



ANTI-SUIT AND ANTI-ARBITRATION INJUNCTIONS IN INTERNATIONAL ARBITRATION: A SWISS PERSPECTIVE

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Introduction

Once perceived as an oddity of common law jurisdictions, anti-suit and anti-arbitration injunctions have become more and more widespread in recent years.¹ Two factors may be responsible for this trend. The first is that there are very few arbitrations nowadays in which the parties do not apply for interim measures. Arbitral tribunals are more confident about, and more used to, granting interim relief than in the past, when arbitrators dealt reluctantly with issues which distracted them from disposing of the main dispute. The second factor is that anti-suit injunctions have been brought to the center of international debates by the ECJ's judgments in *Turner v Grovit*² and *West Tankers*.³

Switzerland has no tradition of court interference in parallel proceedings, whether in support of arbitration or in favour of court proceedings. There is only one known precedent from a Swiss court dealing with an anti-arbitration injunction. A number of decisions dealing with the issue have however been rendered by international arbitral tribunals sitting in Switzerland. The present article summarises these cases.

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1. See, e.g. G. von Segesser and C. Kurth, "Interim Measures" in G. Kaufmann-Kohler and B. Stucki (eds), *International Arbitration in Switzerland — A Handbook for Practitioners* (The Hague, 2004), p.75.

2. *Turner v Grovit* (C-159/02) [2005] 1 A.C. 101; [2004] 3 W.L.R. 1193.

3. *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) v West Tankers Inc* (C-185/07) [2009] All E.R. (EC) 491; [2009] 1 All E.R. (Comm) 435. For a recent English anti-suit injunction restraining court proceedings outside the European Union (in Tunisia) see [2009] EWHC 963 (Comm) dated May 15, 2009 and [2009] EWHC 1684 (Comm) dated July 13, 2009 (*Midgulf International Ltd v Groupe Chimiche Tunisien*). Ultimately the anti-suit injunction was revoked since Midgulf could not establish the existence of a valid arbitration clause.

Applications for anti-suit or anti-arbitration injunctions before Swiss courts

Requests to enjoin a foreign arbitration (anti-arbitration injunction)

In the only known precedent on anti-arbitration injunctions from a Swiss court, the Geneva Court of First Instance decided that such injunctions cannot be obtained from Swiss courts, and that those issued by foreign courts seeking to enjoin a foreign arbitration (*in casu* seated in Switzerland) cannot be enforced.⁴ In the case, a party had sought a stay of an arbitration being conducted in Switzerland on the basis of an anti-arbitration injunction it had previously been granted by a court in Namibia.

The facts of the case were as follows:

A European aviation company ("X") entered into two contracts with the national carrier of Namibia. Subsequently, the European party initiated arbitration proceedings under the IATA Rules,⁵ as provided for in the contracts. The seat of the arbitration was not fixed in the contracts. The African party seized the court in its country and obtained an anti-arbitration injunction prohibiting the commencement of the arbitration in Switzerland, IATA's seat being located in Geneva. IATA nevertheless proceeded with the constitution of the arbitral tribunal, and the Namibian party therefore applied for interim measures from the Geneva courts.

In summary, the Namibian party requested that the court enjoin X from proceeding with the pending arbitration and from initiating any future arbitration based essentially on the same facts. In addition, the applicant requested that

4. *République et Canton de Genève*, Tribunal de première instance. Order of May 2, 2005, réf. C/1043/2005-15SP, *Air (PTY) Ltd v International Air Transport Association (IATA) and C. SA en liquidation*. M. Scherer and T. Giovannini, "Anti-Arbitration and Anti-Suit Injunctions in International Arbitration: Some Remarks following a recent judgment of the Geneva Court" (2005) 3 *Stockholm International Arbitration Review* 201. The decision was published in the (2005) 3 *Stockholm International Arbitration Review* 191. An English translation was published in: (2005) 4 *ASA Bulletin* 739.

5. The International Air Transport Association ("IATA") adopted a set of arbitration rules dated May 30, 1999.

the court enjoin IATA from starting the arbitration and from conducting any future arbitration based essentially on the same facts.

The European party asked the Geneva Court to declare that the motion was inadmissible, and, alternatively, to dismiss it. IATA in turn sought the dismissal of X's motion.

The Geneva Court dismissed the Namibian party's application in the following terms⁶:

"However, consistency of such injunctions with the principles governing arbitration is more than doubtful, as they contradict the negative effect of the principle of 'Kompetenz-Kompetenz' under which courts are not entitled to rule on the jurisdiction of an arbitral tribunal until after the arbitrators have themselves ruled on their own jurisdiction.

...

Swiss law does not allow any 'judicial tutelage' of the courts over arbitral tribunals. Quite to the contrary, it fully implements the principle of 'Kompetenz-Kompetenz', in its positive effect, through the New York Convention which it ratified (see also Article 7 of the Swiss Federal Private International Law) as in its negative effect (Article 186 of the Swiss Federal Private International Law Act). The jurisdiction of the court to determine the validity of an arbitration agreement — which in any event cannot lead to an anti-suit injunction

6. The decision in French, as reproduced in the (2005) 3 *Stockholm International Arbitration Review* 191 and (2005) 4 *ASA Bulletin* 728, held that: "*En revanche, [la] régularité [de ces injonctions] au regard des principes qui régissent l'arbitrage est plus que douteuse puisqu'elles contredisent l'effet négatif du principe de « compétence-compétence » en vertu duquel les juridictions étatiques ne peuvent se prononcer sur la compétence d'un arbitre ou d'un tribunal arbitral qu'après que les arbitres ont déjà statué sur leur propre compétence. ...*

*L'ordre juridique suisse, quant à lui, ne connaît pas de « pouvoir de tutelle » des juridictions étatiques sur les juridictions arbitrales puisqu'au contraire, il intègre pleinement le principe de « compétence-compétence » tant dans son effet positif, par le biais de la [Convention] de New York à laquelle la Suisse a adhéré (voir également l'art. 7 LDIP), que négatif (art. 186 LDIP). La compétence du juge étatique pour statuer sur la validité d'une clause compromissoire — qui ne peut en tout état déboucher sur une anti-suit [in]junction — n'existe dès lors que s'il est lui-même saisi d'une exception d'arbitrage, son examen étant restreint si le siège du tribunal arbitral est en Suisse et libre si ce siège est à l'étranger (Dutoit, *Droit international privé suisse*, 4^e éd. 2005, p. 652 ; ATF 122 III 139 ; 121 III 38).*

En conclusion, quand bien même il apparaît vraisemblable que l'autorité saisie du fond du litige dispose, en vertu de son propre droit, du pouvoir d'ordonner une anti-suit injunction, les requérantes ne sauraient, par le biais de mesures provisionnelles, arguer de la nécessité de préfigurer ce jugement en requérant du Tribunal de céans qu'il prononce lui-même cette mesure, contraire à l'ordre juridique suisse, par le biais d'une exequatur déguisée de l'ordonnance du 10 mai 2004 de la High Court."

— thus only exists when the arbitration agreement is relied upon as a defence before the court, and in such circumstances the court's power to review is limited if the arbitration has its seat in Switzerland, whereas it has full power of review if the seat of arbitration is located abroad (Dutoit, *Droit international privé Suisse*, 2005, 4th ed., p. 652; Swiss Federal Supreme Court Decisions 122 III 139; 121 III 38).

To conclude, even if it appears to be likely that the court before which the merits of the dispute were brought has under its own law the power to grant an anti-suit injunction, the petitioners cannot, by a request for provisional measures, ... request this court to grant an anti-suit injunction, which is contrary to the Swiss legal system, by a disguised enforcement of the Order made by the High Court on 10 May 2004."

In summary, the Geneva court thus ruled that:

- anti-arbitration⁷ injunctions are not inconsistent with international public policy;
- they are, however, at variance with a general principle of arbitration as they negate the *Kompetenz-Kompetenz* principle, according to which the arbitrators themselves shall decide on their jurisdiction, in the first instance, subject to subsequent control of the court⁸;
- as Swiss law embraces the *Kompetenz-Kompetenz* rule, there is no legal basis for an anti-arbitration injunction;
- even if the foreign court to which the dispute had been referred was empowered, by its own law, to issue anti-arbitration injunctions, the injunction cannot be enforced in Switzerland.⁹

It should be noted that while a Swiss court will not restrain foreign proceedings, there are nevertheless circumstances in which a party can refer a dispute to a Swiss court notwithstanding an arbitration agreement invoked by its opponent. In order to do so, the party must persuade the Swiss court that the arbitration agreement is not applicable to the dispute and/or to the parties, or is, "null and void, inoperative or incapable of being

7. The Court uses the term "anti-suit injunction", but the order it examined was an anti-arbitration, rather than an anti-suit injunction.

8. See B. Berger and F. Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz* (2006), p.218, no.616.

9. See, e.g. M. Stacher, "You Don't Want to Go There — Antisuit Injunctions in International Commercial Arbitration" (2005) 4 *ASA Bulletin* 640, according to whom it has been questioned whether an anti-suit injunction rendered by a Swiss court in relation to proceedings in another signatory state would be compatible with the Lugano Convention. It is commonly admitted that signatory states have to enforce a judgement from other signatory states even if they were rendered in disregard of an arbitral agreement (provided that all other requirements for enforcement are met). According to Stacher, if that is the case, the issuance of an anti-suit injunction preventing foreign court proceedings which would lead to an enforceable judgement would be at variance with the Lugano Convention.

performed" (art.II.3 of the New York Convention). In light of the case law of the Swiss Federal Supreme Court, this could for instance be the case if the arbitral tribunal designated in the arbitration clause is not independent.¹⁰

Requests to enjoin foreign state court proceedings (anti-suit injunction)

The authors are not aware of any Swiss court decision dealing with an application by a party to an international arbitration conducted in Switzerland to enjoin the opposite party from initiating or continuing foreign court proceedings. Therefore, it can only be speculated how a Swiss court would handle such an application.

At the outset, it has to be recalled that Switzerland is not member of the European Union. Therefore Swiss courts are not bound by the ECJ's *West Tankers* decision.

A Swiss court would most likely rule that there is no provision under Swiss law that allows a party to obtain such relief. That was indeed the ruling of the Geneva Court of First Instance summarised above in the context of an application for an anti-arbitration injunction. Theoretically, the *Kompetenz-Kompetenz* principle on which the Geneva Court relied could also be used to prohibit a party from seizing a court before the arbitral tribunal has decided on its own jurisdiction. Practically, however, there would be no need to enjoin the foreign proceedings: if the Swiss court accepts that the arbitration agreement on which the applicant relies is valid, it will simply refer the parties to arbitration, and, if so requested and if it has jurisdiction, constitute the arbitral tribunal.

If the Swiss court *itself* has jurisdiction over the dispute (which obviously implies that there is no valid arbitration agreement and that a party has submitted the merits of the dispute of the court), it will proceed on the merits, if requested to do so, unless it finds that the very same case is already pending between the same parties in a foreign court, and that the foreign court is likely to render within an appropriate time a decision which would be enforceable in Switzerland (art.9 PILS; art.21 of the Lugano Convention).¹¹

It has furthermore been submitted that an anti-suit injunction would be at odds with art.7 of the Swiss Private International Law Statute (PILS).¹² According to art.7 PILS, Swiss courts must decline jurisdiction if the parties

are bound by an arbitration agreement. This provision does not however entitle Swiss courts to actively compel a party to arbitrate, to abandon proceedings pending before a foreign court, or to interfere with foreign court proceedings.

As a practical matter, a party confronted with foreign court proceedings which violate an arbitration agreement providing for arbitration in Switzerland would not in any event turn to the Swiss courts, but would simply initiate arbitration. The claimant can seize the Swiss courts at the place of arbitration (*judge d'appui*; art.179 PILS) in the event that the respondent does not participate in the constitution of the arbitral tribunal and the parties have not provided for a default appointment mechanism (for instance, by choosing institutional arbitration under the rules of the ICC, Swiss Chambers or LCIA, among others). Pending court proceedings will not prevent an arbitral tribunal in Switzerland from pressing forward: pursuant to art.186 1bis PILS, which entered into force in 2007, arbitral tribunals having their seat in Switzerland can decide on their own jurisdiction and even on the merits regardless of whether there are parallel court or arbitration proceedings pending between the same parties in Switzerland or abroad.¹³

The award rendered by an arbitral tribunal in a case in which parallel proceedings were taking place would be enforceable in Switzerland. It would also be enforceable in states that have enacted the New York Convention. The party that initiated the parallel court proceedings would then attempt to convince the enforcement judge that there are grounds to refuse enforcement, for instance because the arbitration agreement is not valid (art.V.1(a)).

It might be argued that Swiss courts could, pursuant to art.183(2) PILS, enforce an anti-suit injunction issued by an arbitral tribunal. According to this provision, the arbitral tribunal is entitled to grant interim relief, failing a contrary agreement of the parties. If a party does not voluntarily comply with the tribunal's order, the tribunal (and, according to legal writers, the opposing party)¹⁴ can request the assistance of the court at the place of arbitration. However, a possible obstacle to the enforcement of an order would be that according to many legal writers, Swiss courts cannot grant relief that they would not be entitled to grant themselves.¹⁵

10. See Decision of the Swiss Federal Supreme Court of March 15, 1993, Official Court Reporter 119 II 271; Decision of December 4, 2000 (2001) 3 *ASA Bulletin* 508, 511.

11. "Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

12. M. Stacher, "You Don't Want to Go There — Antisuit Injunctions in International Commercial Arbitration" (2005) 4 *ASA Bulletin* 640, 650.

13. W. Wenger and M. Schott in Honsell et al. (eds), *Basler Kommentar — Internationales Privatrecht*, 2nd edn (2007), n.7b ad art.186. See also Swiss Federal Supreme Court, Decision of October 29, 2008, 4A_210/2008 (2009) 2 *ASA Bulletin* 309. [The arbitral tribunal refused to stay the arbitration pending the outcome of parallel arbitral proceedings initiated by a party to resolve a dispute on an issue that was allegedly not within the scope of the first arbitration.]

14. S. Berti in Honsell et al. (ed.), *Basler Kommentar — Internationales Privatrecht*, 2nd edn (2007), n.16 ad art.183.

15. E. Geisinger, "Les relations entre l'arbitrage commercial international et la justice étatique en matière de mesures provisionnelles" (2005) II *SemJud* 375, 384 ; M. Wirth, "Interim or Preventive Measures in Support of International Arbitration in Switzerland" (2000) 1 *ASA Bulletin* 31, 33.

Another practical remedy for a party facing foreign court proceedings brought in disregard of a valid arbitration agreement could be to request the arbitral tribunal to award damages for breach of the arbitration agreement.¹⁶ The decision in ICC arbitration no.8307 summarised below supports this position. On the other hand, it could also be argued that costs related to foreign parallel proceedings should be claimed in the court in which the proceedings take place. Arbitral tribunals would likely analyse claims for damages on a case-by-case basis. A claim for damages in the arbitration would, in the absence of special circumstances, such as the foreign court's lack of independence, have better prospects of success if the foreign court ruled in favour of the party opposing to the court's jurisdiction than if the court rejected the objection. Double dipping, i.e. recovery of costs in the court proceedings and damages in the arbitration, would in any event not be admissible.

It could also be argued that a party which initiates court proceedings in violation of an arbitration agreement is deemed to have waived the agreement. The respondent in the unlawful court proceedings would no longer be bound by the arbitration agreement and would have the option of in turn submitting the dispute to the competent state courts. In this context, art.7 PILS should be mentioned: the Swiss courts will not decline jurisdiction over a dispute if the arbitral tribunal cannot be constituted for reasons for which the defendant in the arbitration is clearly responsible. There is support for the view, among commentators, that a party whose adversary, without a valid excuse, fails to participate in the constitution of the arbitral tribunal can either seize: (i) the Swiss judge at the place of arbitration to obtain a default appointment of any missing arbitrator; or (if applicable), (ii) the Swiss judge competent to hear the merits in the absence of an arbitration agreement.¹⁷

Requests to enjoin an arbitration in Switzerland

As seen above,¹⁸ Swiss courts do not have the power to issue anti-arbitration injunctions, either for arbitrations taking place in Switzerland or abroad, and cannot issue orders to enjoin proceedings before a foreign authority.

As of 2007, the issue has become moot since a new provision of the Private International Law Act art.186(1)bis, entered into force. Arbitral tribunals having their seat in Switzerland can decide on their own

jurisdiction and even on the merits irrespective of pending parallel court or arbitration proceedings between the same parties in Switzerland or abroad.¹⁹

Where a Swiss court rules that it has jurisdiction notwithstanding an arbitration clause brought to its attention (which implies that the court is of the opinion that the arbitration clause is void, not operational or not applicable),²⁰ it can be expected that an arbitral tribunal in Switzerland would defer to the Court's decision by finding that it does not have jurisdiction²¹ or by suspending the arbitration. If the arbitral tribunal nevertheless proceeds, without a valid contractual basis, a party could theoretically try to stop the arbitration by initiating a court action against the other party or the arbitral tribunal (*Unterlassungsverfügung*). The authors are not however aware of any precedents for such an action.

Courts outside Switzerland may be less deferential of foreign arbitration, as is illustrated by a decision of the US District Court for the Southern District of New York of February 28, 2007 in the *Mastercard v FIFA*²² case. In that case, Mastercard ("MC") and FIFA were bound by a partner agreement whereby FIFA granted MC certain sponsorship rights. MC applied to the US court for preliminary and permanent injunctive relief directing FIFA to specifically perform its obligations to grant MC (and not VISA) a sponsorship rights package. The agreement contained an arbitration clause providing for arbitration before the Zurich Chamber of Commerce. The US court nevertheless granted the injunction. FIFA commenced arbitration before the Zurich Chamber under the contract, seeking a declaration that it had not breached the contract. The arbitral tribunal issued a preliminary award on November 27, 2007 in which it unsurprisingly concluded that only it, and not the US court, had jurisdiction to order permanent relief and that the New York decision would most likely not be recognized in Switzerland. MC responded by seeking an order from the New York court directing FIFA to withdraw its notice of arbitration in the Zurich arbitration. The New York court, which apparently did not consider that the *Kompetenz-Kompetenz* principle prevented it from granting permanent injunctive relief, issued a temporary anti-arbitration injunction. A key consideration for the court was that the Swiss arbitral tribunal had attempted, "to carve out exclusive jurisdiction". The arbitral tribunal's position will most likely not strike the average arbitration practitioner as being wrong, since the parties

16. S. Dutson, "Breach of an Arbitration or Exclusive Jurisdiction Clause: The Legal Remedies if it Continues" (2000) 16 *Arbitration International* 1; Wessel and Cohen, "In Tune With Mantovani: The Novel Case of Damages for Breach of an Arbitration Agreement" (2001) 2 *Int. A.L.R.* 65; O. Sandrock, "Malicious parallel suits in foreign jurisdictions (comments on England, court of appeal, *Union Discount Company v Robert Zoller* [2001] EWCA Civ 1555", Notes by Sandrock, Delvolvé and Zettermarck in Jarvin and Magnusson, *International Arbitration Court Decisions* (2006).

17. S. Berti in Honsell et al. (ed.), *Basler Kommentar—Internationales Privatrecht*, 2nd edn (2007), n.16 ad art.8.

18. See section, "Requests to enjoin a foreign arbitration (anti-arbitration injunction)" above.

19. W. Wenger and M. Schott in Honsell et al. (ed.), *Basler Kommentar—Internationales Privatrecht*, 2nd edn (2007), n.7b ad art.186.

20. In general, pursuant to the provisions of art.7 PILS, Swiss courts will only accept jurisdiction on the merits if: (i) the defendant proceeds on the merits without objecting to jurisdiction; (ii) the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or (iii) the arbitral tribunal cannot be constituted for reasons for which the defendant in the arbitration is clearly responsible.

21. W. Wenger and M. Schott in Honsell et al. (eds), *Basler Kommentar—Internationales Privatrecht*, 2nd edn (2007), ad art.186, n.7b.

22. *Mastercard v FIFA* 2007 WL 631313 (S.D.N.Y.).

agreed to submit their disputes to arbitration, and the merits should only be decided in this agreed forum. The New York court however felt that it had jurisdiction itself, that the arbitral tribunal threatened this jurisdiction, and that an anti-arbitration injunction was therefore necessary to protect it. The District Court also questioned FIFA's good faith as it had only initiated the arbitration after it had lost the injunction proceedings in New York.

Anti-suit and anti-arbitration injunctions issued by arbitral tribunals having their seat in Switzerland

While this was not the case only a few years ago, it appears that the power of arbitral tribunals sitting in Switzerland to issue anti-suit and anti-arbitration injunctions is now well-established.²³ Indeed, a number of tribunals have granted such injunctions.

Interim Award in ICC Arbitration No.8307

A party to an arbitration with seat in Geneva ("B") had initiated court proceedings outside Switzerland against two other parties in the same arbitration ("A" and "C").²⁴ A and C requested the sole arbitrator to order B:

"[T]o suspend and discontinue any judicial proceedings in [country "X"] against the parties in this arbitration having the same object of the dispute outlined in the Terms of Reference."

B contended that although the damages claimed in its foreign court action were identical to those it had claimed in the arbitration, the cause of action was distinct.

The arbitrator held that under the ICC Rules and Swiss arbitration law, he had the power to issue interim measures of protection. He found that the parties in the arbitration were also summoned in the court proceedings. He did not find the argument based on the purported distinct nature of the cause of action to be persuasive. Both claims, he reasoned, were grounded on the same facts.

The arbitrator therefore considered that the court action violated the arbitration clause. He then determined, referring to ICC precedents, that he had, "the power to order the particular conservative measure of refraining from initiating or pursuing an action in state courts (anti-suit order)". Finding that the foreign court action initiated by B was abusive, the arbitrator exercised his power and

ordered B, "to refrain from pursuing the action initiated against [C and A] in the [courts of X]".

It has to be highlighted that the anti-suit injunction was granted on the basis of the arbitrator's exclusive jurisdiction. The arbitrator did not decide on the jurisdiction of the foreign court:

"Basically, a party is free to initiate an action wherever it deems it appropriate. Is such action brought with a tribunal which is not competent, it falls to this one to decide on its own jurisdiction and to find the suit inadmissible."

The arbitral tribunal noted that it had not been asked to threaten sanctions for a possible non-compliance with the anti-suit injunction, and added that:

"It falls therefore to the requesting Parties to take the necessary measures for the enforcement of this Award. Should such measures not be successful, relief for damages suffered as a consequence of the breach to the agreement to arbitrate might be sought in this arbitration."²⁵

Procedural Order in an ICC Arbitration (2008)

In another ICC arbitration seated in Geneva, the tribunal held that under the ICC Rules and Swiss law, it had both jurisdiction and the power to decide on a party's application for interim relief seeking an order against the other party to withdraw and refrain from pursuing parallel proceedings. The proceedings in question had been initiated before a foreign court prior to the commencement of the arbitration.

The facts of the case are as follows:

Company A concluded a distribution agreement with distributor B. The agreement which provided for ICC arbitration in Geneva covered the distribution of the goods of company A by B in a country X (different to the country of incorporation of B). Thereafter, B started a business relationship with the company C in X with a view to the implementation of the distribution agreement. A had objected to this relationship. C was not a party to the distribution agreement (and was therefore also not a party to the arbitration agreement).

A dispute arose out of the purported invalid termination of the distribution agreement by A. A initiated ICC arbitration against B, seeking a declaration that the distribution agreement had been validly terminated.

Shortly before commencing the arbitration, the claimant A had been informed that the companies B and C had initiated court proceedings in X against A and against one of its subsidiaries, the company "D". The claims were based on the distribution agreement.

23. E. Geisinger, "Les relations entre l'arbitrage commercial international et la justice étatique en matière de mesures provisionnelles" (2005) II Semjud 375, 391: "En effet, alors que la question était controversée il y a seulement quelques années, il semble se dégager aujourd'hui un consensus pour reconnaître aux arbitres le pouvoir de prononcer une anti-suit injunction."

24. ICC Arbitration No.8307/FMS/KGA, Interim Award of May 14, 2001 in E. Gaillard (ed.), *Anti-suit injunctions in international arbitration*, IAI Series on international arbitration no.2 (2005), pp.307 et seq. Sole arbitrator: Pierre Tercier. Place of arbitration: Geneva/Switzerland.

25. ICC Arbitration No.8307/FMS/KGA, Interim Award of May 14, 2001 in Gaillard (ed.), *Anti-suit injunctions in international arbitration*, 2005.

Together with its request for arbitration, the claimant A filed an application for urgent interim relief, requesting that the arbitral tribunal order the respondent B, "to withdraw and to refrain from pursuing the proceedings it has initiated against [A] before the courts of [X]".

Shortly after the arbitration was initiated, A learnt that B had also filed a court action against both it and D in the country of incorporation of B. A therefore also asked the arbitral tribunal to order B to withdraw from these proceedings.

B requested that A's application be dismissed, arguing *inter alia* that the parties in the arbitration proceedings and in the court proceedings before the courts of X were not identical and that not all parties to the state court proceedings were bound by the arbitration clause. Even if B withdrew from the proceedings, they would continue with C as the claimant. B also argued that the claims were not covered by the arbitration agreement. Moreover, B took the view that A had appeared in the court proceedings and could therefore not ask B to withdraw its claim. In both court proceedings, A had participated in order to object to the jurisdiction of the state courts by invoking the arbitration agreement contained in the distribution agreement. Finally, according to B, the relief requested from the arbitral tribunal was not "conservative or interim" in the meaning of art.23 of the ICC Rules, as a withdrawal from pending state court proceedings would preclude it from reopening them and would therefore entail a final waiver of its rights.

The arbitral tribunal granted the requested relief. The tribunal first considered that both court proceedings were based on the distribution agreement and were therefore within the scope of the arbitration agreement. Moreover, the arbitral tribunal decided that it had the jurisdiction and power to decide on the requested interim relief under art.23.1 of the ICC Rules. Finally the tribunal decided that the relief was appropriate, necessary and urgent:

"The jurisdiction and the powers of the Arbitral Tribunal are of course limited to the matters that the parties have submitted to its jurisdiction. In this case, to order any measure related to the pending Court proceedings in ..., it is required that the claims pending before those Courts arise out of or in connection to the Distributorship Agreement, which is a fact that has been established.

...

[I]t is unnecessary to wait for the ... Courts to rule on their jurisdiction to hear the claims pending before them, as this Arbitral Tribunal has jurisdiction to decide on its own jurisdiction, which none of the parties has contested.

According to art. 23.1 ICC Rules, the Arbitral Tribunal has the power to issue any measures that 'it deems appropriate'.

...

It is clear that a withdrawal without prejudice ... can be deemed to be 'conservative' and 'interim'. ... Whereas a withdrawal with prejudice could *prima facie* be deemed to be more problematic, this issue does not arise in this case. ... First, because the

Claimant is not asking Respondent to forfeit any rights, but to resort to arbitration. ... And second, ... it remains to be seen whether the effects of a withdrawal ... with prejudice ... could extend to the arbitration, so as to entail a definitive disposition of Respondent's rights. For instance, the affected party could eventually file a counterclaim in the arbitration if it were still allowed by the ICC Rules, such as for instance art. 19 ICC Rules.

...

[T]he fact that the proceedings may have been also initiated by parties that are not bound by the arbitration clause ... and Claimant would have appeared anyway ... does not change the conclusion that Respondent is bound by the arbitration agreement and can only bring claims against Claimant in arbitration proceedings if Claimant requests so. It is precisely this interest that is protected through the requested measure.

...

The measure is also necessary as the proceedings [before the state courts] involve claims related to the Distributorship agreement and ... there is a real risk that ... Claimant shall be obliged to assume additional significant costs and expenses ... as well as time-consuming evidence-taking ... there is also a risk of contradictory decisions.

...

The measure is also urgent. If it is not adopted now, Claimant will be forced to incur in additional expenses and costs. The fact that the proceedings pending before state Courts are still at the early stages weighs heavily for the Arbitral Tribunal."

ICC Interim Order on the application for an anti-arbitration injunction (2005)

In yet another ICC arbitration with seat in Geneva, the respondent objected to the jurisdiction of the arbitral tribunal and alleged that the ICC arbitration agreement had been replaced by an amendment which provided for arbitration in another country before another institution (the concurrent arbitration institution will be referred to as "X").

When the respondent initiated arbitration proceedings under the auspices of X, the claimant in the ICC arbitration filed an application for interim measures pursuant to art.23 of the ICC Rules. In its application, it requested the ICC tribunal to render an order or award requiring the respondent to withdraw its request for arbitration filed with X, or alternatively to agree to a stay of the X proceedings pending a decision on jurisdiction by the ICC tribunal.

The arbitral tribunal considered that *prima facie* jurisdiction, which it found had been established, was sufficient to order preliminary measures, and decided that an order to stay the parallel arbitration (instead of the withdrawal, as requested) was justified:

“WHEREAS the Arbitral Tribunal notes that the kind of relief sought by the Claimant, i.e., *to order the other party in the arbitration* to withdraw a parallel court or arbitration proceedings, is in principle admissible as has been recognized by a number of Arbitral Tribunals (Interim award of 14 May 2001 in ICC Arbitration no. 8307 (Sole Arbitrator: Pierre Tercier), published in *Anti-Suit Injunctions in International Arbitration*, IAI Series on International Arbitration, vol. 2, E. Gaillard ed. 2005, p. 307, Laurent LEVY, *Anti-Suit Injunctions Issued by Arbitrators*, in the same work, p. 115, 121 ff.; Andreas REINER, *Les mesures provisoires et conservatoires et l’arbitrage international*, notamment l’arbitrage CCI, in *Journal de droit international* 4.1998, p. 853, 895 ff);

WHEREAS, on the other hand, the Arbitral Tribunal accepts the Respondent’s view that it may only decide on its own jurisdiction, and has no power to order *another authority*, arbitral or judicial, before which parallel proceedings have been initiated, to stay the proceedings pending before it;

WHEREAS the Claimant must persuade the Arbitral Tribunal that the relief requested is appropriate in the present case;

WHEREAS orders of the nature requested by the Claimant are admissible only in case of a demonstrated risk of aggravation of the dispute or of a demonstrated violation of the arbitration agreement by the other party;

WHEREAS the Tribunal does not consider that filing for [‘X’] arbitration is a breach of the arbitration undertaking *per se* since, on the one hand, the validity of the Agreement on which the present ICC arbitration is based, and of the arbitration undertaking it contains, remains to be decided, and since, on the other hand, the claims made before the [X] Tribunal are not identical with the claims in the present arbitration;

WHEREAS it is therefore not appropriate to order the Respondent to withdraw its [X] Request for Arbitration;

WHEREAS according to Art. 23(1) of the ICC Rules, the Tribunal can order any interim measure it considers appropriate and, thus, can grant less than requested by the applicant, such as a temporary stay instead of a withdrawal;

WHEREAS parallel proceedings will without doubt aggravate the dispute due to the inevitable increase in costs of the Parties;

WHEREAS it can be assumed that at this early stage of the [X] arbitration, the Parties have not yet incurred substantial costs but soon will if the arbitration continues;

WHEREAS the Respondent participates in the ICC arbitration and requests that the Arbitral Tribunal to declare that it has no jurisdiction;

WHEREAS for cost reasons it would make sense for the parties to stay the [X] arbitration voluntarily

pending the present Tribunal’s decision on its jurisdiction, as requested by the Respondent;

WHEREAS the Respondent argued that it has a right to initiate the [X] proceedings but did not affirm, nor is there any visible reason, that any temporary stay of the [X] proceedings would be harmful to such right;

WHEREAS the Arbitral Tribunal notes that a provisional stay of the [X] Arbitration until such time as it has established its procedural timetable giving an estimated timeframe for the decision on jurisdiction, which is requested by Respondent, will not undermine the Respondent’s right to an effective remedy and would not unduly burden the Respondent;

WHEREAS in any event, subject to Art. 19 of the ICC Rules, the Respondent is free to introduce its claim currently pending before the [X] Tribunal in the present arbitration;

WHEREAS, for these reasons, the balance of inconvenience tips in favor of issuing a temporary interim order to be in force until it is predictable when the issue of jurisdiction will be decided in the present arbitration.”

Therefore, the Arbitral Tribunal held that:

- “1. The Parties are ordered to refrain from pursuing the [X] arbitration until further directions from the present Tribunal;
2. The Parties shall inform the [X] Secretariat and, if appointed, the [X] Arbitral Tribunal accordingly, and shall send a copy of all communications in this respect to the present Tribunal.”

Conclusions regarding the powers of arbitral tribunals in Switzerland to enjoin parallel proceedings

The following conclusions can be drawn from the decisions which are summarised above.

Arbitral tribunals in Switzerland have the power to issue appropriate anti-suit/anti-arbitration injunctions

The first conclusion which can be drawn from the above-mentioned decisions is that the power of an arbitral tribunal with seat in Switzerland to issue anti-suit and anti-arbitration injunctions is generally recognised by Swiss authors and arbitral tribunals.²⁶

The above decisions were all based on the arbitral tribunal’s power to decide on its own jurisdiction and were rendered pursuant to art.23 of the ICC Rules. They

26. See also the two examples of interim measures issued by two different Swiss arbitral tribunals, respectively prohibiting a party from bringing an action before a foreign court and from participating in foreign legal proceedings referred to in M. Wirth, “Interim or Preventive Measures in Support of International Arbitration in Switzerland” (2000) 1 *ASA Bulletin* 31.

took the form of procedural orders or interim awards.²⁷ However an arbitral tribunal may only decide on its own jurisdiction and may not rule on the jurisdiction of another tribunal or court.²⁸ Furthermore, the tribunal only has power to enjoin the parties to the arbitration before it from initiating or conducting parallel proceedings. It has no power to order an arbitral or judicial authority or institution before which parallel proceedings have been initiated to stay the proceedings.

In all three matters, the arbitral tribunal considered that the party requesting the injunction had successfully demonstrated that the proceedings it was seeking to restrain were based on identical facts and involved the same parties as those pending before the arbitral tribunal, even if other parties also participated in the parallel proceedings.

Anti-suit/anti-arbitration injunctions can be ordered by a tribunal only if it is appropriate

The arbitral tribunals considered that the anti-suit/anti-arbitration injunction could be rendered only under certain conditions. In particular, the decision must be appropriate in the circumstances.

There is no clear litmus test to assess the appropriateness of an injunction. One prerequisite seems to be that the state court proceedings at issue are initiated in violation of the party's obligations under the arbitration agreement. To demonstrate this, the requesting party will in most instances have to show that the proceedings it seeks to enjoin are identical to those pending before the arbitral tribunal. It is however also conceivable that parallel proceedings would be found to be improper even if they do not deal with the merits of the case.

Indeed, an injunction would also appear to be appropriate if the parallel proceedings would aggravate the dispute. As was mentioned by two of the tribunals, this could be the case if the continuation of the parallel proceedings would lead to significant costs and expenses,

redundant and time-consuming evidence-taking, and to contradictory decisions by the different tribunals and courts involved, or would otherwise be inconsistent with the parties' obligation to refrain from anything that could aggravate the dispute. It is conceivable that a parallel action (such as a lawsuit, administrative proceeding, or criminal complaint) initiated after the constitution of the arbitral tribunal is inconsistent with the parties' obligation even if it does not encroach on the arbitral tribunal's jurisdiction.

However, the measures ordered by the tribunal ought not to unduly interfere with a party's fundamental right to free access to the courts.²⁹ Arbitrators must take into account the impact of their decisions in this respect. For instance, prohibiting the initiation of proceedings before another court or arbitral tribunal may prevent a party from tolling a prescriptive period and may therefore cause the loss of a party's rights.

Finally, it is important to mention that arbitral tribunals sitting in Switzerland always have the power to decide on their own jurisdiction even if parallel proceedings are being conducted in Switzerland or abroad, and may order a stay of the arbitration only if it is warranted by "serious reasons" (art.186 lit. 1bis PILS). Swiss authors have indicated that that standard is met, *inter alia*: (i) if the claimant in the arbitration appears to participate in the state court proceedings without objecting the jurisdiction; or (ii) if the arbitral tribunal considers that it is very likely that another arbitral tribunal has jurisdiction rather than itself.³⁰

The arbitral tribunal may be able to penalise a party's non-compliance

In the event of non compliance with an arbitral tribunal's anti-suit for anti-arbitration injunction, it is conceivable for a tribunal, upon the request of a party, to order *astreintes* or penalties, or to allow claims for damages for the breach of an agreement to arbitrate. However, while they may be appropriate in certain cases, *astreintes* raise delicate issues which are yet to be resolved, for example arising from the tribunal's lack of "imperium".³¹

27. It will be noted that whatever the name or title of the decision, the latter will be subject to the provisions of the Swiss PIL Act on the setting aside of arbitral awards if, functionally, the decision is equivalent to an arbitral award (Swiss Federal Supreme Court, Decision of October 29, 2008, 4A.210/2008 (2009) 2 *ASA Bulletin* 309).

28. This is accepted by Swiss commentators: see L. Lévy, "Anti-Suit Injunctions issued by arbitrators" in E. Gaillard (ed.), *Anti-suit injunctions in international arbitration*, IAI Series on international arbitration no.2 (2005), pp.115, 120.

29. G. von Segesser and C. Kurth, "Interim Measures" in G. Kaufmann-Kohler and B. Stucki (eds), *International Arbitration in Switzerland — A Handbook for Practitioners* (The Hague: 2004), p.75; L. Lévy, "Anti-Suit Injunctions issued by arbitrators" in Gaillard (ed.), *Anti-suit injunctions in international arbitration*, 2005, pp.115, 125.

30. W. Wenger and M. Schott in Honsell et al. (ed.), *Basler Kommentar — Internationales Privatrecht*, 2nd edn (2007), n.14 ad art.186.

31. On *astreintes* see P. Bernardini, "Des mesures spécifiques: les *astreintes*, les *mesures conservatoires*" in J. Rosell (ed.), *Les arbitres internationaux*, Colloque du 4 février 2005, Centre français de droit comparé, Vol.8 (Société de Législation Comparée, 2005), pp.145–151; L. Lévy, "Les *astreintes* et l'*arbitrage international en Suisse*" (2001) 2 *ASA Bulletin* 21; E. Geisinger, "Les relations entre l'*arbitrage commercial international* et la justice étatique en matière de mesures provisionnelles" (2005) II *SemJud* 375, 378.

INTERNATIONAL ARBITRATION LAW REVIEW

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ARTICLES

Professor Peter F. Schlosser Europe—Is it Time to Reconsider the Arbitration Exception from the Brussels Regulation?

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Andrew Pullen The Future of International Arbitration in Europe: West Tankers and the EU Green Paper

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Matthias Scherer & Werner Jahnel Anti-suit and Anti-arbitration Injunctions in International Arbitration: A Swiss Perspective

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