Anti-Arbitration Injunctions: The Core Concepts

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What is an anti-arbitration injunction?

An anti-arbitration injunction seeks to prevent the initiation or continuation of arbitration proceedings.

In contrast, an anti-suit injunction seeks to prevent the initiation or continuation of court proceedings.

Differences between anti-arbitration and anti-suit injunctions

Anti-Suit Injunctions	Anti-Arbitration Injunctions
Intended to prevent court proceedings	Intended to prevent arbitration proceedings
Issued against parties (not a court)	Issued against parties and/or the tribunal
Issued by a court or tribunal	Issued by a court
Raises issues as to the sovereignty of a foreign court (even though a party and not the court is restrained)	No sovereignty issues involved as a tribunal is a private body, not an organ of a State, as are courts

Four reasons against anti-arbitration injunctions

It attacks the very foundations of "competence-competence" – a bedrock arbitral principle. Arbitral tribunals deploy that principle to determine their own jurisdiction. "Competence-competence" thus empowers a tribunal to conclude that the arbitration agreement is invalid or inoperable and to make a decision declaring that the tribunal lacks jurisdiction. Anti-arbitration injunctions strip the tribunal of this power.

It is inconsistent with the legal framework generally accepted as applicable for the conduct of international arbitration. This system is based on the tribunal first determining its jurisdiction and only thereafter does it allow courts to step in to review (on limited grounds) the decision made by the tribunal. The following provisions confirm this well-established regime:

- Article 23 of the UNCITRAL Arbitration Rules (2010):
    - Art. 23(1) "The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."
    - Art. 23(3) "The arbitral tribunal may rule on a plea [that the tribunal does not have jurisdiction] either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court."
- Article 16(3) of the UNCITRAL Model Law provides that if the tribunal rules as a preliminary question that it has jurisdiction, any party may submit the matter to the courts at the arbitration's seat to have the matter re-determined.

- Article 34 of the UNCITRAL Model Law enables the tribunal to proceed to make an award but then permits a court to set aside the award if the arbitration agreement is not legally valid or that the subject matter of the dispute was not capable of settlement by arbitration.
- The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards permits the tribunal to make an award but then permits a court to refuse enforcement of that award on grounds similar to those expressed in Article 34 of the Model Law, including arbitration agreement invalidity.

It increases unnecessarily the level of court interference in the arbitral process. That interference should be kept to a minimum.

It promotes abuse of the arbitral process. Gary Born, for example, has written "*In most cases, anti-arbitration injunctions are part of deliberately obstructionist tactics, typically pursued in sympathetic local courts, aimed at disrupting the parties' agreed arbitral mechanism.*" He continues "*even if the power to enjoin arbitral proceedings were recognized in principle to exist, that authority should be exercised with the utmost circumspection and only in rare circumstances*."[1]

Four arguments in favour of anti-arbitration injunctions

The competence-competence principle is not absolute. The following passage of Lord Collins in the UK Supreme Court case of *Dallah* is sometimes cited in support of this proposition:

> "*So also the principle that a tribunal in an international commercial arbitration has the power to consider its own jurisdiction is no doubt a general principle of law. It is a principle which is connected with, but not dependent upon, the principle that the arbitration agreement is separate from the contract of which it normally forms a part. But it does not follow that the tribunal has the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it.*"[2]

Article 8 of the Model Law provides that courts before which proceedings are brought in a matter that is the subject of an arbitration agreement shall refer the parties to arbitration "*unless it finds that the agreement is null and void, inoperative or incapable of being performed*." A similar provision is found in Article II of the New York Convention. The assumption of these provisions is that a party can commence court proceedings even in respect of a matter that is said to be covered by an arbitration agreement and the court – not an arbitral tribunal – decides whether the arbitration agreement is null and void, inoperative or incapable of being performed.

If the arbitration agreement was never formed, it is inherently illogical that an arbitration tribunal has the power to determine any issue. In other words, it makes no sense that an arbitral tribunal can decide that it lacks jurisdiction if a consequence of that decision is that the tribunal did not have jurisdiction to make that decision in the first place.

If a party has an objection to the tribunal's jurisdiction, it will end up in court sooner or later. Better to save the time and costs of going through the arbitral process and "front end" the review process by having courts determine the jurisdictional issue from the outset.

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[1] Gary B. Born, *International Commercial Arbitration* (Kluwer 2009), Vol I, p. 1049 and p. 1054.
[2] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] 3 WLR 1472, at para. 84 (emphasis added).

Situations in which anti-injunctions have been granted

An anti-arbitration injunction may be sought for several reasons, including:

- where there is no agreement to arbitrate;
- where arbitral proceedings have been initiated at the wrong seat;
- where arbitral proceedings have been initiated before the wrong institution;
- where the arbitral proceedings are outside the scope of the arbitration agreement;
- where an arbitration of a certain issue is *res judicata*;
- where an exclusive court jurisdiction clause has been breached; and
- where an arbitration has been commenced against a third party who was not a party to the agreement.

References

S.I. Strong, "Anti-Arbitration Injunctions in Cases Involving Investor-State Arbitration: British Caribbean Bank Ltd. v. The Government of Belize", (2014) 15 *Journal of World Investment Law and Trade*, forthcoming.

Nicholas Poon, "The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore", (2013) 25 *Singapore Academy Law Journal* 244.

Jennifer Gorskie, "US Courts and the Anti-Arbitration Injunction", (2012) 28 *Arbitration International* 295.