personam jurisdiction upon the defendant. Hence such court may be in the seat of arbitration, or may not necessarily be the court of the seat.

Anti-Suit Injunctions and its scope.

The jurisprudence on the grant of anti-suit injunctions in arbitration is that the court must consider questions of comity (Swanson, 2006; Swanson, 1996) and the country involved is a reciprocating territory. However, when there is a request for injunctions for the enforcement of an arbitration agreement, a more flexible stance should be taken; parties should be compelled to live up to any contractual obligations to submit their disputes to arbitration (Himachal Sorang Power Pvt. Ltd. v. NCC Infrastructure Holdings Ltd., 2019, para. 84). A party may not try to avoid an arbitration agreement to which he or she has agreed (Bhushan Steel Ltd. v. Singapore International Arbitration Centre, 2010; Sancorp Confectionary Pvt. Ltd. v. Gumlink A/S, 2012, para. 11; Handicrafts & Handlooms Exports Corporation of India Ltd. v. Ashok Metal Corporation, 2010). The question of comity and territoriality may be of a relatively lesser importance in the arbitral sphere, as the anti-suit injunction is directed against the parties and not the foreign court. The power to issue anti-suit injunctions has been traditionally exercised by courts in India under inherent jurisdiction of the court and in exceptional cases only. The imposition of these restrictions expressly by the IAA, 1996 would eliminate these restrictions, make Indian law conform to international practice and allow for granting of anti-suit injunctions with greater ease where appropriate to protect the jurisdiction of the arbitral tribunal.

Standards for issuance of anti-suit injunctions.

There are criteria for the granting of anti-suit injunctions. In principle, the criteria for granting an anti-suit injunction in favour of an arbitration agreement stands on a different footing than the standard for granting an interim injunction in general. The court has to take into account aspects such as violation of the arbitration clause, the better forum to litigate in, if the foreign proceedings are vexatious or oppressive, and if failure to grant the injunction would cause unfairness to the party who started those proceedings(Hardy & Kaur, n.d.). In general, however, courts in various jurisdictions have granted anti-suit injunctions where it is shown that foreign proceedings have actually been commenced in violation of an arbitration agreement (Maldives Airport Co. Ltd. & Another v. GMR Male International Airport Pte. Ltd., 2013; BC Andaman Co. Ltd. v. Xie Ning Yun, 2017; Ever Judger Holding Co. Ltd. v. Kroman Celik Sanayii Anonim Sirketi, 2015; Aggeliki Charis Compania Maritima SA v. Pagnan SpA, 1995; Donoghue v. Armco Inc., 2002), in essence because the defendant had undertaken in the contract not to commence such proceedings (Aggeliki Charis Compania Maritima SA v. Pagnan SpA, 1995). In India the Supreme Court has laid down the following conditions for granting anti-suit injunction (Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd., 2003, para. 24):

a) The court must have jurisdiction over the defendant (Setalvad, 2007, pp. 182–183).

b) A refusal to grant the injunction would be a denial of justice and injustice would be perpetuated.

c) The principle of comity must be adhered to and appropriate consideration be shown to the court of the foreign state before which proceedings are sought to be stayed.

This is consistent with the position taken in other jurisdictions. It is now agreed that an anti-suit injunction should be issued only in the absence of any imminent threat to conflicting judgments, and only if it would otherwise be the perpetuation of injustice if the foreign court continued to proceed without it (Videocon Industries Ltd. v. Union of India, 2011, para. 97).

Whether The Arbitral Tribunal has Authority to Issue Anti-Suit Injunctions?

An anti-suit injunction is a common law remedy as civil law jurisdictions (Schwebel, 2003, pp. 397, 428; Rahim, n.d., p. 679) do not recognise it except with few civil law countries (Waincymer, 2012, p. 655). The origin of anti-suit injunctions dates back to the English Courts decisions many centuries ago (Bermann, 1990, pp. 593–594; Stacher, 2005, p. 642), which exercised it in very limited cases. It was considered an inappropriate exercise to issue anti suit injunctions by the judges on the ground of direct interference with the jurisdiction of another court/tribunal (Hartley, 1987, p. 506). Therefore, it was also thought inappropriate for a tribunal to exercise such power having lesser power as compared to court (Landau, 2007, pp. 282, 290–291). There is consensus of both common law and civil law authorities on this point that the arbitrator should not exercise such power as it may entail recognition and enforcement problems (Ibid). Policy objections to a tribunal's power to grant anti-suit injunctions persist. Nevertheless, several authors trace that power to one of four sources: (a) the tribunal's inherent jurisdiction; (Gaillard, 2007, pp. 242, 251; Rahim, n.d., pp. 678–679) (b) the national law of the seat (Lévy, 2005, p. 121); (c) procedural rules; or (d) the arbitration agreement itself.

The proponent of this view state that the arbitral tribunal has inherent jurisdiction to pass order for anti-suit injunctions in order to ensure the smooth and enforceable resolution of dispute by the tribunal (Nuclear Tests (Australia v. France), 1974, pp. 259–260; Case Concerning the Northern Cameroons (Cameroon v. United Kingdom), 1963; Anglo-Iranian Oil Co. (United Kingdom v. Iran), 1952; Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), 1939; Collins, 1994, pp. 169–170; Mann, n.d.; Landau, 2007, p. 292). The arbitral tribunal has inherent jurisdiction to pass restraining order against the parties from doing any act, which is prejudicial to the jurisdiction of the tribunal (Gaillard, 2007, p. 212). The supporter of this view make recourse to the 'general principle of law' enshrined under Article 38(1)(c) of the Statute of the International Court of Justice (Landau, 2007, p. 292). Levy enunciates that the arbitral tribunal can grant anti-suit injunctions if such power is recognised under the law of the seat/lex arbitri (Lévy, 2005, p. 121). Whereas, Molloo states that some institutional rules allow the tribunal to exercise this power to grant provisional measures by leaving the same to the tribunal to assess regarding the nature and type of measures to be granted by it. He gives example of Article 28(1). 2017 of ICC Rules, which mandates that the tribunal may pass order any interim or conservatory measure it deems appropriate (Rahim, n.d., pp. 683–684).

As far as arbitration agreement is concerned, under Kompetenz-kompetenz, a tribunal may rule on its own jurisdiction, and once it has done so, restraining a party from pursuing the claim in a national court is sensible, since that court could undermine the tribunal or review its jurisdiction (Landau, 2007, p. 290) Waincymer disagrees, arguing that an anti-suit injunction permanently denies another forum's jurisdiction and so is not an interim measure (Waincymer, 2012, p. 656). He adds that listing its advantages does not establish the power to issue it, that parties cannot be denied access to courts (Gaillard, 2007, p. 241; Paul, n.d., p. 269), and that the injunction requires the tribunal to affirm its own jurisdiction to the exclusion of other forums (Lévy, 2005, p. 117). Proponents respond that by agreeing to arbitrate, parties knowingly waive recourse to domestic courts, leaving only the agreement's validity and existence in question. The injunction does not place the tribunal above the court but it merely upholds the parties' contract to arbitrate (Ever Judger Holding Co. Ltd. v. Kroman Celik Sanayii Anonim Sirketi, 2015; AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC, 2011) and is, in essence, a mechanism for enforcing their expectations as said by Toby Landau.

International Practice.

It is important to note that the law in England and Wales does not expressly provide for the power of arbitral tribunals to issue anti-suit injunctions, or to stay court proceedings pending arbitration proceedings. Rather, English courts have always assumed this power as a facilitative tool for the arbitration process. Courts have the power to restrain foreign proceedings (Pena Copper Mines Ltd. v. Rio Tinto Co. Ltd., 1911–1913) where there

is a 'sufficient connection between the dispute and the forum' to the dispute to be restrained (Gaillard, 2006, p. 244). This judicial power has been repeatedly confirmed in English case law (Aggeliki Charis Compania Maritima SA v. Pagnan SpA, 1995; Starlight Shipping Co. v. Tai Ping Insurance Co., 2007; C v. D, 2007; Elektrim SA v. Vivendi Universal SA, 2007; XL Insurance Co. Ltd. v. Owens Corning, 2002; GmbH v. Cargill France, 1997; Aeakos Compania Naviera SA, 1994; West Tankers Inc. v. Allianz SpA, 2007; Van Uden Maritime BV v. Deco-Line, Case C-391/95), and especially since the decision in The Angelic Grace (Aggeliki Charis Compania Maritima SA v. Pagnan SpA, 1995), which established anti-suit injunctions as a useful tool to safeguard arbitration agreements. The availability of anti-suit injunctions reflects the principle that arbitration agreements must be respected and that proceedings initiated in violation of such agreements may be restrained. The reasoning is intertwined with the basic principles of international arbitration: not only the tribunal's jurisdiction to reach into contractual obligations and deal with failures to comply with the arbitration agreement, but also its power to stop the 'aggravation of the dispute' and the preservation of the 'efficiency of any future award'. The dispute over arbitrators' ability to award punitive damages has thus been compared to previous conflicts on the issue. During the revision of the UNCITRAL Model Law, concerns were raised by the Working Group on Arbitration and Conciliation regarding the inclusion of provisions relating to anti-suit injunctions because such measures were unfamiliar in many jurisdictions and lacked uniform treatment in practice. It was also contended that anti-suit injunctions do not necessarily have interim nature, which is characteristic of interim measures (United Nations Commission on International Trade Law [UNCITRAL], 2010). However, the UNCITRAL Working Group acknowledged (UNCITRAL, 2006, art. 17) the possibility of obtaining anti-suit injunctions by the parties directly from the arbitral tribunals by getting benefit from the Model Law enforcement mechanism (UNCITRAL, 2006, arts. 17H–17I), while recognizing that it would be beneficial for such relief to be available. However, there exist uncertainty about the practical efficacy of tribunal-issued anti-suit injunctions in England and parties are making use of anti-suit injunctions issued by court primarily.

The arbitral Tribunal in some cases have issued anti-suit injunctions (Mange, 2010, pp. 195–196). with particular reference to construction contracts (Bunni, n.d., p. 585). The U.K High Court recognised the arbitral tribunal award wherein it had restrained the claimant from submitting claims concerning arbitration (Interim Award in ICC Case No. 8887, 2000; ICC Interim Award, 2001). Likewise, the ICC Tribunals have, sometimes, issued restraining orders to the claimants from agitating a claim before the foreign court (Derains & Schwartz, 2005, pp. 108–109). and even granted damages in case of their disobedience to the injunctive orders (ICC Case No. 8887, 2000). Article 26 of the ICSID Convention is often cited in support of anti-suit injunctions to be granted by the arbitral tribunal in ICSID arbitrations, which is reproduced as under:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.

According to one interpretation, Article 26 supra excludes the jurisdiction of courts unless otherwise agreed by the parties through agreement (Gaillard & Savage, 1999, para. 1309). The proponent of this view make recourse to the Report of the Executive Directors to the Convention according to which when an investor and state undertake to resolve their dispute through arbitration without showing their intention to resolve it through any other mode, then their intention can be inferred from the fact that they do not want to adopt any other remedy (International Centre for Settlement of Investment Disputes [ICSID], 1965, para. 32; Schreuer, 2001, p. 368). The ICSID Tribunal relied upon Article 26 in case titled Tokios Tokelés v. Ukraine (Tokios Tokelés v. Ukraine, 2003), by granting anti-suit injunctions retraining the parties from continuing any domestic judicial proceedings on the ground that any such proceedings may prejudice the expected award and its subsequent execution.

In SGS v. Pakistan (SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, 2002), the tribunal made reliance upon Article 26 for the grant of anti-suit injunctions as well as an anti-arbitration order. This decision endorses the fact that parties have a right to resolve their disputes through arbitration by excluding any other forum unless agreed otherwise. However, the tribunal intended to grant an interim anti-suit injunction

against proceedings pending in Pakistani Court and a parallel arbitration proceeding till it had decided on its jurisdiction. In the Westinghouse case (Westinghouse Electric Corp. v. Islamic Republic of Iran, 1987), the tribunal concluded that the adverse party making a counterclaim was at liberty to pursue its claims before the other tribunals but when it filed the said counterclaim in accordance with the Claims Settlement Declaration, then the said case would be in the exclusive jurisdiction of the tribunal. In case titled as Linen, Fortinberry & Associates Inc. v. Islamic Republic of Iran (Linen, Fortinberry & Associates Inc. v. Islamic Republic of Iran, 1985), the tribunal issued an anti-suit injunction against following unfiled counterclaims in the Iranian court.

In India, the Section 17(1) of IAA does not expressly empower the arbitral tribunal to grant anti-suit injunctions. Some commentators make resort to Section 17(1)(ii)(e) under the residual clause of 'just and convenient' in support of their arguments that the tribunal may grant anti-suit injunctions. The proponents of this view also trace such power from the Supreme Court judgment of BALCO to the effect that since the tribunal holds power to determine its jurisdiction, therefore it also has the power to protect the same by issuing anti-suit injunctions (Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., 2012; Avinash, 2014).. However, this view is not expected to get endorsement from superior courts, which are considered superior to the tribunal. If India adopts the general definition of Article 17(2) of the Model Law, then it would actually recognise the power of tribunals to grant an anti-suit injunction. Similarly, the adoption of Article 17H of the Model Law would mitigate the problem of recognition and enforcement of such injunctions as well.

In Pakistan, neither there exists any provision in the Arbitration act, 1940 or any other law to empower the arbitral tribunal to issue anti-suit injunctions nor the superior courts of Pakistan have pronounced any judgment empowering the arbitral tribunal to grant such injunctions. However, such anomaly may be covered up by adopting the Model Law in true letter and spirit. Despite all the pros and cons of such anti-suit injunctions issued by the arbitral tribunals, we have seen growing tendency supporting such injunctions (Strong, 2014). irrespective of the fact that the national court may not recognise such injunctions, which will depend on the its domestic law requirements (Ojiegbe, 2015, p. 286).

Anti-Arbitration Injunctions

Anti-arbitration injunction is based on the consensual basis of arbitration. A party may only be required to submit a dispute to arbitration where there is a valid and legally binding agreement to arbitrate at the time of the dispute (Lim & Uson, 2019). The determination at the outset that an arbitration agreement is inoperative or incapable of being performed may effectively force the court to determine an issue which should be within the scope of the arbitral process (Himachal Sorang Power Pvt. Ltd. v. NCC Infrastructure Holdings Ltd., 2019, para. 101). Even so, such orders have been issued (Societé Générale de Surveillance S.A. v. Islamic Republic of Pakistan, 2002; The Hub Power Company Ltd. v. Water and Power Development Authority of Pakistan, 2000; Kerr, 1997, pp. 121, 137; Saipem S.p.A. v. People's Republic of Bangladesh, 2009, paras. 167–168; Bettauer, 2009; Union of India v. Dabhol Power Co., 2002), but are still exceptional and fairly uncommon (Lew, 2007, p. 186). Article II (3) of the New York Convention stipulates that disputes must be submitted to arbitration unless the arbitration agreement is null, void, inoperative or unenforceable. Although the provision gives the courts permission to enter a decision in circumstances that meet the requirements of the exceptions, it doesn't cover creation of anti-arbitration injunctions. Such orders are some of the most controversial issues in arbitration, given the fact that courts frequently adopt traditional civil litigation rules instead of rules specific to arbitration.

An anti-suit injunction may also restrain a party from continuing arbitral proceedings that it considers to have been commenced without a valid arbitration agreement. In practice, a party that asks a court for such an injunction is convinced the arbitration is illegitimate and seeks to avoid it entirely (Oil & Natural Gas Commission Ltd. v. Western Co. of North America, 1987). The mechanism has been used repeatedly in India and Pakistan. In one case, the Supreme Court of India ordered an American party to withdraw from arbitral proceedings and, failing compliance, barred enforcement of the resulting award in the United States. It has been

held unfair to require a party to pursue long and costly proceedings it believes to be unlawful (Fomento de Construcciones y Contratas v. Colon Container Terminal, 2001). The only real justification for such measures is where a party has been compelled to take part in an arbitration instituted fraudulently. The validity of arbitral proceedings depends on the validity and enforceability of the arbitration agreement, and findings on that point can vary dramatically between jurisdictions. While in Pakistan, courts have struck down arbitrators' decisions without having applied a uniform legal test or sought a test derived from the general civil law principles, they have developed either case-by-case or general civil law-based tests. This points to the importance of having a consistent framework based on national principles of arbitration recognised internationally. Thus, the section looks at the judicial attitude towards arbitration in Pakistan, India and U.K and the guidelines governing the filing of anti-arbitration injunctions.

Source and Nature of Power of the courts to grant an Anti-Arbitration injunction.

This judicial hesitation to grant anti-arbitration injunctions may be due to the ongoing uncertainty as to whether courts have the authority to issue such injunctions and whether the same are in consonance with the NYC and the Model Law (Bishop, n.d.; Cavalcanti Abbud & Kulesza, 2014; Hagras, n.d.). Because both the convention and Model law do not provide for anti-arbitration injunctions. Fouchard believes that ‘in an ideal world' there should be no injunctions against arbitral proceedings (Fouchard, 2005, p. 154). However, situations can exist in which an anti-arbitration injunction is obviously warranted (Seriki, 2013, pp. 43–44), especially because the arbitral process cannot be considered to be completely removed from the necessities of international law (Subramanian, 2017, p. 215). This relief may thus be required for the protection of a party against injustice suffered as a result of frivolous and vexatious arbitral proceedings. In the past, state bodies applied for anti-arbitration injunctions to delay or halt arbitral proceedings launched by foreign claimants and force them to pursue their claims in state courts. Such practices had been linked to developing nations, especially South Asian countries (Societé Générale de Surveillance S.A. v. Islamic Republic of Pakistan, 2002; The Hub Power Company Ltd. v. Water and Power Development Authority of Pakistan, 2000; Kerr, 1997, p. 121; Saipem S.p.A. v. People's Republic of Bangladesh, 2009, paras. 167–168; Bettauer, 2009; Union of India v. Dabhol Power Co., 2002), (959) where they were employed to block arbitrations by judicial protectionism in favour of state entities and national businesses (Bishop, n.d.).

This has also been recognised as a similar practice in European jurisdictions (Karrer, 2007, p. 229; Air (PTY) Ltd. v. International Air Transport Association (IATA) and C. SA, 2005; Savage & Gaillard, 1999, p. 407; Lew, 2007, p. 213), The justifications are that because courts can order parties to behave in accordance with their agreement to have their matters arbitrated, courts can equally rule that the parties must stop their arbitration proceedings. Anti-arbitration declarations have also been made because of the implicit effect of a comprehensive statute of arbitration on withholding use of the inherent jurisdiction (Etri Fans Ltd. v. NMB (UK) Ltd., 1987), and the presumption that any such statute is aimed to operate in accordance with any relevant treaty obligations (International Electromechanical Services Co. LLC v. Al Fattan Engineering LLC, 2012; Spalton, 2012; Williams, 2014, p. 153). For instance, section 32 of the English Arbitration Act (also known as the International Commercial Arbitration Act) expressly authorizes the state courts to rule on the issue of the existence and validity of arbitration agreement in a limited (AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC, 2011; Claxton Engineering Services Ltd. v. TXM Olaj-Es Gazkutato KTF, 2011; Vale do Rio Doce Navegacao SA v. Shanghai Bao Steel Ocean Shipping Co. Ltd., 2000; Dallah Real Estate and Tourism Co. v. Ministry of Religious Affairs of the Government of Pakistan, 2010; Cannon, 2011; Dassule, 2003, pp. 70–77).

In the exercise of ordinary civil powers, Pakistani courts have long ruled that they have no jurisdiction to monitor or take part in arbitrations held outside of Pakistan (Hasan Ali Rice Export Co. v. Flame Maritime Ltd., 2004; Hitachi Ltd. v. Rupali Polyester, 1998). In addition, the Arbitration Act 1940, as well as all other arbitration laws, do not expressly provide for anti-arbitration injunctions in relation to foreign-seated

arbitrations. However, there is no uniform guidance in court to establish legal norms to reduce these orders. In Hakimuddin Harmusji v Ghafoor Textile Mills (Hakimuddin Harmusji & Sons v. Ghafoor Textile Mills, 1978), the Sindh High Court came to the conclusion that under section 33 of the Arbitration Act 1940, the court has the power to consider the validity, existence or effectiveness of an arbitration agreement and as an incidental to that power, to stay the arbitration proceedings pending determination of this matter. The court noted the difference between a stay and an injunction, distinguishing between its effect on the arbitral tribunal and the parties

In Pakistan, a stay order has an immediate effect directly on the subordinate court or arbitral tribunal while an injunction is directed to a party either to do or omit certain acts, which takes effect only upon service to the other party. This interpretation goes a long way towards resolving the problem area earlier identified by the Punjab High Court of the lack of statutory power to terminate a valid reference to arbitration. The Punjab High Court saw this as a legislative flaw and called for a change, which gives power to the judge to intervene and nullify the arbitrator's powers when the circumstances so warrant. However, the Sindh High Court upheld the Lahore High Court's opinion on the lack of any provision in the 1940 Act to grant the power to the judge to revoke the authority of an arbitrator even if there is a genuine submission/reference according to the facts and circumstances (M. A. Ghani Soofi & Sons v. Federation of Pakistan, 1957), and asked for amendment to the Act 1940 to take care of this lacuna.

Those who oppose anti-arbitration injunctions argue that they are counterproductive to the effectiveness, integrity and, in some cases, the viability of international arbitration. They are alleged to be inconsistent with the conventional principles of customary international law, international public policy and generally accepted international arbitration principles (Lew, 2007, p. 216; Schwebel, 2003, p. 5). As such, courts and tribunals should not be permitted to issue directions to prohibit the conduct of arbitrations (Karrer, 2007, p. 230). Instead, it is even proposed that the parties agree to arbitrate future commercial dispute by way of an ‘International Pledge to Arbitrate Commercial Disputes’ to avoid anti-arbitration injunctions (McIlwrath, 2011). These types of injunctions are then considered to be a de-facto denial in essence of the jurisdiction of an arbitral tribunal (Bachand, 2005, p. 88). Even if a party agrees to arbitration and chooses an arbitration forum, it could be found subject to proceedings before a jurisdiction with very different standards for its conduct. Other than corruption and xenophobia issues, the respondent may also have practical benefits due to local language, local procedures, convenience, having their own lawyers and cultural familiarity with the judges (Paulsson, 2004, p. 124). These are the same benefits the parties wanted to achieve over litigation in their own domestic courts (Lew, 2007, p. 186). Anti-arbitration injunctions thus serve to promote the very conflict of jurisdiction the NYC was designed to reduce. They might result in erratic decisions and in conflicts between various jurisdictions on the recognition and enforcement of arbitral awards (Markaki, 2018, p. 14).

The grounds for the grant of anti-arbitration injunctions.

Anti-arbitration injunctions are often hard to put in place, but should be used sparingly. The jurisdiction to grant such relief is ancillary to the jurisdiction of the court under section 33 of the Arbitration Act, 1940 and it should be limited to disputes relating to the existence, validity and efficacy of an arbitration agreement. It is reflected in Cosmopolitan Development Co. Ltd. v. Alfred C. Toepfer International and others (1991 CLC 1087), where the court granted an interlocutory injunction to prevent foreign arbitrations in Germany because it found there was no valid contract created, and thus no arbitration agreement. Similarly, the Supreme Court of Pakistan has affirmed the injunctive order issued by the Sindh High Court in the case of HUBCO v. WAPDA (Hub Power Company Ltd. v. WAPDA, 2000), where the underlying contract was said to be tainted with illegality and bribery, but yet it had an ICC arbitration clause that was seated in London. In SGS v. Pakistan (Societe Generale de Surveillance S.A. v. Pakistan, 2002), the Supreme Court tried to enjoin ICSID arbitration proceedings since it was the ground that the bilateral investment treaty supplier would not be binding on Pakistan; however, the ICSID tribunal refused to follow the Supreme Court's injunctions.

Anti-arbitration injunctions under the 2011 Act

Following the enactment of the Arbitration Agreements and Foreign Arbitral Awards Act, 2011, points like inconvenience, the foreign seat of arbitration and cost of engaging in arbitration abroad will no longer suffice to compel courts to pre-emptively refuse to stay proceedings in favour of arbitration (Metropolitan Steel Corporation Ltd. v. Macsteel International U.K. Ltd., 2006; Travel Automation (Pvt.) Ltd. v. Abacus International (Pvt.) Ltd., 2006; Far Eastern Impex (Pvt.) Ltd. v. Quest International Nederland BV & Others, 2009). Impliedly, these should also be the inadequate basis for anti-arbitration injunctions. Thus, this could be justified from the Supreme Court's decision in the Reko Diq case (Maulana Abdul Haque Baloch v. Government of Balochistan, 2013) wherein the Supreme Court did not issue anti-arbitration injunctions and ordered the Government of Pakistan to ask the ICSID to suspend proceedings till the decision of the Supreme Court was made.

Examples of refusal of anti-arbitration injunctions.

Pakistani courts have, in some cases, refused to use the anti-arbitration injunction procedure, but instead protected the interests of the parties by requiring that the proceedings under an arbitrator must be done with the court's approval before implementation of any arbitral award. This approach was adopted in the case of Pakistan Chrome Mines Ltd. v. Phibro Asia Ltd. (Pakistan Chrome Mines Ltd. v. Phibro Asia Ltd. & Others, 1976), which involved ICC arbitration seated in Paris and the anti-arbitration injunctions were declined by applying Section 35 of the Arbitration Act 1940. In the case of Muhammad Rafiq & Co. (Pvt.) Ltd. v. International Construction Corp. (Pvt.) Ltd. (Muhammad Rafiq & Co. (Pvt.) Ltd. v. International Construction Corporation (Pvt.) Ltd. & Others, 1994), the court held that section 35 applies only where the judicial proceedings involve all parties and encompass the entire subject matter of the arbitration. As the court proceedings addressed only part of the dispute, the request to restrain the arbitration was dismissed.

Anti-arbitration Injunctions relating to domestic arbitration in Pakistan.

So far, the status of domestic arbitration is unclear. In a dispute arising from the termination of a hotel lease granted by the Capital Development Authority (CDA), the lessee initiated arbitration after the CDA sought recovery of amounts allegedly due under the lease. Neither the CDA was involved in the selection of the arbitrator nor was the authority of the lessee confirmed to be able to take action against the CDA. The court concluded that there were substantial questions whether the arbitrator was competent, and whether the person who represented the lessee had standing before the arbitrator. It also accepted a reasoning that if the arbitration was not successful, it would cause prejudice if it continued until the tribunal could be found to be lacking in jurisdiction. Based on this, the court had granted an anti-arbitration injunction barring the arbitral proceedings (Hassan Amin v. Capital Development Authority, Islamabad, 1979).

Conducting analysis of Anti-suit Injunctions and Grounds for Issuance.

Considering the relevance of anti-arbitration injunctions in a Pakistani context (Bishop, n.d.; Schwebel, 2003, pp. 5–14), where such orders have often been viewed as reflecting judicial protectionism. These injunctions are widely considered as inconsistent with international arbitration principles, including the doctrines of competence-competence and separability (Bishop, n.d.; Schwebel, 2003, p. 14), because they allow courts to determine issues that properly fall within the arbitral tribunal's jurisdiction, particularly the validity and continuation of arbitral proceedings. Nor can anti-arbitration injunctions be justified as a means of protecting domestic judicial proceedings. Such orders interfere with the authority of both the arbitral tribunal and the courts of the arbitral seat, thereby undermining the agreed supervisory framework (Nigel Peter Albon v. Naza Motor Trading Sdn Bhd, 2007).

This has been understood in English Law. In A v. B, (A v. B & Others, 2006, pp. 112–113, 124–125) the court

had ruled on the grounds that there must be exceptional justifications to impose on the supervisory jurisdiction of any court over foreign seated arbitrations since the parties have already consented supervisory jurisdiction of the courts at the seat. Likewise, in the case of Weissfisch v. Anthony Julius (Amir Weissfisch v. Anthony Julius, Rami Weissfisch & Philip Davis, 2006, para. 33; Raphael, 2008), the court held that the parties' selection of Switzerland as the seat of arbitration, it had given the Swiss courts exclusive jurisdiction over matters concerning the arbitration. In such cases, where anti-arbitration injunctions are allowed under a legal system consensual nature of arbitration and respect the principles of competence-competence and separability, which acknowledge the jurisdiction of the arbitral tribunal to decide on its jurisdiction. The common rules used to issue anti-suit injunctions are thus not applicable to arbitration.

The law of England has step by step, taken the view that the arbitrator is exercising a judicial function. The role in the UK also has a history of development. The precedent in English was that injunctions could only be issued in cases specifically provided for in the English Arbitration Act, which made no mention of anti-arbitration injunctions (Elektrim SA v. Vivendi Universal SA & Others, 2007). This position has subsequently changed. In the UK, the power to issue an anti-arbitration injunction is found in Section 9(4) of the English Arbitration Act and Section 37 of the Senior Courts Act 1981 (Fiona Trust & Holding Corporation & Others v. Yuri Privalov & Others, 2015). The NYC is also consistent with the English rules of practice, where anti-arbitration injunctions have been recognised (Welex AG v. Rosa Maritime Ltd. (The Epsilon Rosa), 2003). Although the general rule is that the courts should not intervene in arbitrations unless the Act provides for it (English-seated arbitrations), it is possible for a court to grant injunctions to stop arbitrations on the basis of the power given in s.37 of the Senior Courts Act 1981 and under the terms of the criteria it provides.

The court had granted anti-arbitration injunctions to prevent arbitrations from Britain in the same manner in a recent case in which Serbia's GIC Re, India, Corp Member Ltd sought to prevent proceedings of an arbitration in New York (Tyson International Co. Ltd. v. GIC Re, India, Corporate Member Ltd., 2025, para. 58), which restated the conditions set out by Foxton J in QBE Europe. Whilst an anti-arbitration injunction was granted in the GIC Re case above, an anti-arbitration injunction was refused in the related case of Tyson International Co Ltd v. Partner Reinsurance Europe SE, ([2023] EWHC 3243 (Comm)) which decision was upheld on appeal ([2024] EWCA Civ. 363). Both courts held that wording in the policy which incorporated a New York arbitration clause had overruled the wording that required all disputes to be resolved in England and had exclusive jurisdiction clause such that the arbitration was binding. Interestingly, however, the Court of Appeal rejected the argument at first instance that even had it not been superseded by the jurisdiction clause in the English contract, the court would not have ordered the anti-arbitral remedy, in exercise of its discretion, in the context of the delay of 6 months on part of the injunction applicant.

In Pakistani jurisprudence the same principle has been given force, which considers arbitration as an adjudicatory process and the performance of the similar adjudicatory functions as the distinguishing feature of arbitrator from a referee. An arbitrator is known to be a person who decides a dispute a person who decides solely on the basis of personal knowledge, without authority to conduct an inquiry, is regarded as a referee, whose decision is not binding unless the parties have contractually agreed to accept it (Pakistan v. Gulnar Sher Muhammad & Others, 2002; Sher Zaman Khan v. Noor Zaman Khan & Another, 1977; Muhammad Hanif Khan & Another v. Ghulam Farid Khan & Others, 1988; Ch. Muhammad Saleem v. Muhammad Akram & Others, 1971; Zulifqar Ali Shah & Others v. Muhammad Hussain & Others, 2002; Abdullah & Others v. Abdur Rehman & Others, 2004). So if the arbitrator has an inherent power to recognize his or her own jurisdiction, and objections against the arbitration agreement are limited to the narrow grounds affecting its existence, validity and separability, there would be little scope for anti-arbitration injunctions. Such an approach would reinforce the principle that questions concerning the tribunal's jurisdiction should ordinarily be determined within the arbitral process itself.

Conclusion

The main purpose of anti-suit injunctions is to prohibit a party from making recourse to or pursuing parallel legal proceedings pending in a court or foreign court in breach of an arbitration agreement, which protects the arbitral tribunal's authority having a positive impact on arbitration. Pakistani statutory law lacks explicit provisions for anti-suit injunctions and Section 58(b) of the Specific Relief Act 1877 restricts issuance of such injunctions by a court against a court being not a subordinate, the Pakistani courts have recognized their inherent jurisdiction to grant equitable, in personam anti-suit relief to restrain vexatious parallel litigation. In contrast, anti-arbitration injunctions have been granted by Pakistani courts in several cases, but have not developed any consistent or clear guidelines for issuing anti-arbitration injunctions. The Arbitration Act 1940, as well as all other arbitration laws, do not expressly provide for anti-arbitration injunctions in relation to foreign-seated arbitrations The preferred course is to limit the use of anti-arbitration injunctions but, as they are recognised, the test for obtaining such immunity should be based on the consensual and international foundations of arbitration. According to Pakistani case law, applying the Modi Entertainment test, the personal jurisdiction, injustice and respecting foreign judicial comity are necessary conditions for granting anti-suit relief. However, the courts granted anti-arbitration injunctions in many cases like HUBCO v. WAPDA; SGS v. Pakistan; Agro Forestry by applying the three- test theory (prima facie case, balance of convenience and irreparable loss). The Supreme Court of Pakistan refused to grant anti-arbitration order in Reko Diq case merely on the ground of inconvenience or foreign seat cost.

In England, there is a well-established uniform practice to issue anti-suit orders in order to enforce arbitration agreement. The classic examples are the Angelic Grace, NTDC, XL Catlin, Ecom Agro-industrial. But the English court denied to grant such relief in case of unconscionable delay duly established in cases of Ecobank, Essar Shipping) or within EU member states (West Tankers Inc). Moreover, the English Courts also exercised great caution and restraint in the grant of anti-arbitration injunctions particularly in case of A v. B; Weissfisch v. Anthony Julius, although the power to issue an anti-arbitration injunction is found in Section 37 of the Senior Courts Act 1981. It reserved such power in case of most unusual situations in which the very existence, validity or enforcement of the arbitration clause has been directly contested and where a declaration of non-enforceability of the arbitration clause would not in itself be enough to safeguard the rights of the parties.

In India, the courts have inherent powers to grant anti-suit, which is aligned with the Article 17/ 17-J of the Model Law. As regards anti-arbitration injunctions the Indian courts have the authority to grant such injunctions under the inherent powers of court, that too, under exceptional circumstances where is arbitration agreement is void, inoperative or incapable of performance. Both the New York convention and the Model law do not provide for anti-arbitration injunctions. Under the Model Law and Article II(3) of the New York Convention, anti-arbitration injunctions are limited to very special circumstances where the arbitration agreement is established to be void, inoperative or simply non-existent. The chapter suggests that to create an arbitration friendly legal environment, jurisdictions such as Pakistan should implement the standards of UNCITRAL Model Law, be cautious in exercising injunctive powers and permit arbitral tribunals to have the primary jurisdiction to decide questions of their competence.

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