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**WHAT IS THE PROPER SCOPE OF THE POWER OF AN  
ARBITRAL TRIBUNAL TO ISSUE AN ORDER  
RESTRAINING A PARTY FROM PURSUIT OF PARALLEL  
PROCEEDINGS IN A NATIONAL COURT?**

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## *Contents*

<b>Abstract</b> .....	<b>3</b>
<b>I Introduction</b> .....	<b>4</b>
<b>II Tribunal-Ordered Anti-Suit Injunctions</b> .....	<b>7</b>
<b>A What Are Parallel Proceedings in the Context of This Paper?</b> .....	<b>7</b>
<b>B When Are Provisional Measures, Including Anti-Suit Injunctions, Ordered?</b> .....	<b>9</b>
1 Source of Arbitrators' Powers to Issue Anti-Suit Injunctions .....	9
2 Various Conditions Must Be Met Before Tribunals May Order Anti-Suit Injunctions .....	16
3 Enforcement of Anti-Suit Injunctions Under The New York Convention and The UNCITRAL Model Law .....	21
4 Grounds for Refusing Enforcement of Anti-Suit Injunctions .....	23
<b>C Development of Tribunal-Ordered Anti-Suit Injunctions</b> .....	<b>27</b>
1 Early Cases in Support of, and Against, Anti-Suit Injunctions Issued in ICSID Arbitration .....	28
2 Gazprom.....	30
<b>III Court-Ordered Anti-Suit Injunctions</b> .....	<b>34</b>
<b>A Court-Ordered Anti-Suit Injunctions in Common Law Jurisdictions</b> .....	<b>34</b>
1 Court-Ordered Anti-Suit Injunctions Generally .....	34
2 Court-Ordered Anti-Suit Injunctions Specifically in Support of Arbitration .....	35
<b>B Court-Ordered Anti-Suit Injunctions in Civil Law Jurisdictions</b> .....	<b>36</b>
<b>C Conclusion</b> .....	<b>37</b>
<b>D Comparison between court-ordered and tribunal-ordered anti-suit injunctions, with particular focus on the enforceability of the injunctions</b> .....	<b>38</b>
<b>IV Proper Scope of Tribunal-Ordered Anti-Suit Injunctions</b> .....	<b>40</b>
<b>A The UNCITRAL Model Law and UNCITRAL Arbitration Rules</b> .....	<b>40</b>

**B Commercial Reasons ..... 41**

**C Conflicting Decisions ..... 42**

**D Lack of Precedent ..... 43**

**E Private Contractual Arrangements, Not Sovereign Authority ..... 44**

    1 Tribunal-Ordered Injunctions Are Not More Offensive Than Court-Ordered Injunctions ..... 44

    2 The Principle of Mutual Trust is Irrelevant ..... 45

**F Competence-Competence: Courts’ Ability to Rule on Their Own Jurisdiction ..... 46**

**G Right of Access to Courts and Justice ..... 47**

**H Enforcement Difficulties ..... 48**

**I Anti-Suit Injunctions Are Disruptive And May Cause Disproportionate Harm ..... 48**

**J Tribunal- And Court-Ordered Anti-Suit Injunctions Should Receive Identical Treatment ..... 49**

**K Suggestions on Reducing the Scope of Tribunal-Ordered Anti-Suit Injunctions ..... 50**

**V Conclusion ..... 51**

**Bibliography ..... 54**

## *Abstract*

The proper scope of tribunal-ordered anti-suit injunctions to combat parallel proceedings has been subject to much debate. Some have argued that arbitrators' use of the injunctions requires restriction, while others argue that existing conditions and limitations are sufficient. This paper provides an outline of the sources from which arbitrators are empowered to order anti-suit injunctions, the development of the injunctions through cases, and the recent European Court of Justice decision in *Gazprom*. It briefly touches on court-ordered anti-suit injunctions, and the implications of the Brussels I Regulation for tribunal-ordered anti-suit injunctions. It concludes that the scope of anti-suit injunctions does not require further restriction. Reasons for this conclusion include the 2006 amendments to the UNCITRAL Model Law; commercial reasons; the need to prevent conflicting decisions; and the nature of arbitration as arising from private commercial arrangements between parties.

Keywords: anti-suit injunction, arbitration, parallel proceedings, UNCITRAL Model Law, New York Convention, *Gazprom*, *West Tankers*, proper scope

## *Word count*

The text of this paper (excluding table of contents, non-substantive footnotes, and bibliography) comprises approximately 14,500 words.

## *I Introduction*

International arbitration is an increasingly utilised dispute resolution method. Lew, Mistelis and Kröll describe arbitration as:<sup>1</sup>

[A] specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal or non-legal standards chosen directly or indirectly by the parties.

For many parties who agree to exclusively resolve disputes through arbitration, as opposed to through domestic courts, it is considered a useful means of quickly resolving disputes in a private and neutral forum.<sup>2</sup> A minority choose to breach their arbitration agreements, however, by initiating proceedings in national courts contrary to exclusive arbitration agreements and already instituted arbitral tribunals.

Parallel proceedings are problematic, because they can waste resources, serve merely to frustrate or delay proceedings, and can undermine parties' arbitration agreements.<sup>3</sup> They cause "fragmentation and unpredictability" through the possibility of conflicting decisions and enforcement difficulties.<sup>4</sup>

While national courts are under a duty to stay their proceedings when disputes subject to arbitration come before them, because of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"),<sup>5</sup> occasionally this is insufficient. This is illustrated in a number of cases in which the courts have not referred parties to arbitration despite the existence of an agreement to arbitrate, and instead continued with hearing these cases domestically. As a result, anti-suit injunctions may occasionally be necessary to combat parallel proceedings.

Parties may apply for anti-suit injunctions from two possible *fora*: the courts or arbitral tribunals. Court-ordered anti-suit injunctions are generally well accepted in Anglo-commonwealth courts, however civil law jurisdictions have typically resisted their use.

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<sup>1</sup> Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003), at [1-1].

<sup>2</sup> Joseph Lookofsky and Ketilbjørn Hertz *Transnational Litigation and Commercial Arbitration: An Analysis of American, European, and International Law* (3rd ed, JurisNet, New York, 2011) at 815.

<sup>3</sup> Olga Vishnevskaya "Anti-suit injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?" (2015) 32(2) J.Int'l Arb. 173 at 174.

<sup>4</sup> At 174.

<sup>5</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 June 1958, entered into force 07 June 1959) ("the New York Convention").

Court-ordered injunctions maintain applicability in many common law jurisdictions today, but their scope has been curtailed in the European Union (the “EU”). Within many EU countries’ civil law systems, anti-suit injunctions are not viewed favourably, and this is reflected in the Brussels I Regulation<sup>6</sup> and the relatively recent decision of *Allianz SpA and Others v West Tankers Inc* (“*West Tankers*”).<sup>7</sup> As a result, court-ordered anti-suit injunctions are no longer permitted in the EU because of their inconsistency with the Brussels I Regulation. The unavailability of court-ordered anti-suit injunctions makes the case for retaining tribunal-ordered anti-suit injunctions more compelling.

Over the course of time, tribunal-ordered anti-suit injunctions have received increasing international acceptance. Some commentators, such as Laurent Lévy,<sup>8</sup> argue that the scope of the injunctions needs restriction, through the imposition of additional requirements.<sup>9</sup> This paper argues that anti-suit injunctions does not need these further restrictions, because they are a necessary tool in the arbitral tribunal arsenal to prevent parties from breaching exclusive arbitration agreements. Moreover, the Advocate-General Wathelet’s opinion<sup>10</sup> and the European Court of Justice (“ECJ”) judgment in the *Gazprom* case,<sup>11</sup> and amendments to the UNCITRAL Model Law on International Commercial Arbitration (the “UNCITRAL Model Law”),<sup>12</sup> support the current scope of the injunctions.<sup>13</sup>

In *Gazprom*, the ECJ signalled its recognition of the injunctions as a legitimate tool able to be utilised by arbitral tribunals in support of arbitration.<sup>14</sup> The ECJ held that anti-suit injunctions from tribunals do not infringe upon the principle of mutual trust accorded by EU Member States to each other’s legal systems and judicial institutions, as enshrined in the Brussels I Regulation. Therefore, whether EU member states are to enforce and recognise tribunal-ordered anti-suit injunctions depends on each state’s individual interpretation of the New York Convention, which relates to the enforcement of foreign arbitral awards, and their national arbitration laws. This places EU member states in the same situation as most other

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<sup>6</sup> Regulation 44/2001 on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1 (“Brussels I Regulation”).

<sup>7</sup> Case C-185/07 *Allianz SpA and Others v West Tankers Inc* [2009] ECR I-663.

<sup>8</sup> Laurent Lévy is an experienced arbitrator, has taken part in numerous international arbitration proceedings, and has written a multitude of texts and articles on arbitration. He is a partner at Lévy Kaufmann-Kohler, and visiting professor at the Centre for Commercial Law Studies, Queen Mary University of London.

<sup>9</sup> Laurent Lévy “Anti-suit injunctions issued by arbitrators” (2005) IAI International Arbitration Series No. 2 115.

<sup>10</sup> Case C-536/13 *Gazprom OAO* [2014] (Opinion of Mr Advocate-General Wathelet 4 December 2014).

<sup>11</sup> Case C-536/13 *Gazprom OAO* [2015] (ECJ 13 May 2015).

<sup>12</sup> UNCITRAL Model Law on International Commercial Arbitration (1985) (the “UNCITRAL Model Law”).

<sup>13</sup> See discussion in part IV.

<sup>14</sup> *Gazprom*, above n 11.

countries, including New Zealand, with regards to the enforceability of tribunal-ordered anti-suit injunctions.

Many national arbitration laws are based on the UNCITRAL Model Law: 69 states, in 99 jurisdictions, have national arbitration laws based on the UNCITRAL Model Law.<sup>15</sup> An example is the New Zealand Arbitration Act 1996, which is based on the UNCITRAL Model Law and also incorporates the most recent amendments. In 2006, UNCITRAL made amendments to art 17, and inserted new articles: arts 17A to 17H. Article 17 now expressly provides for arbitral tribunal-ordered anti-suit injunctions, through the inclusion of art 17(2)(b). It did not previously provide for anti-suit injunctions. Article 17(2)(b) provides that arbitral tribunals may, as a form of interim measure, order a party to “[t]ake action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself”. The insertion of article 17H is also significant. Article 17H sets out express provision for the recognition and enforcement of interim measures. This is of note, because prior to this amendment, it was unclear under the UNCITRAL Model Law, and remains unclear under the 1958 New York Convention for some jurisdictions,<sup>16</sup> whether courts had an obligation to enforce interim awards.

This paper seeks to determine the proper scope of tribunal-ordered anti-suit injunctions. It starts with an explanation of what parallel proceedings are defined as for the purpose of this paper in part II(A). Part II(B) considers the background to tribunal anti-suit injunctions, and includes discussion of the source of arbitrators’ powers, conditions that must be satisfied before tribunals will order anti-suit injunctions, and the enforcement of the injunctions. Part II(C) maps the development of anti-suit injunctions, and analyses the recent *Gazprom* case. Part III briefly touches on court-ordered anti-suit injunctions, because these are relevant to arguments concerning the scope of tribunal-ordered anti-suit injunctions. Part IV will consider arguments commonly put forward in support of narrowing the scope of anti-suit injunctions, and will counter these arguments with reasons as to why the scope of the injunctions does not need restricting. Part V provides a conclusion to the paper as a whole.

The focus of this paper is on the use of anti-suit injunctions in international commercial arbitration. References are occasionally made to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”) and arbitral cases decided under the umbrella of ICSID, however, for comparative purposes.

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<sup>15</sup> UNCITRAL “Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006” <[www.uncitral.org](http://www.uncitral.org)>.

<sup>16</sup> Jurisdictions in which enforcement remains unclear are those that have not incorporated the most recent amendments to the UNCITRAL Model Law.

## II *Tribunal-Ordered Anti-Suit Injunctions*

Part II begins with a brief explanation of the definition of parallel proceedings as referred to in this paper. It then examines the development of tribunal-ordered anti-suit injunctions, the source of tribunals' powers to grant the injunctions, and the enforceability of tribunal-ordered anti-suit injunctions. It also contrasts and compares tribunal-ordered and court-ordered anti-suit injunctions, in order to determine which are likely to be more advantageous to parties seeking a stay domestic court proceedings. This part is intended to provide readers with a background to the arguments made in part IV.

### *A What Are Parallel Proceedings in the Context of This Paper?*

By way of background, it is important to understand what is meant by parallel proceedings in this paper, so as to fully understand the concepts and arguments discussed below.

The test that courts and tribunals apply in international arbitration to determine whether proceedings are parallel differs from the usual triple identity test.<sup>17</sup> The triple identity test requires two sets of proceedings to have the same facts, the same parties, and the same causes of action.<sup>18</sup> In the context of international arbitration, while the test remains relevant, it is interpreted in a broader sense.<sup>19</sup> The focus, instead, is on the core of the dispute, and whether this is the same across the proceedings.<sup>20</sup> The formal identities of the parties, causes of action, and the facts are less crucial, although in many cases, the actual parties to the proceedings must still be identical.<sup>21</sup> This is illustrated in the ICSID arbitration case of *Millicom International Operations BV and Sentel GSM SA v The Republic of Senegal* ("*Millicom v Senegal*").<sup>22</sup>

*Millicom v Senegal* involved a number of related companies, who were involved in a dispute with the Republic of Senegal ("*Senegal*").<sup>23</sup> The related companies included Sentel GSM SA ("*Sentel*"), Millicom International Operations ("*MIO*"), and Millicom International Cellular SA Group ("*MIC*"). Sentel was a Senegalese company; MIO was a company based in the

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<sup>17</sup> Vishnevskaya "Anti-suit injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?", above n 3, at 184.

<sup>18</sup> At 184.

<sup>19</sup> At 184.

<sup>20</sup> At 184.

<sup>21</sup> At 184.

<sup>22</sup> *Millicom International Operations BV and Sentel GSM SA v The Republic of Senegal (Decision on Jurisdiction of the Arbitral Tribunal)* ARB/08/20, 16 July 2010 ("*Millicom v Senegal, Decision on Jurisdiction*"), and (*Decision on the Application for Provisional Measures*) ARB/08/20, 09 December 2009 ("*Millicom v Senegal, Decision on Provisional Measures*").

<sup>23</sup> The full facts can be found in [1]-[24] of *Millicom v Senegal, Decision on Jurisdiction*.

Netherlands; and MIC operated out of Luxembourg. MIC owned 100% of MIO's shares, and MIO owned 99% of Sentel's shares.

Sentel operated a telecommunications network in Senegal under a twenty year concession granted by Senegal. In response to breaches Senegal alleged Sentel had committed against the terms of the concession, Senegal issued a decree terminating the concession.<sup>24</sup> After this decree, MIC, MIO, and Sentel were all involved to varying degrees with negotiations and communications with Senegal.<sup>25</sup> A dispute eventually arose as to whether the decree had actually terminated the concession.<sup>26</sup>

Senegal initiated court proceedings against MIC and Sentel, requesting a ruling regarding the termination of the concession.<sup>27</sup> On the same day, MIO and Sentel commenced arbitration.<sup>28</sup> While the parties to the court proceedings (MIC and Sentel against Senegal) and the arbitration proceedings (MIO and Sentel against Senegal) were not identical, the arbitral tribunal nevertheless proceeded to recommend an anti-suit injunction,<sup>29</sup> requesting that the proceedings in the Dakar Regional Court be stayed pending a decision by the arbitral tribunal on its jurisdiction.<sup>30</sup> The arbitral tribunal said that it was sufficient that the cases centred on the continued applicability of the concession.<sup>31</sup> The different parties to the court and arbitral proceedings did not affect the tribunal's ability to issue an anti-suit injunction.<sup>32</sup>

Another ICSID arbitration case in which broadly similar, but not identical facts, were no hindrance to a tribunal issuing an anti-suit injunction is *CSOB v Slovakia*.<sup>33</sup> In *CSOB*, an arbitral tribunal issued an anti-suit injunction against bankruptcy proceedings in the Bratislava Regional Court in Slovakia. The arbitral tribunal recommended that the parties suspend the bankruptcy proceedings "to the extent that such proceedings might include determinations as to whether the [claimant] has a valid claim in the form of a right to receive funds from the Slovak Republic to cover its losses as contemplated in the Consolidation Agreement at issue in this arbitration".<sup>34</sup>

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<sup>24</sup> At [15].

<sup>25</sup> At [9]-[21].

<sup>26</sup> See [22] and [23].

<sup>27</sup> At [23].

<sup>28</sup> At [23].

<sup>29</sup> This is because in ICSID arbitration, rather than making orders, arbitral tribunals make recommendations to the parties. While the recommendations do not have to be followed by the parties, they are generally followed in practice.

<sup>30</sup> *Millicom v Senegal*, Decision on Provisional Measures, at [49].

<sup>31</sup> At [45].

<sup>32</sup> At [45].

<sup>33</sup> *CSOB v Slovakia (Procedural Order No. 4)*, ICSID Arb/97/4, 11 Jan 1999.

<sup>34</sup> At [7].

*Millicom v Senegal*<sup>35</sup> and *CSOB v Slovakia*<sup>36</sup> illustrate the looser criteria applied by tribunals when determining whether proceedings are parallel for the purposes of an anti-suit injunction. It is important to bear in mind this definition of parallel proceedings when considering cases and further discussion in this paper.

## *B When Are Provisional Measures, Including Anti-Suit Injunctions, Ordered?*

### *1 Source of Arbitrators' Powers to Issue Anti-Suit Injunctions*

Anti-suit injunctions are recognised in the UNCITRAL Model Law as a form of interim, or provisional, measure.<sup>37</sup> Arbitral tribunals' powers to order provisional measures can derive from a number of sources, because no single law applies in international arbitration.<sup>38</sup> The sources can include a mix of arbitration agreements, arbitration rules, and national arbitration laws, and these are regulated "by an often complex maze of national and international rules".<sup>39</sup>

Lew, Mistelis, and Kröll helpfully explain how they all interact:<sup>40</sup>

The agreement of the parties (1) will prevail over the provisions in the chosen arbitration rules (2) which in turn prevail over international arbitration practice (3) and applicable law (4). In this hierarchy the norms of a lower stage are superseded by those of a higher stage and are only applicable where there is no regulation in any of the proceeding stages. By corollary, in the absence of agreement as to specific rules or arbitration rules it is the applicable law (4) that will govern the arbitration.

Below, the sources from which arbitrators' powers to order provisional measures may derive are discussed. It is important to understand from whence the powers originate, for without the power to order provisional measures, arbitrators are unable to order anti-suit injunctions.

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<sup>35</sup> *Millicom v Senegal*, above n 22.

<sup>36</sup> *CSOB v Slovakia*, above n 33.

<sup>37</sup> UNCITRAL Model Law, art 17.

<sup>38</sup> Lookofsky and Hertz *Transnational Litigation and Commercial Arbitration: An Analysis of American, European, and International Law*, above n 2, at 816.

<sup>39</sup> At 816.

<sup>40</sup> Lew, Mistelis and Kröll *Comparative International Commercial Arbitration*, above n 1, at [2-45].

***(a) Arbitration agreements***

One of the four fundamental features of arbitration is that it is “selected and controlled by the parties”.<sup>41</sup> Parties have the autonomy to determine the exact way in which they wish for arbitration to go ahead, subject to some restrictions.<sup>42</sup> “Party autonomy” is a long standing principle in international commercial arbitration.<sup>43</sup> For example, it is acknowledged in the UNCITRAL Model Law, the 1958 New York Convention, and the ICSID Arbitration rules.<sup>44</sup>

Stemming from party autonomy and parties’ consent to arbitrate, where an arbitration agreement provides for arbitration as an exclusive dispute resolution mechanism, it “obliges the parties to honour this commitment and provides the basis for the jurisdiction of the arbitral tribunal”.<sup>45</sup> If parties have agreed to exclusive arbitration, this means they have agreed not to seek recourse from domestic courts, and so should restrict the resolution of any disputes to arbitration alone.<sup>46</sup> This contractual obligation is one reason cited in support of anti-suit injunctions, for without the power to order the injunctions, tribunals have no means of enforcing arbitration agreements.<sup>47</sup> This arguments gains further traction considering the restrictions imposed following *West Tankers* on court-ordered anti-suit injunctions in the EU.<sup>48</sup>

Where an arbitration agreement does not specify whether an arbitral tribunal can order provisional measures, most arbitral tribunals, by default, have the power to order provisional measures.<sup>49</sup> This is the case even where national laws and arbitration rules do not expressly provide arbitrators with the power to grant provisional measures, because arbitrators are

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<sup>41</sup> At [1-7].

<sup>42</sup> At [1-11]. See also Alan Redfern and others *Law and Practice of International Commercial Arbitration* (5<sup>th</sup> ed, Sweet and Maxwell, London, 2009) at [6-02].

<sup>43</sup> At [6-03].

<sup>44</sup> At [6-03].

<sup>45</sup> Emmanuel Gaillard and John Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, Netherlands, 1999) at [624.]

<sup>46</sup> At [624].

<sup>47</sup> See Part IV(E).

<sup>48</sup> See Part III(B).

<sup>49</sup> Lew, Mistelis and Kröll *Comparative International Commercial Arbitration*, above n 1, at [23-30]. For example, the arbitration agreement in *Mantovani v Caparelli* [1980] 1 Lloyd’s Rep 375 (CA), cited at [23-7]-[23-14] and [23-116]. See also the discussion of international arbitration rules from [23-23]-[23-29]. Also relevant here is Gaillard and Savage *Fouchard Gaillard Goldman on International Commercial Arbitration*, above n 45, at [1319]; and Christoph H Schreuer *The ICSID Convention: a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1<sup>st</sup> ed, Cambridge University Press, Cambridge, 2001), chapter on article 47, at [7].

assumed to have an implied power to grant the measures.<sup>50</sup> The rationale for this assumption is:<sup>51</sup>

[B]y the arbitration agreement the parties give the tribunal the powers necessary to settle their dispute ... [which] includes any measure of provisional relief which is necessary to safeguard the rights of the parties and the efficiency of the tribunal's decision-making.

Parties can disempower arbitrators from ordering the measures, however, by expressly excluding them from the scope of the arbitration agreement. This is reflected in article 17(1) of the UNCITRAL Model Law, which provides that an arbitral tribunal may order provisional measures unless the parties have agreed otherwise:

**Article 17 Power of arbitral tribunal to order interim measures**

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

There are restrictions, however, on parties' autonomy to determine the scope of their arbitration agreements.<sup>52</sup>

First, the parties must be treated equally by the arbitral tribunal.<sup>53</sup> This is enshrined in article 18 of the UNCITRAL Model Law:

**Article 18. Equal treatment of parties**

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Second, the powers conferred upon an arbitral tribunal by means of an arbitration agreement cannot "cause the arbitration to be conducted in a manner contrary to the mandatory rules or public policy of the state in which the arbitration is held".<sup>54</sup> Public policy is discussed further below in relation to the enforcement of anti-suit injunctions.<sup>55</sup>

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<sup>50</sup> Lew, Mistelis and Kröll *Comparative International Commercial Arbitration*, above n 1, at [23-30].

<sup>51</sup> At [23-30].

<sup>52</sup> Alan Redfern and others *Law and Practice of International Commercial Arbitration*, above n 42, at [6-05]; Lookofsky and Hertz *Transnational Litigation and Commercial Arbitration: An Analysis of American, European, and International Law*, above n 2, at 819.

<sup>53</sup> Alan Redfern and others *Law and Practice of International Commercial*, above n 42, at [6-06].

<sup>54</sup> At [6-07].

<sup>55</sup> See Part II(B)(4).

Arbitration rules, as specifically included in arbitration agreement, may also restrict party autonomy, although there are only a small number of rules that impose compulsory restrictions.<sup>56</sup>

Lastly, arbitral tribunals are generally unable to make orders that affect third parties to the proceedings, so the inclusion of such powers in an arbitration agreement would be invalid.<sup>57</sup> This restriction underscores tribunals' inability to order anti-suit injunctions directly against the domestic courts in which parallel proceedings are taking place. Instead, arbitral tribunals can only order the injunctions against the parties to the arbitration.

***(b) Arbitration rules***

To preface this subsection on arbitration rules, a general explanation on the relevance of arbitration rules to international arbitration is necessary.

When parties enter into agreements to arbitrate, they can choose either institutional arbitration or ad hoc arbitration.<sup>58</sup> Ad hoc arbitration involves an arbitral tribunal being specifically constituted to address the parties' dispute; institutional arbitration differs in that arbitration takes place "under the auspices of a particular institution".<sup>59</sup> Such institutions include the International Chamber of Commerce (the "ICC"), the American Arbitration Association, and the London Court of International Arbitration (the "LCIA").<sup>60</sup> Institutions often have their own rules and procedures, may provide a "watchdog" function, and may provide parties with services such as meeting rooms in which arbitration can take place.<sup>61</sup>

In ad hoc arbitration, parties may agree for specific arbitration rules to govern their disputes.<sup>62</sup> Below is an example of a clause in an arbitration agreement incorporating the UNCITRAL Arbitration rules:<sup>63</sup>

All disputes arising in connection with the present contract shall be settled by arbitration under the UNCITRAL rules.

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<sup>56</sup> Alan Redfern and others *Law and Practice of International Commercial Arbitration*, above n 42, at [6-08].

<sup>57</sup> At [6-09].

<sup>58</sup> Lookofsky and Hertz *Transnational Litigation and Commercial Arbitration: An Analysis of American, European, and International Law*, above n 2, at 830.

<sup>59</sup> At 830.

<sup>60</sup> At 830.

<sup>61</sup> At 830. See also 830-832 for more information on institutional arbitration.

<sup>62</sup> Lew, Mistelis and Kröll *Comparative International Commercial Arbitration*, above n 1, at [2-45]; Lookofsky and Hertz *Transnational Litigation and Commercial Arbitration: An Analysis of American, European, and International Law*, above n 2, at 818.

<sup>63</sup> At 818.

Arbitration rules vary in their treatment of provisional measures, but typically empower arbitrators the power to grant them.<sup>64</sup>

For example, article 26 of the UNCITRAL Arbitration Rules, which for the most part reflects articles 17 to 17G of the UNCITRAL Model Law, empowers arbitrators to order provisional measures. The power to issue anti-suit injunctions is bolded in the below excerpt from article 26:

#### **Article 26**

1. The arbitral tribunal may, at the request of a party, grant interim measures.
2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
  - (a) Maintain or restore the status quo pending determining of the dispute
  - (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;**
  - (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
  - (d) Preserve evidence that may be relevant and material to the resolution of the dispute

[other paragraphs omitted; emphasis added]

A similar provision empowering arbitral tribunals to issue provisional measures, although less detailed, can be found in article 28 of the ICC Rules of Arbitration (the “ICC rules”).

#### **Article 28: Conservatory and Interim Measures**

- 1) Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.

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<sup>64</sup> Lew, Mistelis and Kröll *Comparative International Commercial Arbitration*, above n 1, at [23-23]-[23-29].

[paragraph 2 omitted]

In contrast with the UNCITRAL rules, the ICC rules do not provide specifically for anti-suit injunctions. Neither does article 25.1 of the LCIA rules, which provides:

**Article 25 Interim and Conservatory Measures**

25.1 The Arbitral Tribunal shall have the power upon the application of any party, after giving all other parties a reasonable opportunity to respond to such application and upon any such terms as the Arbitral Tribunal considers appropriate in the circumstances:

(i) to order any respondent party to a claim or cross-claim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner;

(ii) to order the preservation, storage, sale or other disposal of any documents, goods, samples, property, site or thing under the control of any party and relating to the subject-matter of the arbitration; and

(iii) to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties.

Such terms may include the provision by the applicant party of a cross-indemnity, secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by the respondent party in complying with the Arbitral Tribunal's order. Any amount payable under such cross-indemnity and any consequential relief may be decided by the Arbitral Tribunal by one or more awards in the arbitration.

As the articles above illustrate, depending on the rules agreed upon by the parties, the powers of arbitral tribunals to order provisional measures may differ. This is further complicated by the existence of national laws.

**(c) National laws**

As mentioned above, where arbitration agreements are silent on provisional measures, national laws will generally flesh out the arbitration process.<sup>65</sup> Any mandatory rules in the

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<sup>65</sup> Alan Redfern and others *Law and Practice of International Commercial Arbitration*, above n 42, at [6-17]; and UNCITRAL Model Law, Explanatory Note by the UNCITRAL Secretariat, at 25.

domestic law of the *lex arbitri*, or the law applying to the arbitration, must be followed by the arbitral tribunal.<sup>66</sup> This is relevant to anti-suit injunctions, because many national arbitration laws are based on the UNCITRAL Model Law.<sup>67</sup>

The UNCITRAL Model Law specifically provides for anti-suit injunctions as provisional measures through article 17(2)(b). This provision was inserted, along with a number of others, as amendments to the UNCITRAL Model Law in 2006.<sup>68</sup>

#### **Article 17 Power of arbitral tribunal to order interim measures**

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
- (2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
  - (a) Maintain or restore the status quo pending determination of the dispute;
  - (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;**
  - (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
  - (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

[emphasis added]

Article 17(1) provides that an arbitral tribunal, governed by domestic law based on the UNCITRAL Model Law, will have the power to grant interim measures provided the parties have not agreed otherwise. It specifically empowers tribunals to order anti-suit injunctions, through the inclusion of article 17((2)(b), if the injunctions are necessary to prevent “current or imminent harm or prejudice to the arbitral process itself”.

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<sup>66</sup> Lookofsky and Hertz *Transnational Litigation and Commercial Arbitration: An Analysis of American, European, and International Law*, above n 2, at 819. A recent example of a case in which parties failed to follow mandatory rules in the New Zealand Arbitration Act 1996 is the case of *Carr v Galloway Cook Allan* [2014] NZSC 75.

<sup>67</sup> See UNCITRAL “Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006” <[www.uncitral.org](http://www.uncitral.org)>.

<sup>68</sup> Art 17(2)(b) of the UNCITRAL Model Law is also discussed in Part IV(A). See Sundaresh Menon and Elaine Chao “Reforming the Model Law Provisions on Interim Measures of Protection” (2006) 2 AIAJ 1 at 6 for a detailed discussion of the amendments.

Whether national laws provide tribunals with the power to issue provisional measures varies. Domestic legislation generally falls into one of three categories.

First, where domestic legislation provides arbitrators broad powers to grant provisional measures.<sup>69</sup> This is the approach taken by the UNCITRAL Model Law. Second, where domestic laws specify the provisional measures that arbitrators may grant, with any further measures unavailable unless explicitly provided for in an arbitration agreement.<sup>70</sup> Third, where domestic laws deny arbitrators the power to grant any provisional measures except where otherwise expressly provided in an arbitration agreement.<sup>71</sup> For example, New Zealand's Arbitration Act 1996 is based on the UNCITRAL Model Law, and includes the amendments from 2006. Section 17A of the Arbitration Act replicates article 17(1) of the UNCITRAL Model Law, and s 17 incorporates article 17(2).

In addition to expressly providing arbitral tribunals with the power to issue anti-suit injunctions, article 17H of the UNCITRAL Model Law provides for their enforcement. Article 17H article is discussed in greater detail in Part II(A)(3).

## 2 *Various Conditions Must Be Met Before Tribunals May Order Anti-Suit Injunctions*

There are conditions that a party seeking an anti-suit injunction must meet before a tribunal will grant an injunction. These requirements emphasise the significant effect provisional measures can have on parties, and reinforce the need for arbitral tribunals to order them sparingly.<sup>72</sup>

The conditions include:

- The risk of prejudice to the arbitral process itself;
- The risk of irreparable harm;
- The likelihood of success on the merits of the case
- An element of urgency; and
- A tribunal with prima facie competence to hear the merits of the case.

Below each of the conditions is discussed specifically in relation to anti-suit injunctions, with examples of their application in *Millicom v Senegal*.<sup>73</sup> Provisions from the UNCITRAL Model Law are included where relevant.

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<sup>69</sup> Lew, Mistelis and Kröll *Comparative International Commercial Arbitration*, above n 1, at [23-16] to [23-17].

<sup>70</sup> At [23-20].

<sup>71</sup> At [23-22].

<sup>72</sup> At [23-4]. See also *Millicom v Senegal*, Decision on Provisional Measures, above n 22, at [38] and [50].

<sup>73</sup> *Millicom v Senegal* is discussed in greater detail in Part II(A).

***(a) Risk of prejudice to the arbitral process itself***

Anti-suit injunctions are often issued to prevent “prejudice to the arbitral process itself”.<sup>74</sup> This includes ensuring the enforceability of future awards. This condition is provided in article 17(2)(b) of the UNCITRAL Model Law:

**Article 17. Power of arbitral tribunal to order interim measures**

...

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

...

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

[remaining provisions omitted]

Article 17(2)(b) was added by UNCITRAL to explicitly provide for tribunal-ordered anti-suit injunctions.<sup>75</sup> The rationale for the provision was to ensure arbitral tribunals could “prevent obstruction or delay of the arbitral process” by parties seeking recourse in domestic courts, or in separate arbitral tribunals, contrary to exclusive arbitration agreements.<sup>76</sup>

UNCITRAL intended for the anti-suit injunctions issued in accordance with article 17 to be ordered as interim measures against parties instigating either court proceedings or other arbitral proceedings.<sup>77</sup> Arguments against the amendments, based on the lack of familiarity of civil law jurisdictions with anti-suit injunctions, were made, but UNCITRAL rejected the arguments.<sup>78</sup>

UNCITRAL justified the amendments on these grounds:<sup>79</sup>

- The increasingly widespread utilisation of anti-suit injunctions generally;

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<sup>74</sup> UNCITRAL Arbitration Rules, art 26; UNCITRAL Model Law, art 17(2)(b).

<sup>75</sup> *Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session* A/61/17 (2006) at [93].

<sup>76</sup> *Report of the Working Group on Arbitration and Conciliation on the work of its forty-third session* A/CN.0/589 (2005) at [20].

<sup>77</sup> At [21].

<sup>78</sup> At [23].

<sup>79</sup> At [23].

- The importance of anti-suit injunctions in facilitating international trade; and
- Parties in civil and common law jurisdictions occasionally breach exclusive arbitration agreements, so tribunals in both types of jurisdictions need the power order parties to stay proceedings.

UNCITRAL concluded that it is “legitimate for arbitral tribunals to seek to protect their own process” by issuing anti-suit injunctions against recalcitrant parties.<sup>80</sup>

An example of this condition operating in practice can be found in *Millicom v Senegal*.<sup>81</sup> In *Millicom*, the claimants requested an anti-suit injunction based on their “right to continue bringing their claims without the arbitration proceedings becoming meaningless owing to a judgment to the contrary passed by the Senegalese courts”.<sup>82</sup>

***(b) The risk of irreparable harm***

Article 17A of the UNCITRAL Model Law provides conditions for granting interim measures. Article 17A(1)(a) sets out the requirement of a risk of irreparable harm:

**Article 17 A. Conditions for granting interim measures**

(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

- (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted;

[other provisions omitted]

Tribunals are required to consider whether there is a risk of harm, to ensure that ordering an anti-suit injunction is “necessary and proportional” to the harm that may arise as a result of the issuance of the injunction.<sup>83</sup> Menon and Chao suggest that the test applied may be similar to the common law “balance of convenience” test.<sup>84</sup>

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<sup>80</sup> At [23].

<sup>81</sup> *Millicom v Senegal*, above n 22.

<sup>82</sup> *Millicom v Senegal*, Decision on Provisional Measures, at [44].

<sup>83</sup> Vishnevskaya “Anti-suit injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, above n 3, at 190.

<sup>84</sup> Menon and Chao “Reforming the Model Law Provisions on Interim Measures of Protection”, above n 68, at 8.

It is argued that a case meets the requisite threshold if:<sup>85</sup>

- A judgment rendered in parallel proceedings would be made public; or
- The overall dispute would be aggravated should the parallel proceedings be allowed to continue.

A dispute may be aggravated if there would be higher costs associated with resolving the dispute in more than one forum; the parallel proceedings may cause delay in resolving the dispute; there is a risk of inconsistent judgments; and the inconsistent judgments could lead to enforcement issues.<sup>86</sup>

The risk of irreparable harm was also considered by the arbitral tribunal in *Millicom v Senegal*. The tribunal concluded that there was a risk of irreparable harm, because allowing Senegal to continue with its court proceedings could seriously affect the enforceability of any award rendered by the tribunal, especially if the award proved to be at odds with the judgment produced by the courts.<sup>87</sup>

***(c) The requirement of urgency and the likelihood of success on the merits of the case***

Another requirement is that parties must be likely to succeed on the merits of the case before an arbitral tribunal will issue a provisional measure. This requirement can be found in article 17A of the UNCITRAL Model Law:

**Article 17 A. Conditions for granting interim measures**

(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

...

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

[article 17A(2) omitted]

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<sup>85</sup> Vishnevskaya “Anti-suit injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, above n 3, at 190.

<sup>86</sup> At 190-191. These factors are from ICC Case No 8307. See also Lew, Mistelis and Kröll *Comparative International Commercial Arbitration*, above n 14, at [23-42]; and Gaillard and Savage *Fouchard Gaillard Goldman on International Commercial Arbitration*, above n 45, at [1326] and [1334].

<sup>87</sup> *Millicom v Senegal*, Decision on Provisional Measures, above n 22, at [47].

There must also be an element of urgency before anti-suit injunction may be granted. This was illustrated in *Millicom v Senegal*, in which the tribunal said that the requirement of urgency is satisfied where a party has “proven that if the measures are not ordered rapidly, there are serious risks that the rights of applicants will be jeopardised”.<sup>88</sup>

***(d) Prima facie competence to decide on the merits of the case***

Last, an arbitral tribunal must establish that it has *prima facie* competence to decide on a case’s merits before it is able to order an anti-suit injunction.

For example, in *Millicom v Senegal*, the arbitral tribunal found that it had *prima facie* competence to decide on the case’s merits, and then proceeded to recommend an anti-suit injunction.<sup>89</sup> The mere fact that one party is contesting an tribunal’s jurisdiction is insufficient to render the tribunal *prima facie* incompetent.<sup>90</sup> On the other hand, simply bringing proceedings to establish jurisdiction is also inadequate on its own to establish *prima facie* jurisdiction.<sup>91</sup>

The tribunal in *Millicom* said:<sup>92</sup>

[W]hile waiting for a decision to be given on the merits of a case and provided that the conditions have been met, the aim is to ensure as far as possible that no decisions can be taken that risk depriving that decision of its main effect in fact.

After an “initial analysis” of the case, the tribunal in *Millicom* found that it had *prima facie* jurisdiction to hear the dispute, and the potential to recommend an anti-suit injunction.<sup>93</sup>

Once the above conditions have been met, there is still the issue of whether or not anti-suit injunctions are enforceable. Enforcement is not guaranteed in all jurisdictions, because of uncertainties surrounding the interpretation of the New York Convention and the lack of incorporation by the majority of jurisdictions of amendments to the UNCITRAL Model Law.

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<sup>88</sup> At [43].

<sup>89</sup> At [43].

<sup>90</sup> At [42].

<sup>91</sup> At [42].

<sup>92</sup> At [42].

<sup>93</sup> At [42]-[43].

### *3 Enforcement of Anti-Suit Injunctions Under The New York Convention and The UNCITRAL Model Law*

The enforcement of anti-suit injunctions, along with other provisional measures generally, is unclear. This is because of uncertainty regarding the interpretation of the New York Convention. As mentioned above, article 17H of the UNCITRAL Model Law has helped provide clarity in states that have adopted the most recent amendments to the UNCITRAL Model Law. Enforcement under both the New York Convention and the UNCITRAL Model Law is considered below.

#### *(a) The New York Convention*

The New York Convention relates to the enforcement of arbitral awards. There are approximately 150 contracting states to the 1958 New York Convention.<sup>94</sup> Article 1(1) of the New York Convention provides that the Convention applies to:

[T]he recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

It interacts with domestic legislation by setting the minimum standard that must be adhered to in contracting states.<sup>95</sup>

Of particular relevance to the enforcement of provisional measures is article III:

#### **Article III**

Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

[final sentence omitted]

The problem with article III is that it is unclear as to what arbitral awards come within the scope of the Convention. This lack of clarity means there is no obvious indication as to

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<sup>94</sup> Lookofsky and Hertz *Transnational Litigation and Commercial Arbitration: An Analysis of American, European, and International Law*, above n 2, at 844.

<sup>95</sup> At 845. Refer to Part II(B)(1) for discussion on national laws.

whether the Convention requires contracting states to enforce provisional measures.<sup>96</sup> This uncertainty was considered in *Gazprom*, in which the European Court of Justice (“the ECJ”) acknowledged that whether an anti-suit injunction is enforceable in a given state depends on the case law in that state on how the New York Convention should be interpreted.<sup>97</sup>

This issue with the New York Convention is, however, addressed to a limited extent by the insertion of article 17H into the UNCITRAL Model Law.

**(b) *The UNCITRAL Model Law***

Article 17H(1) of the UNCITRAL Model Law provides for the enforcement of provisional measures, including anti-suit injunctions. It provides:

An interim measure issued by an arbitral tribunal shall be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

The article specifically provides that interim measures, such as anti-suit injunctions, are binding, and should be enforced by courts regardless of the country in which the measure was issued. Article 17H of the UNCITRAL Model Law does not consider anti-suit injunctions as such, but rather provides for a separate means by which they can be enforced.<sup>98</sup> The article was inserted to address concerns that parties were denied “effective relief” because of “the ease and speed with which assets can be transferred out of a jurisdiction in order to avoid satisfying an arbitral award” and because of “increasingly sophisticated parties” with “higher expectations of their ability to enforce their rights”.<sup>99</sup> Born says that the article “is a desirable addition to the Model Law that would enhance the efficacy of the arbitral process”.<sup>100</sup>

As mentioned above, New Zealand has adopted the most recent amendments to the UNCITRAL Model Law, which include article 17H. The Arbitration Act 1996 defines awards as meaning “a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory, or partial award”.<sup>101</sup> New Zealand is rather pioneering,

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<sup>96</sup> Gary B Born *International Commercial Arbitration* (Kluwer Law International, The Netherlands, 2009) at 2020-2023.

<sup>97</sup> *Gazprom OAO*, above n 11, at [41]-[42].

<sup>98</sup> Born *International Commercial Arbitration*, above n 96, at 2024.

<sup>99</sup> Menon and Chao “Reforming the Model Law Provisions on Interim Measures of Protection”, above n 68, at 2 and 17.

<sup>100</sup> Born *International Commercial Arbitration*, above n 96, at 2026.

<sup>101</sup> Arbitration Act 1996, s 2.

however, in adopting the amendments: out of the 99 jurisdictions with national arbitration laws based on the UNCITRAL Model Law, only 16 have adopted the most recent amendments.<sup>102</sup> Therefore, the extent to article 17H will have an overall impact upon the enforceability of anti-suit injunctions globally is questionable.

In the vast majority of jurisdictions, whether tribunal-ordered anti-suit injunctions are binding and enforceable will still rest on domestic courts' interpretation of the 1958 New York Convention. These enforcement difficulties are often cited as a reason against a wide scope for anti-suit injunctions.<sup>103</sup> In addition to the lack of clarity surrounding whether anti-suit injunctions are enforceable at all, there are grounds on which domestic courts can refuse enforcement.

#### *4 Grounds for Refusing Enforcement of Anti-Suit Injunctions*

The grounds on which states can refuse to enforce anti-suit injunctions are provided in article V of the New York Convention. The article provides:

##### **Article V**

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
  - (a) The parties to the agreement ... were ... under some incapacity, or the said agreement is not valid ... ; or
  - (b) The party against whom the award was invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
  - (c) The award deals with a difference contemplated by or not falling within the terms of the submission to arbitration ... ; or
  - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

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<sup>102</sup> The jurisdictions that adopted the UNCITRAL Model Law with the 2006 amendments include Australia (includes New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria, and Western Australia), Bahrain, Belgium, Bhutan, Brunei Darussalam, Hong Kong, Costa Rica, Georgia, Ireland, Lithuania, Mauritius, New Zealand, Peru, Rwanda, Slovenia, the British Virgin Islands, and Florida.

<sup>103</sup> See Part IV(H).

- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Further grounds, which are occasionally invoked by domestic courts as justification for rejecting anti-suit injunctions, are provided in paragraph 2:

- 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
  - (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
  - (b) The recognition or enforcement of the award would be contrary to the public policy of that country

Arguments based on public policy were advanced by counsel in *Gazprom*<sup>104</sup> and *Four Seasons Hotels and Resorts BV v Consorcio Barr SA* (“*Four Seasons v Consorcio*”).<sup>105</sup>

**(a) *Four Seasons v Consorcio***

The United States Court of Appeal in *Four Seasons* upheld an anti-suit injunction ordered by an arbitral tribunal against parallel proceedings in Venezuela.

*Four Seasons* involved an agreement regarding the construction and operation of a hotel in Venezuela.<sup>106</sup> Under the agreement, Consorcio (a Venezuelan company) built the hotel, and Four Seasons (a company registered in Barbados) ran the hotel.<sup>107</sup> A dispute arose between the parties, so Four Seasons invoked an arbitration clause contained in the agreement.<sup>108</sup> An arbitral tribunal was subsequently constituted in Florida.<sup>109</sup>

Consorcio considered arbitration inappropriate for the issues at dispute, so in parallel to the arbitration proceedings, Consorcio initiated court proceedings in Venezuela.<sup>110</sup> Four Seasons sought a court-ordered anti-suit injunction from a court in the United States, but this was refused.<sup>111</sup> A similar request to the arbitral tribunal was successful, so the tribunal issued a

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<sup>104</sup> *Gazprom OAO*, above n 10 and 11.

<sup>105</sup> *Four Seasons Hotels and Resorts BV v Consorcio Barr SA* 377 F 3d 1164 (11<sup>th</sup> Cir 2004).

<sup>106</sup> At [2].

<sup>107</sup> At [2].

<sup>108</sup> At [3].

<sup>109</sup> At [3].

<sup>110</sup> At [3].

<sup>111</sup> At [4].

partial award ordering Consorcio to cease the Venezuelan proceedings in favour of arbitration.<sup>112</sup> The Venezuelan court held that the disputes were not suited to arbitration, and found that it had jurisdiction to hear the disputes.<sup>113</sup> Consequently, Four Seasons sought confirmation of the injunction from the Florida District Court.<sup>114</sup> The District Court confirmed the award, after which Consorcio appealed to the United States Court of Appeal.

On appeal, Consorcio argued against the enforcement of the anti-suit injunction on public policy grounds.<sup>115</sup> It argued that the injunction violated public policy on the grounds that it was contrary to international comity, since it prohibited Consorcio “from filing a suit in Venezuela despite a Venezuelan courts’ determination that Venezuelan courts have authority to resolve the dispute”.<sup>116</sup>

The Court of Appeal did not decide on Consorcio’s public policy argument, however, because Consorcio had failed to raise the argument earlier in the proceedings.<sup>117</sup> *Four Seasons* nevertheless provides an example of a public policy argument raised against enforcing an anti-suit injunction.

**(b) *Gazprom***

Gazprom was a gas supplier in Lithuania.<sup>118</sup> It had a long-term gas agreement and shareholders’ agreement with a Lithuanian-owned entity.<sup>119</sup> The shareholders’ agreement contained an arbitration agreement, which in turn contained an exclusive arbitration clause.<sup>120</sup> The clause provided that:<sup>121</sup>

[A]ny claim, dispute or contravention in connection with this Agreement or its breach, validity, effect, or termination, shall be finally settled by arbitration in accordance with the rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

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<sup>112</sup> At [5].

<sup>113</sup> At [5].

<sup>114</sup> At [6].

<sup>115</sup> At [20].

<sup>116</sup> At [32].

<sup>117</sup> At [33].

<sup>118</sup> *Gazprom OAO*, above n 10, at [23].

<sup>119</sup> At [25] and [27].

<sup>120</sup> At [29].

<sup>121</sup> At [29].

Lithuania alleged that Gazprom had breached the shareholder's agreement.<sup>122</sup> Despite the arbitration agreement, Lithuania brought an action against Gazprom in a Lithuanian court.<sup>123</sup>

Gazprom filed a request for arbitration, and argued that Lithuania had breached the exclusive arbitration clause by initiating proceedings in Lithuania.<sup>124</sup> The arbitral tribunal granted an anti-suit injunction against Lithuania, on the basis that Lithuania had breached the shareholders' agreement, and ordered Lithuania to withdraw its domestic court proceedings.<sup>125</sup>

The domestic proceedings continued despite the anti-suit injunction, and the court found for Lithuania. It held that the issue was within the scope of the court's jurisdiction, and could not be subject to arbitration.<sup>126</sup> Gazprom appealed the court's decision, seeking recognition and enforcement of the injunction in accordance with the New York Convention.<sup>127</sup> The court rejected Gazprom's appeal, however, and said that because the issue had already been subject to a domestic court hearing, it could not be subject to arbitration.<sup>128</sup> The court added that it considered the injunction in breach of a principle in the Lithuanian constitution, namely "the principle of the independence of judicial authorities".<sup>129</sup> Therefore, article V(2)(b) of the New York Convention supported the court's refusal to enforce the injunction.<sup>130</sup>

Gazprom further appealed the decision to a higher Lithuanian court, the Lietuvos Aukščiausiasis Teismas ("LAT").<sup>131</sup> The LAT stayed the proceedings, and referred various questions to the ECJ.<sup>132</sup>

(i) Public policy arguments

Advocate-General Wathelet said in his opinion that the public policy exception to the requirement that state parties to the New York Convention enforce arbitral awards should be used sparingly, with article V(2)(b) requiring a strict interpretation.<sup>133</sup>

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<sup>122</sup> At [30].

<sup>123</sup> At [31]-[32].

<sup>124</sup> At [33].

<sup>125</sup> At [37].

<sup>126</sup> At [38].

<sup>127</sup> At [39].

<sup>128</sup> At [41-42].

<sup>129</sup> At [43].

<sup>130</sup> At [43].

<sup>131</sup> At [46].

<sup>132</sup> At [47].

<sup>133</sup> At [172].

While ultimately whether an award offends a state's public policy is up to the judicial institutions of each member state, and each state's case law, the Advocate-General said that the exception is:<sup>134</sup>

[A] safety valve to be used in exceptional circumstances when it would be impossible for a legal system to recognise an award and enforce it without abandoning the very fundamentals on which it is based.

The threshold that must be reached for domestic courts to invoke the public policy exception and refuse to enforce an anti-suit injunction on this basis is a high one, and will only be satisfied in exceptional cases that breach a state's fundamental principles. The Advocate-General goes as far as to say that to reach the threshold, violations must:<sup>135</sup>

Constitute a manifest breach of the of the rule of law regarded as essential in the legal order of the State in which enforcement is sought or a right being recognised as being fundamental within that legal order.

The public policy exception cannot be used where the award merely bears the risk of "pecuniary damage" or threatens "economic interests".<sup>136</sup>

### *(c) Conclusion*

Advocate-General Wathelet's opinion in *Gazprom* indicates that the public policy exception can only be invoked in a limited range of circumstances. If this were not the case, considering the enforcement difficulties discussed Part II (B)(3), the effectiveness of anti-suit injunctions would be severely limited.

The following section considers other cases relevant to anti-suit injunctions.

### *C Development of Tribunal-Ordered Anti-Suit Injunctions*

Part II(C) will canvas the development of anti-suit injunctions through various cases. It begins with early cases concerning anti-suit injunctions, and then considers *Gazprom*.<sup>137</sup> The purpose of this section is to provide readers with an understanding of the cases in which anti-suit injunctions may arise, so as to paint the backdrop against which arguments regarding the proper scope of anti-suit injunctions are made.

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<sup>134</sup> At [166].

<sup>135</sup> At [172].

<sup>136</sup> At [176].

<sup>137</sup> *Gazprom OAO*, above n 10 and 11.

## *1 Early Cases in Support of, and Against, Anti-Suit Injunctions Issued in ICSID Arbitration*

This section discusses cases in which ICSID tribunals have considered awarding anti-suit injunctions. It seeks to map the development of anti-suit injunctions as a legitimate tool used by tribunals to uphold parties' agreements to exclusively arbitrate.

Article 26 of the ICSID Convention is significant to many of the cases discussed in this section:

### **Article 26**

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. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

The article provides for the exclusive jurisdiction of ICSID tribunals, "unless otherwise stated".

### *(a) Cases in support of anti-suit injunctions*

A number of cases have lent support to tribunals having the power to grant anti-suit injunctions. Even where mere recommendations have been made, as is the case in ICSID arbitration, the recommendations are generally followed in practice.

An early instance of tribunal-ordered anti-suit injunction is *MINE v Guinea* ("MINE").<sup>138</sup> In *MINE*, an ICSID tribunal recommendation that domestic courts should stay proceedings was taken into account in a decision by domestic courts to decline MINE's request to maintain attachments against Guinea.<sup>139</sup> The tribunal had recommended that "MINE immediately withdraw and permanently discontinue all pending litigation in national courts and commence no new action arising out of the dispute ... [and] dissolve every existing provisional measure in litigation in national courts".<sup>140</sup>

*MINE* illustrates the strong influence that tribunal recommendations can have on domestic courts where parallel proceedings have arisen.<sup>141</sup> *MINE* provides "unequivocal support to the protection of ICSID exclusivity vis-à-vis domestic proceedings by way of provisional

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<sup>138</sup> *MINE v Guinea (Award)* ICSID 06 January 1988.

<sup>139</sup> Cited in Schreuer *The ICSID Convention: a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, above n 49, at [60].

<sup>140</sup> At [60].

<sup>141</sup> At [35].

measures”, which is apparent from the clear language used by the arbitral tribunal recommending the anti-suit injunction, and “also from the threat of sanctions and the eventual award of damages for failure to comply with the tribunal’s recommendations in a timely fashion.”<sup>142</sup>

*Vacuum Salt v Ghana* (“*Vacuum Salt*”) also provides support for anti-suit injunctions ordered by tribunals in support of arbitration over domestic proceedings.<sup>143</sup> In *Vacuum Salt*, Ghana promised to stay proceedings in domestic courts until after the parties had either resolved their dispute by agreement or ICSID arbitration had resulted in a recommendation.<sup>144</sup>

An arbitral tribunal also recommended an anti-suit injunction in *CSOB v Slovakia* (“*CSOB*”).<sup>145</sup> In *CSOB*, the tribunal recommended an anti-suit injunction in support of arbitration, targeted at suspending parallel domestic bankruptcy proceedings.<sup>146</sup> The injunction was issued to ensure the parties’ rights to an “exclusive remedy” under article 26 of the ICSID Convention were preserved.<sup>147</sup> The tribunal found that the injunction was necessary because of the risk that the bankruptcy proceedings would touch on issues also under consideration in the arbitration proceedings.<sup>148</sup>

#### ***(b) Cases in which tribunals did not order or recommend anti-suit injunctions***

An arbitral tribunal rejected a request for an anti-suit injunction in *Atlantic Triton v Guinea* (“*Atlantic Triton*”).<sup>149</sup> Schreuer suggests that the decision “can be taken as an indication that [the Tribunal] was generally disinclined to interfere with domestic proceedings directed at obtaining conservatory measures”.<sup>150</sup>

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<sup>142</sup> At [87].

<sup>143</sup> *Vacuum Salt Products Limited v Government of the Republic of Ghana (Decision on Provisional Measures)* (1993) 4 ICSID Reports 324, cited in Schreuer *The ICSID Convention: a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, above n 49.

<sup>144</sup> Schreuer *The ICSID Convention: a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, above n 49, at [89].

<sup>145</sup> *CSOB v Slovakia (Procedural Order No 3)* 5 November 1998, cited in Schreuer *The ICSID Convention: a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, above n 49, at [90]. Also discussed above in Part II(A).

<sup>146</sup> Schreuer *The ICSID Convention: a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, above n 49, at [90].

<sup>147</sup> At [90]

<sup>148</sup> At [90].

<sup>149</sup> *Atlantic Triton v Guinea (Interim Award)* ICSID ARB/84/1, 18 December 1984. See Paul D Friedland “Provisional Measures and ICSID Arbitration” (1986) 2(4) *Arb Int* 335.

<sup>150</sup> Schreuer *The ICSID Convention: a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, above n 49, at [59].

In *Holiday Inns v Morocco* (“*Holiday Inns*”), an arbitral tribunal refused to recommend an anti-suit injunction.<sup>151</sup> The tribunal said that an anti-suit injunction would be “beyond the framework of provisional measures which the tribunal could consider”.<sup>152</sup> The tribunal noted, however, that it was “motivated by general caution and did not want to confront the state party at an early stage of the proceedings”.

### (c) *Conclusion*

While *MINE* and *CSOB* provide clear support for anti-suit injunctions ordered by arbitral tribunals, *Holiday Inns* and *Atlantic Triton* “ultimately evade the issue”, so the cases “cannot be taken as authority that ICSID tribunals lack the power” to issue anti-suit injunctions.<sup>153</sup> Moreover, in *Holiday Inns*, the tribunal might have refused to grant an anti-suit injunction because the case was one of the very first ICSID cases to go to arbitration, and also since the tribunal’s jurisdiction was unclear at the time the injunction was sought.<sup>154</sup>

Both *Holiday Inns* and *Atlantic Triton* are approximately thirty years old, and it seems highly likely that the results would have differed in the light of developments since the 1980s. These developments include the 2006 amendments to the UNCITRAL Model Law,<sup>155</sup> and increasing acceptance of anti-suit injunctions as reflected in recent cases. In any case, arbitral tribunals continue to have the power to issue anti-suit injunctions, although the enforceability of the injunctions remains uncertain in some jurisdictions, as discussed above in Part II(B)(3).

## 2 *Gazprom*

This section analyses the *Gazprom* case, with particular focus on the rationale put forward by Advocate-General Wathelet and the ECJ for distinguishing between tribunal and court-ordered anti-suit injunctions. The facts of *Gazprom* are set out in II(A)(4) above.

The ECJ decision, and the opinion of Advocate-General Wathelet, both consider the issue of whether court-ordered and tribunal-ordered anti-suit injunctions were sufficiently distinguishable, such that tribunal-ordered injunctions could be permitted in EU despite the

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<sup>151</sup> Unreported, but see discussion in Pierre Lalive “The First ‘World Bank’ Arbitration (*Holiday Inns v Morocco*) – Some Legal Problems” (1980) 51(1) BYBIL 123. Cited in Schreuer *The ICSID Convention: a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, above n 49, at [52].

<sup>152</sup> At [52].

<sup>153</sup> At [62].

<sup>154</sup> At [92].

<sup>155</sup> Discussed above at Part II(B)(1) and below at Part IV(A).

Brussels I Regulation, which (as interpreted in *West Tankers*<sup>156</sup>) prohibits court-ordered anti-suit injunctions.<sup>157</sup>

***(d) Opinion of Advocate-General Wathelet***

Prior to the ECJ decision, Advocate-General Wathelet concluded in an opinion that the amended Brussels I Regulation did not prevent tribunal-ordered anti-suit injunctions, because of the arbitration exclusion in recital 12.<sup>158</sup> Recital 12 provides that “ancillary proceedings relating to...an arbitral procedure” are not within the scope of the Regulation.<sup>159</sup>

The Advocate-General said that his position was “wholly consistent” with article II(3) of the 1958 New York Convention, which provides that unless an arbitration agreement is determined to be invalid or incapable of being performed, any disputes that fall within its scope must be referred by courts to arbitral tribunals at the request of a party to the dispute.<sup>160</sup> It is interesting that the Advocate-General cites the article in support of his position, because the article was cited for the ECJ’s contrary stance in *West Tankers* on court-ordered anti-suit injunctions.<sup>161</sup> He reasoned that tribunal-ordered anti-suit injunctions were necessary to ensure that arbitral tribunals have a mechanism by which they can respond to requests to remedy breaches of arbitration agreements.<sup>162</sup>

Regarding the enforcement of anti-suit injunctions, the Advocate-General said that whether anti-suit injunctions are enforceable in EU member states depends on each state’s interpretation of the 1958 New York Convention.<sup>163</sup> Each member state must determine whether it will decline to enforce anti-suit injunctions for public policy reasons, but the public policy exception in art V(2)(b) of the Convention should be subject to strict interpretation and only available in rare cases.<sup>164</sup>

***(e) ECJ judgment***

The ECJ upheld the *West Tankers* decision, which held that court-ordered anti-suit injunctions are not compatible with the Brussels I Regulation.<sup>165</sup> This was on the basis that

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<sup>156</sup> Discussed further below in Part III (B).

<sup>157</sup> *Gazprom OAO*, above n 10, at [47].

<sup>158</sup> At [140].

<sup>159</sup> Brussels I Regulation, cited in *Gazprom OAO*, above n 10, at [141].

<sup>160</sup> At [152].

<sup>161</sup> See discussion in Part III(B).

<sup>162</sup> *Gazprom OAO*, above n 10, at [155].

<sup>163</sup> At [158].

<sup>164</sup> At [172]. Discussed in further detail above in Part II(C)(4).

<sup>165</sup> *Gazprom OAO*, above n 11, at [32-33].

court-ordered anti-suit injunctions deprive foreign courts of the ability to rule on their own jurisdiction.<sup>166</sup>

According to the ECJ, court-ordered anti-suit injunctions go against the principle of mutual trust, which is the trust states place in each other's "legal systems and judicial institutions".<sup>167</sup> They are also problematic because they prevent parties from instigating court proceedings, even when there are genuine concerns about the validity of an arbitration agreement or the extent to which it can be performed.<sup>168</sup>

Anti-suit injunctions issued by courts are, however, distinguishable from tribunal-ordered injunctions.<sup>169</sup> The ECJ said that the principle of mutual trust is irrelevant in the context of tribunal-ordered injunctions, because arbitral tribunals do not represent any particular states.<sup>170</sup>

Moreover, tribunal-ordered injunctions do not affect parties' ability to question the validity or applicability of arbitration agreements in domestic courts:<sup>171</sup>

[A]n arbitral tribunal's prohibition of a party from bringing certain claims before a court of a Member State cannot deny that party judicial protection ... since, in the proceedings for recognition and enforcement of such an arbitral award, *first*, that party could contest the recognition and enforcement, and, *second*, the court seised would have to determine, on the basis of applicable national procedural law and international law, whether or not the award should be recognised and enforced.

In harmony with Advocate-General Wathelet's opinion, the ECJ said that tribunal-ordered injunctions differ from court-ordered injunctions because unlike the courts, arbitral tribunals cannot impose direct sanctions upon non-compliant parties.<sup>172</sup> The ECJ confirmed that recent EU legal developments prohibiting court ordered anti-suit injunctions did not extend to tribunal ordered injunctions,<sup>173</sup> and said that tribunal-ordered injunctions are less problematic because they do not involve one State's courts interfering with the courts of another State.<sup>174</sup> Another factor provided by the ECJ in support of anti-suit injunctions is the limited ability of

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<sup>166</sup> At [33]

<sup>167</sup> At [34].

<sup>168</sup> At [34].

<sup>169</sup> At [35].

<sup>170</sup> At [37].

<sup>171</sup> At [38].

<sup>172</sup> At [38].

<sup>173</sup> At [36].

<sup>174</sup> At [37].

tribunals, when compared with domestic courts, to impose penalties for non-compliance with anti-suit injunctions.<sup>175</sup>

The ECJ does not, however, consider public policy arguments, as was considered by the Advocate-General Wathelet in his opinion. While the effect of the ECJ judgment in *Gazprom* is that anti-suit injunctions from arbitral tribunals are allowed in EU member states, and are subject only to limitations imposed by each state's interpretation of enforcement provisions in the 1958 New York Convention, it does not provide clear support for the injunctions. It merely says that whether the injunctions are enforceable or not depends on each individual member state.

Before putting forward arguments relating to the proper scope of tribunal-ordered anti-suit injunctions, this paper will consider court-ordered anti-suit injunctions in part III.

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<sup>175</sup> At [40].

### III *Court-Ordered Anti-Suit Injunctions*

Part III briefly discusses court-ordered anti-suit injunctions. They are relevant to this paper, because arguments against court-ordered anti-suit injunctions are often used in support of arguments against tribunal-ordered anti-suit injunctions. Court-ordered anti-suit injunctions share similarities with tribunal-ordered anti-suit injunctions, and are issued for a similar purpose: to uphold contractual agreements to arbitrate to the exclusion of other forms of dispute resolution. Recent developments in the EU following the Brussels I Regulation and the *West Tankers* decision on court-ordered anti-suit injunctions have made the debate about the proper scope of tribunal-ordered anti-suit injunctions more significant.

#### A *Court-Ordered Anti-Suit Injunctions in Common Law Jurisdictions*

##### 1 *Court-Ordered Anti-Suit Injunctions Generally*

Court-ordered anti-suit injunctions are a long utilised, accepted tool in common law jurisdictions, having been used in England since at least the early 1900s.<sup>176</sup> The injunctions developed in the United States in parallel with developments in England.<sup>177</sup> The injunctions are thought to have originated in the 1821 English case of *Bushby v Munday*, which involved Scottish proceedings that an English court thought were better suited to determination in England.<sup>178</sup> To prevent the Scottish proceedings from continuing, the English court issued an anti-suit injunction.<sup>179</sup>

In England, court-ordered anti-suit injunctions are defined as:<sup>180</sup>

[A]n order made by an English court requiring a party *in personam* to the jurisdiction of the English courts not to bring or advance particular claims, to withdraw such claims, or take the necessary steps to terminate or suspend proceedings pending before a national court or tribunal, or arbitral tribunal, established in a foreign country.

The purpose of court-ordered anti-suit injunctions is to prevent a party from being denied its rights under an arbitration agreement to resort to arbitration where damages would be

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<sup>176</sup> Sir Lawrence Collins and others (eds) *Dicey, Morris & Collins: The Conflict of Laws* (14<sup>th</sup> ed, Sweet & Maxwell, London, 2006) at [16-088].

<sup>177</sup> Jonathan RC Arkins “Borderline Legal: Anti-Suit Injunctions in Common Law Jurisdictions” (2001) 18(6) J. Int’l Arb. 603 at 605-606.

<sup>178</sup> At 604.

<sup>179</sup> At 604.

<sup>180</sup> *Gazprom OAO*, above n 10, at [63].

insufficient to remedy the situation.<sup>181</sup> The injunctions have historically been used relatively liberally by English courts.<sup>182</sup>

Four principles eventually became settled law with regards to anti-suit injunctions ordered by courts. The principles are:<sup>183</sup>

- The injunction must be required in the interests of justice;
- The injunction is ordered *in personam*, that is, against one of the parties rather than against the foreign court itself;
- The party against whom the injunction is ordered must be capable of control by the English court; and
- The court must exercise caution in determining whether to issue the anti-suit injunction.

There are two circumstances in which English courts will grant an anti-suit injunction.<sup>184</sup> The first is where one of the parties has acted unconscionably. This unconscionable action includes conduct that is “oppressive or vexatious”.<sup>185</sup> The second circumstance is where one party’s legal or equitable rights have been breached.<sup>186</sup> Parties seeking an anti-suit injunction must also ensure that their applications are made without delay.<sup>187</sup>

## 2 Court-Ordered Anti-Suit Injunctions Specifically in Support of Arbitration

In the context of international arbitration, anti-suit injunctions have been used to uphold parties’ obligations to exclusively arbitrate to the exclusion of other fora.<sup>188</sup> Cases in which anti-suit injunctions are issued by courts in support of arbitration are those that would not be caught by article II of the New York Convention. Article II provides that where two parties have agreed to exclusively arbitrate disputes, and one party then decides to pursue the matter in court, the court of Contracting States must refer the parties to arbitration.

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<sup>181</sup> Sir Lawrence Collins and others (eds) *Dicey, Morris & Collins: The Conflict of Laws*, above n 176, at [16-088].

<sup>182</sup> At [16-088]. See discussion from [16-088]-[16-093] for discussion of various cases in which English courts have issued anti-suit injunctions.

<sup>183</sup> From *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak & Anor* [1987] 1 AC 871 (PC) at 892, cited in Arkins “Borderline Legal: Anti-Suit Injunctions in Common Law Jurisdictions”, above n 177, at 607.

<sup>184</sup> Hakeem Seriki “Anti-suit Injunctions and Arbitration: A Final Nail in the Coffin?” (2006) 23(1) *J. Int’l Arb.* 25 at 26.

<sup>185</sup> At 26.

<sup>186</sup> At 26.

<sup>187</sup> Arkins “Borderline Legal: Anti-Suit Injunctions in Common Law Jurisdictions”, above n 177, at 613; and Seriki “Anti-Suit Injunctions and Arbitration: A Final Nail in the Coffin?”, above n 183, at 26.

<sup>188</sup> See Sir Lawrence Collins and others (eds) *Dicey, Morris & Collins: The Conflict of Laws*, above n 176, at [16-088]-[16-093] for discussion of various cases in which English courts have issued anti-suit injunctions.

### *B Court-Ordered Anti-Suit Injunctions in Civil Law Jurisdictions*

Anti-suit injunctions are less common in civil law jurisdictions. In civil law jurisdictions, courts are usually more reluctant to accept anti-suit injunctions, normally on the basis that they constitute a state court unjustifiably interfering with the judicial processes of another state.<sup>189</sup> This is reflected in earlier cases, as well as more recently in the stance taken by the ECJ in *West Tankers*.

In *West Tankers*, West Tankers had chartered a vessel to Erg Petroli SpA (“Erg”).<sup>190</sup> The charter contract included an arbitration agreement, which was governed by English law and provided for arbitration in London.<sup>191</sup> The vessel damaged an Italian jetty that Erg owned, so Erg lodged a claim with its insurers, Allianz SpA and Generali Assicurazione Generali SpA (“Allianz and Generali”) for compensation.<sup>192</sup> The insurance paid out to Erg was insufficient to cover the full extent of damage caused by the chartered vessel, so Erg initiated arbitration in London under the arbitration agreement for the excess.<sup>193</sup> Concurrently, Allianz and Generali sued West Tankers in the Tribunale di Siracusa, an Italian court, for the compensation it paid to Erg.<sup>194</sup> The grounds for this action was Allianz and Generali’s right to subrogation, regarding Erg’s claim for the damaged wharf, under Italian law.<sup>195</sup>

West Tankers objected to the Italian proceedings, on the grounds that the court did not have jurisdiction because of the arbitration agreement in the charter contract.<sup>196</sup> It also commenced proceedings in England, in which it sought an anti-suit injunction in support of exclusive arbitration in accordance with the arbitration agreement.<sup>197</sup> West Tankers requested an injunction against the insurers, Allianz and Generali, that would both prevent them from pursuing any court proceedings in relation to the damaged jetty and require them to cease the Italian proceedings that had already commenced.<sup>198</sup>

The House of Lords considered cases that had held that anti-suit injunctions were incompatible with the Brussels I Regulation. The House of Lords said, however, that it should be able to issue an anti-suit injunction because of article 1(2)(d) of the Brussels I

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<sup>189</sup> Vishnevskaya “Anti-suit injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, above n 3, at 176.

<sup>190</sup> *West Tankers*, above n 7, at [9].

<sup>191</sup> At [9].

<sup>192</sup> At [10].

<sup>193</sup> At [10].

<sup>194</sup> At [11].

<sup>195</sup> At [11].

<sup>196</sup> At [11].

<sup>197</sup> At [12].

<sup>198</sup> At [12].

Regulation, which provides an exclusion for arbitration.<sup>199</sup> It reasoned that the exclusion should extend not only to arbitration itself, but also to legal proceedings where the subject-matter is arbitration. Therefore, the Brussels I Regulation should not preclude the House of Lords from having the power to issue an anti-suit injunction in support of arbitration.<sup>200</sup> Before coming to a decision, however, the House of Lords decided to stay proceedings and seek a preliminary ruling from the European Court of Justice on whether court-ordered anti-suit injunctions are compatible with the Brussels I Regulation.<sup>201</sup>

The ECJ held that an anti-suit injunction from the House of Lords would be incompatible with the Regulation, because it would “necessarily amount to stripping that court [the Italian court] of the power to rule on its own jurisdiction”.<sup>202</sup> The court said that court-ordered anti-suit injunctions are in breach of the general principle that every court has the power to determine its own jurisdiction,<sup>203</sup> and are contrary to the principle of mutual trust.<sup>204</sup>

An anti-suit injunction would also prevent the Italian court from giving a ruling on whether the arbitration agreement was valid or relevant to the dispute at hand, so would preclude Allianz and Generali from accessing and seeking protection from the court.<sup>205</sup> The ECJ also found that EU member states’ courts’ inability to issue anti-suit injunctions in support of arbitration was consistent with article II(3) of the New York Convention.<sup>206</sup> The article provides that where a court has proceedings brought before it that are subject to an arbitration agreement, it must refer the parties to arbitration at the request of either of the parties, except where the arbitration agreement is invalid or ‘incapable of being performed’.<sup>207</sup>

### *C Conclusion*

While court-ordered anti-suit injunctions remain permissible in non-EU member states, such as the United States, and depends on each state’s laws, their use in the EU following the *West Tankers* decision was prohibited. Following the ECJ decision in *West Tankers*, uncertainty arose as to the continued legitimate use of tribunal-ordered anti-suit injunctions in support of arbitration. This uncertainty centred on whether tribunal-ordered injunctions, too, came within the scope of the Brussels I Regulation, and this uncertainty remained unresolved until

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<sup>199</sup> At [14]-[15].

<sup>200</sup> At [15-17].

<sup>201</sup> At [18].

<sup>202</sup> At [28].

<sup>203</sup> At [28]. The argument that anti-suit injunctions deprive the foreign court of its powers/rights to rule on its own jurisdiction is an argument also commonly cited as a reason why tribunal-ordered injunctions should not be permitted. See Part IV(F).

<sup>204</sup> At [30]. Mutual trust is discussed in Part IV(E)(2).

<sup>205</sup> At [31]. This argument ties in with arguments in Part IV(G).

<sup>206</sup> At [33].

<sup>207</sup> At [33].

the ECJ decision in *Gazprom*. The ECJ in *Gazprom* held, however, that anti-suit injunctions remain an option available to arbitral tribunals faced with parallel proceedings, although their enforceability is not guaranteed in all jurisdictions. Part III(D), considers the advantages and disadvantages of court- versus arbitration- ordered anti-suit injunctions.

*D Comparison between court-ordered and tribunal-ordered anti-suit injunctions, with particular focus on the enforceability of the injunctions*

*Gazprom* illustrates that the issuance of anti-suit injunctions by arbitral tribunals is still acceptable practice within the EU, and is not affected by Brussels I Regulation. Therefore, whether an anti-suit injunction is enforceable in EU member states, and in other jurisdictions globally, depends on each state's recognition and acceptance of tribunal ordered provisional measures. This section compares the benefits and drawbacks of anti-suit injunctions, comparing court-ordered injunctions with tribunal-ordered injunctions.

Tribunal-ordered and court-ordered anti-suit injunctions seem prima facie similar in both their purpose and effect. They are issued to support arbitration, and provided parties comply, their effect is to require parties to desist from parallel proceedings for the duration of the arbitral proceedings. Yet for all their similarities, the ECJ has differentiated between the injunctions in *Gazprom*,<sup>208</sup> and the UN has amended the UNCITRAL model law to reflect the growing acceptance expressed internationally for tribunal-ordered anti-suit injunctions.<sup>209</sup> Tribunal-ordered injunctions have been supported in substantial amount of case law, and various arguments in support of their continued use, and against restricting their use in international arbitration, have been put forward, as is discussed in part IV.

One significant advantage of court-ordered anti-suit injunctions generally is their direct enforceability in the state of the courts that have issued the injunction. By contrast, tribunal-ordered anti-suit injunctions are not necessarily enforceable, even in states that are party to the New York Convention. Applying directly to the courts can also save time and cost, because tribunal ordered anti-suit injunctions may need to be confirmed by national courts before they can be enforced.<sup>210</sup> This was illustrated in *Four Seasons v Consorcio*,<sup>211</sup> in which Four Seasons had to apply to the United States District Court (the "USDC") for confirmation of a tribunal-ordered anti-suit injunction ordering Consorcio to stay proceedings in Venezuela.

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<sup>208</sup> See discussion in Part II(C)(2).

<sup>209</sup> See discussion in Part II(B)(1).

<sup>210</sup> Lew, Mistelis and Kröll *Comparative International Commercial Arbitration*, above n 1, at [23-84].

<sup>211</sup> *Four Seasons v Consorcio*, above n 105. See discussion in Part II(B)(4).

On the other hand, it is broadly accepted internationally that arbitral tribunals should order provisional measures where possible, because tribunals are better equipped than national courts to determine whether provisional measures, such as anti-suit injunctions, are appropriate.<sup>212</sup> While unlike courts, tribunals usually cannot impose direct penalties for non-compliance, parties still have an incentive to comply with tribunal ordered provisional measures, because arbitral tribunals have shown a willingness to impose higher costs on parties who fail to comply with provisional measures.<sup>213</sup>

As mentioned in part III(B), the *West Tankers* decision limits the availability of court-ordered anti-suit injunctions, so parties now have no choice other than to seek injunctions from tribunals for disputes in EU member states. In jurisdictions outside of the EU, court-ordered anti-suit injunctions may still be permitted, and may be a better option in jurisdictions that have not adopted the most recent amendments to the UNCITRAL Model Law. In countries that have adopted the UNCITRAL Model Law amendments however, anti-suit injunctions are enforceable, so are a good choice for parties seeking to stay parallel proceedings.<sup>214</sup>

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<sup>212</sup> Lew, Mistelis and Kröll *Comparative International Commercial Arbitration*, above n 1, at [23-14].

<sup>213</sup> At [23-84].

<sup>214</sup> Refer to discussion in Part II(B)(3).

#### *IV Proper Scope of Tribunal-Ordered Anti-Suit Injunctions*

Part IV considers arguments regarding the proper scope of tribunal-ordered anti-suit injunctions. Key arguments considered relate to amendments to the UNCITRAL Model Law; commercial reasons supporting tribunal-ordered injunctions; the risk of conflicting decisions; private contractual arrangements versus sovereign authority; competence-competence; the right of access to justice; enforcement difficulties; the disruption and potentially disproportionate harm purportedly caused by anti-suit injunctions; and the argument that tribunal- and court-ordered injunctions should receive the same treatment.

Restrictions posed by various academics and commentators are also summarised, with arguments against these restrictions put forward.

##### *A The UNCITRAL Model Law and UNCITRAL Arbitration Rules*

Amendments to the UNCITRAL Model Law in 2006 reflect a “trend in favour of limiting and clearly defining court involvement in international commercial arbitration”.<sup>215</sup> The Explanatory Note by the UNCITRAL secretariat on the Model Law justifies these amendments on the basis that by entering into an arbitration agreement, the parties have consciously decided to use arbitration to the exclusion of domestic court processes.<sup>216</sup> It adds that aside from exceptions provided in legislation based on the Model Law, courts should not intervene in arbitration proceedings, because of article 5:<sup>217</sup>

##### **Article 5. Extent of court intervention**

In matters governed by this Law, no court shall intervene except where so provided in this Law.

UNCITRAL decided explicitly to adopt the amendments, which provide expressly for anti-suit injunctions ordered by tribunals, through article 17(2)(b) and their enforcement via article 17H, despite arguments made against the injunctions.<sup>218</sup>

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<sup>215</sup> UNCITRAL Model Law Explanatory Note, above n 65, at [15]. See also discussion in Part II(B)(1) and (3).

<sup>216</sup> At [15].

<sup>217</sup> At [16] and [17].

<sup>218</sup> *Report of the United Nations Commission on International Trade Law and the work of its thirty-ninth session*, above n 75, at [93]. The rationale for the amendments is discussed above in Part II(B)(1).

The arguments put forward include:<sup>219</sup>

In support of deletion, it was stated that anti-suit injunctions did not always have the provisional nature of interim measures but could also relate to substantive matters such as questions relating to the competence of the arbitral tribunal. It was also said that such a provision derogated from the fundamental principle that a party should not be deprived of any judicial remedy to which it was entitled.

The amendments indicate a clear acceptance of tribunal-ordered anti-suit injunctions as a tool available in support of arbitration. Clear support of anti-suit injunctions from UNCITRAL, a “subsidiary body of the General Assembly of the United Nations”, surely has great weight.<sup>220</sup> This is especially so, considering its “general mandate to further the progressive harmonisation and unification of the law of international trade”, and the involvement of representatives from numerous states in the drafting of the UNCITRAL Model Law.<sup>221</sup> Moreover, the UNCITRAL Arbitration Rules are nearly identical to the UNCITRAL Model Law, which is significant, because the rules are representative of “international arbitration practice and provide a milestone for review in many arbitrations under other systems”.<sup>222</sup>

### *B Commercial Reasons*

Agreements to exclusively arbitrate have commercial value.<sup>223</sup> For some contracts, they may be a deal breaker, as is illustrated by the following statement from a United States Supreme Court judgment in relation to an “exclusive jurisdiction clause”:<sup>224</sup>

There is strong evidence that the forum clause was a vital part of the agreement and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.

Restricting arbitral tribunals’ powers to issue anti-suit injunctions inevitably reduces the effectiveness of exclusive arbitration clauses. This is especially so, with the reduced availability of court-ordered anti-suit injunctions after *West Tankers*, and the fact that some parallel proceedings will not necessarily be caught by article II of the 1958 New York

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<sup>219</sup> *Report of the United Nations Commission on International Trade Law and the work of its thirty-ninth session*, above n 75, at [93]

<sup>220</sup> UNCITRAL “FAQ – Origin, Mandate and Composition of UNCITRAL” <[www.uncitral.org](http://www.uncitral.org)>.

<sup>221</sup> UNCITRAL “FAQ – Origin, Mandate and Composition of UNCITRAL” <[www.uncitral.org](http://www.uncitral.org)>.

<sup>222</sup> Lew, Mistelis and Kröll *Comparative International Commercial Arbitration*, above n 1, at [2-36].

<sup>223</sup> Andrew Bell *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, Oxford, 2003) at [5.06].

<sup>224</sup> *The Chaparral* 407 US 1, 13 (1972); [1972] 2 Lloyd’s Rep 315 at 320-321; cited in Bell *Forum Shopping and Venue in Transnational Litigation*, above n 223, at [5.06].

Convention.<sup>225</sup> The importance of anti-suit injunctions to international trade was also recognised by UNCITRAL when developing the amendments to the UNCITRAL Model Law.<sup>226</sup> It said that “the effectiveness of arbitration as a method of settling commercial disputes depend[s] on the possibility of enforcing such interim measures”.<sup>227</sup>

Arbitration agreements also provide commercial certainty. They provide certainty as to where any disputes will be litigated, which can be incredibly important, especially for commercial contracts involving parties based in jurisdictions with potentially partial judicial systems. They provide a better guarantee of neutrality, because in arbitration both parties generally play a role in choosing the arbitrators that comprise the arbitral tribunal.<sup>228</sup>

Arbitral tribunals also provide the benefit of being private proceedings, and are sometimes perceived to have greater “commerciality”.<sup>229</sup> Thus toothless exclusive arbitration clauses, rendered so through restricting tribunals’ powers to grant anti-suit injunctions, would reduce this commercial certainty, and in turn provide a deterrent to international trade. This is reiterated in *The Chaparral* case:<sup>230</sup>

Manifestly, much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur ... The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.

Bell argues that a failure to enforce exclusive jurisdiction clauses might also lead to parties engaging in forum shopping.<sup>231</sup> This would result in wasted time and money, expended by parties “shopping around” for the forum that best suits their dispute.<sup>232</sup>

### *C Conflicting Decisions*

Another reason in support of allowing anti-suit injunctions from arbitral tribunals, and against unduly narrowing their scope, is the risk of conflicting decisions that can arise should parallel

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<sup>225</sup> See Part III(A)(2) and Part III(B).

<sup>226</sup> *Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session*, above n 75, at [88].

<sup>227</sup> At [88].

<sup>228</sup> Bell *Forum Shopping and Venue in Transnational Litigation*, above n 223, at [5.07].

<sup>229</sup> At [5.07].

<sup>230</sup> At [5.08].

<sup>231</sup> At [5.12].

<sup>232</sup> At [5.13].

proceedings be allowed to continue.<sup>233</sup> The risk of conflicting decisions was cited as a reason in support of anti-suit injunctions in both *Gazprom*<sup>234</sup> and *Millicom v Senegal*.<sup>235</sup> The problem with conflicting decisions is that they can potentially affect the enforcement of arbitration awards, which is why article 17(2)(b) of the UNCITRAL Model Law enables tribunals to order interim measure to prevent actions that may cause “current or imminent harm or prejudice to arbitral process itself”.

Allowing arbitral tribunals to issue anti-suit injunctions ensures that the principle that “arbitrators must render an award capable of being enforced” is adhered to, by preventing the issuance of conflicting decisions that may affect future enforcement of awards.<sup>236</sup> It also ensures adherence to the principle of “non-interference”, which prohibits courts from interfering with arbitration except if interference is necessary to enforce arbitral awards or issue interim measures.<sup>237</sup>

Restricting tribunal-ordered anti-suit injunctions to the extent that conflicting decisions are allowed to occur would lead to wasted resources as parties have no choice but to defend their case fully in two different forums.<sup>238</sup> Ensuring tribunals have the power to order anti-suit injunctions when required would prevent this waste.

#### *D Lack of Precedent*

Tribunal-ordered anti-suit injunctions are also said to lack a “uniform framework” or “general rules”, and so are argued to need a more restricted scope.<sup>239</sup> In comparison, court-ordered anti-suit injunctions are based on a body of case law built up over time.<sup>240</sup> Anti-suit injunctions ordered by courts may be based on precedent, but depending on the parties’ arbitration agreements, tribunals may have to adhere to requirements in various laws, rules, and conventions, as discussed above in part II(B). Tribunal-ordered anti-suit injunctions,

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<sup>233</sup> Vishnevskaya “Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, above n 3, at 174.

<sup>234</sup> *Gazprom* is discussed in greater detail in Parts II(B)(4) and II(C)(2).

<sup>235</sup> See Part II(A) for the facts of *Millicom v Senegal*. The case is also used for illustrative purposes throughout Part II(B).

<sup>236</sup> Emmanuel Gaillard “Anti-Suit Injunctions Issued by Arbitrators” in AJ van den Berg (ed) *ICCA Congress Series No. 13* (2006, ICCA, Montreal) 235 at 240.

<sup>237</sup> Schreuer *The ICSID Convention: a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, above n 49, chapter on article 26, at [3].

<sup>238</sup> Vishnevskaya “Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, above n 3, at 174.

<sup>239</sup> At 174.

<sup>240</sup> See discussion above about court-ordered anti-suit injunctions in England, at Part III(A).

along with all provisional measures, are temporary, and should only be used sparingly, as was emphasised in *Millicom v Senegal*.<sup>241</sup>

### *E Private Contractual Arrangements, Not Sovereign Authority*

#### *1 Tribunal-Ordered Injunctions Are Not More Offensive Than Court-Ordered Injunctions*

Tribunal-ordered anti-suit injunctions are said to be more offensive than court-ordered injunctions, because the very existence of arbitral tribunals derives from a private contractual arrangement between parties.<sup>242</sup> By contrast, court-ordered anti-suit injunctions are said to be more appropriate because they at least have “sovereign authority”, so their interference with other states’ judicial processes is less controversial.<sup>243</sup>

The author disagrees. Tribunal-ordered anti-suit injunctions in support of anti-suit injunctions are derived from a private agreement between parties, and their purpose is to uphold parties’ private agreements to resort exclusively to arbitration.

This is supported by various principles:

- The principle that “parties are bound by their contracts”,<sup>244</sup> as reflected in the New York Convention’s objective to ensure the enforcement of parties’ arbitration agreements;<sup>245</sup>
- The principle that parties who have agreed to arbitrate must resort exclusively to arbitration when disputes arise;<sup>246</sup> and
- The principle that arbitrators may sanction violations of arbitration agreements, and take measures to prevent disputes becoming aggravated or future awards being undermined.<sup>247</sup>

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<sup>241</sup> *Millicom v Senegal*, Decision on Provisional Measures, above n 22, at [38] and [50].

<sup>242</sup> Vishnevskaya “Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, above n 3, at 174.

<sup>243</sup> At 174.

<sup>244</sup> Gaillard and Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration*, above n 45, at [627].

<sup>245</sup> John J Barcelo “Anti-Foreign Suit Injunctions to Enforce Arbitration Agreements” in Arthur W Rovine (ed) *Contemporary Issues in International Arbitration and Mediation – The Fordham Papers 2007* (Martinus Nijhoff Publishers, The Netherlands, 2008) 107 at 108.

<sup>246</sup> Schreuer *The ICSID Convention: a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, above n 49, chapter on article 26 at [6].

<sup>247</sup> Vishnevskaya “Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, above n 3, at 180-181. Gaillard “Anti-Suit Injunctions Issued by Arbitrators”, above n 236, at 237-238.

Gaillard provides an excellent description of the function served by tribunal-ordered anti-suit injunctions.<sup>248</sup>

[Anti-suit injunctions] are in reality nothing more than an order given to the party acting in breach of the arbitration agreement to comply with its contractual undertaking to arbitrate the dispute it has submitted to domestic courts.

By agreeing to arbitration through entering into an arbitration agreement, parties relinquish their ability to access domestic courts to resolve arbitrable disputes, and domestic courts are in turn prohibited from considering the disputes.<sup>249</sup> If parties initiate court proceedings in breach of an arbitration agreement, courts should refuse to continue with proceedings and should refer parties to arbitration so as to uphold the arbitration agreement.<sup>250</sup> The only issues courts may rule on are whether a valid arbitration agreement exists, and whether the dispute comes within the scope of the arbitration agreement.<sup>251</sup> If these two elements are satisfied, arbitrators should be left by the courts to decide their own jurisdiction in accordance with the principle of competence-competence.<sup>252</sup>

## 2 *The Principle of Mutual Trust is Irrelevant*

It is argued that tribunal-ordered anti-suit injunctions violate the principle of “mutual trust between courts”, imported through article II(3) of the New York Convention.<sup>253</sup> The article provides:

### **Article II(3)**

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article II(3) is said to establish “a system for pacific coexistence of arbitration and court adjudication” and that where a tribunal orders an anti-suit injunction it disregards the system by signalling that.<sup>254</sup>

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<sup>248</sup> At 239.

<sup>249</sup> At 241.

<sup>250</sup> At 241.

<sup>251</sup> At 242.

<sup>252</sup> At 242. Discussed below at Part IV(F).

<sup>253</sup> Vishnevskaya “Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, above n 3, at 198.

<sup>254</sup> At 199.

- It does not believe the court will be able to reach a fair outcome for the parties; and
- The tribunal's will trumps the will of the court.

The author argues that the principle of mutual trust does not apply to tribunal-ordered injunctions. According to the ECJ in *Gazprom*, anti-suit injunctions from arbitral tribunals are different from court-ordered injunctions, since arbitrators are not the representatives of particular states.<sup>255</sup> Therefore, anti-suit injunctions ordered by tribunals do not violate the sovereignty of other states, do not violate the principle of mutual trust, and so are not as problematic as court-ordered injunctions.<sup>256</sup>

#### *F Competence-Competence: Courts' Ability to Rule on Their Own Jurisdiction*

Tribunal-ordered anti-suit injunctions are criticised for breaching international law principles.<sup>257</sup> One of these is competence-competence. Competence-competence is the principle that courts have the ability to rule on their own jurisdiction.<sup>258</sup> By ordering an anti-suit injunction, arbitral tribunals deny courts this power, because by doing so they “implicitly declare that any other court or arbitral tribunal is prevented from ruling on the same subject matter”.<sup>259</sup> Therefore, tribunal-ordered injunctions are inappropriate as they breach the principle of competence-competence.<sup>260</sup>

The rationale behind competence-competence is to level the playing field between tribunals and courts.<sup>261</sup> Allowing tribunals to issue anti-suit injunctions is said to elevate tribunals such that they are above courts, allowing arbitrators to protect their competence-competence to the detriment of courts' powers.<sup>262</sup> While the injunctions are *in personam*, rather than ordered directly against courts, it is argued that the distinction is “more formal than of substance”,

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<sup>255</sup> *Gazprom OAO*, above n 11, at [37].

<sup>256</sup> Vishnevskaya “Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, above n 3, at 193; Lévy “Anti-suit injunctions issued by arbitrators”, above n 9, at 116; and *Gazprom OAO*, above n 11, at [35]-[38].

<sup>257</sup> Vishnevskaya “Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, above n 3, at 174.

<sup>258</sup> At 193. Lévy “Anti-suit injunctions issued by arbitrators”, above n 9, at 116.

<sup>259</sup> Vishnevskaya “Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, above n 3, at 193; Gaillard “Anti-Suit Injunctions Issued by Arbitrators”, above n 236, at 240-241; Lévy “Anti-suit injunctions issued by arbitrators”, above n 9, at 117.

<sup>260</sup> Vishnevskaya “Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, above n 3, at 193; Gaillard “Anti-Suit Injunctions Issued by Arbitrators”, above n 236, at 240-241. This argument is also often cited as a rationale against allowing court-ordered injunctions.

<sup>261</sup> Vishnevskaya “Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, above n 3, at 194.

<sup>262</sup> At 194.

and that in reality, the injunctions have the practical effect of depriving courts of the ability to rule on their own jurisdiction.<sup>263</sup>

Convincing counter-arguments can be made, however, that tribunal-ordered anti-suit injunctions do not infringe upon courts' competence-competence. Tribunal-ordered anti-suit injunctions do not impede upon courts' competence-competence, because disputes covered by arbitration are simply excluded from state courts' jurisdiction.<sup>264</sup> Where a dispute falls outside the scope of an arbitration agreement, or a state court determines that an arbitration agreement is invalid or incapable of being performed, the state court is open to continue with proceedings and make a decision on the merits of the case.<sup>265</sup> Therefore, arguments that competence-competence means tribunal-ordered anti-suit injunctions should be restricted are arguably unconvincing.

### *G Right of Access to Courts and Justice*

By ordering parties to refrain from filing proceedings in domestic courts, it is argued that tribunal-ordered anti-suit injunctions may deprive parties of their "constitutional right" to unimpeded access to justice through states' judicial institutions.<sup>266</sup> This denial of access creates a tension between state courts' powers to protect parties who believe their arbitration agreements are invalid and "promoting arbitration as a dispute resolution mechanism alternative to state court litigation".<sup>267</sup> As a result, arbitrators must take care to ensure parties' access to courts is not infringed upon when they issue anti-suit injunctions.<sup>268</sup>

The author argues that anti-suit injunctions do not deny parties the right to access courts and seek justice through states' judicial institutions. First, injunctions are granted against parties, rather than against state courts.<sup>269</sup> Second, parties waive their right to settle disputes through other dispute resolution mechanisms when they agree to arbitration through an exclusive arbitration clause.<sup>270</sup> By issuing anti-suit injunctions, tribunals are merely upholding contractual agreements between parties to submit disputes to arbitration.

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<sup>263</sup> At 195.

<sup>264</sup> Gaillard "Anti-Suit Injunctions Issued by Arbitrators", above n 236, at 243.

<sup>265</sup> At 243.

<sup>266</sup> Vishnevskaya "Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?", above n 3, at 196; Lévy "Anti-suit injunctions issued by arbitrators", above n 9, at 124.

<sup>267</sup> Vishnevskaya "Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?", above n 3, at 196.

<sup>268</sup> Lévy "Anti-suit injunctions issued by arbitrators", above n 9, at 124.

<sup>269</sup> This is illustrated by article 17(2)(b) of the UNCITRAL Model Law, which allows for anti-suit injunctions to be ordered against a party to the dispute, not the other forum in which parallel proceedings are taking place.

<sup>270</sup> This ties in to discussions above under Part IV(E). In particular, the principle that parties who have agreed to exclusive arbitration must refer disputes to arbitration if they arise.

If a state court believes a final award should not be recognised and enforced because it finds the arbitral tribunal lacked jurisdiction, the court has the final say as to whether the award is enforced in that particular state.<sup>271</sup> Therefore, parties do not lose any “fundamental” or “constitutional” rights through arbitrators issuing anti-suit injunctions; courts may still ultimately refuse enforcement if certain criteria are met.<sup>272</sup>

### *H Enforcement Difficulties*

An argument often cited against anti-suit injunctions is their lack of effectiveness because of the limited enforcement options on offer to arbitral tribunals facing non-compliant parties.<sup>273</sup> Lévy argues that the lack of remedies available to arbitrators facing recalcitrant parties is one ground for restricting the availability of anti-suit injunctions.<sup>274</sup>

While the author admits that there may be difficulties enforcing anti-suit injunctions in some jurisdictions, they are more enforceable than previously because of the insertion of article 17H of the UNCITRAL Model Law. As more jurisdictions adopt the amendments, the enforceability of anti-suit injunctions will increase.<sup>275</sup>

### *I Anti-Suit Injunctions Are Disruptive And May Cause Disproportionate Harm*

Anti-suit injunctions are argued to be “illegitimate, as they inevitably aggravate the dispute and scatter it among various fora”.<sup>276</sup> It is also argued that some anti-suit injunctions may cause more harm than good, especially when arbitral awards end up unenforceable because of arbitrators’ perceived impartiality: by issuing an anti-suit injunction, an arbitrator may be thought to have “been a judge for his own cause”.<sup>277</sup> Anti-suit injunctions may also delay proceedings in domestic courts to the extent that a party loses its ability to initiate court proceedings because time limits have lapsed.<sup>278</sup>

These arguments are unconvincing. Rather than “scattering” disputes across different forums, an anti-suit injunction ensures the dispute is confined to one forum, assuming the recalcitrant

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<sup>271</sup> Gaillard “Anti-Suit Injunctions Issued by Arbitrators”, above n 236, at 242.

<sup>272</sup> At 242. See Part II(B)(4).

<sup>273</sup> Vishnevskaya “Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, above n 3, at 200. These enforcement difficulties are discussed above in Parts II(B)(3) and II(B)(4).

<sup>274</sup> Lévy “Anti-suit injunctions issued by arbitrators”, above n 9, at 126.

<sup>275</sup> Margaret L Moses *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, New York, 2008) at 106-107. See discussion in Parts II(B)(3) and (4) above.

<sup>276</sup> Vishnevskaya “Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, above n 3, at 192.

<sup>277</sup> Lévy “Anti-suit injunctions issued by arbitrators”, above n 9, at 125.

<sup>278</sup> At 125.

party adheres to the anti-suit injunction. It is the denial of anti-suit injunctions that poses the risk of conflicting decisions from multiple sources. Regarding the argument that arbitrators may be considered impartial as a result of ordering anti-suit injunctions, and thus render any final awards unenforceable, this argument is untenable because the arbitrators are selected by both parties, and arbitration is usually chosen specifically because of its perceived neutrality when compared with domestic courts.<sup>279</sup> Lastly, as reiterated above, anti-suit injunctions against parties do not prevent them from pursuing domestic court proceedings, as they are directed against the parties to a dispute rather than the courts themselves.<sup>280</sup> There is nothing to prevent a party from taking the dispute to court, albeit in breach of its arbitration agreement.

### *J Tribunal- And Court-Ordered Anti-Suit Injunctions Should Receive Identical Treatment*

It is argued that the treatment of anti-suit injunctions should not differ depending on the forum that issues them: court and tribunal ordered measures should be treated identically.<sup>281</sup> Irrespective of their source, anti-suit injunctions are ordered for the same purpose, and result in the same issues.<sup>282</sup>

While this argument may appear to have merit, it fails to acknowledge the differentiation of anti-suit injunctions from courts and tribunals by the ECJ in *Gazprom*,<sup>283</sup> and the ECJ's determination that anti-suit injunctions may be enforceable in the EU.<sup>284</sup> Moreover, as discussed above, there is a fundamental difference between courts and tribunals in that courts represent a sovereign state whereas tribunals arise as a result of arbitration agreements between private parties.<sup>285</sup> Treating court-ordered anti-suit injunctions and tribunal-ordered anti-suit injunctions would also be problematic because there is no universal treatment of court-ordered anti-suit injunctions universally.<sup>286</sup> Common law and civil law jurisdictions have different attitudes towards the injunctions, and court-ordered anti-suit injunctions are not permitted in the EU as a result of the Brussels I Regulation.<sup>287</sup> Therefore, this argument in support of restricting the scope of tribunal-ordered anti-suit injunctions is not a strong one.

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<sup>279</sup> Lew, Mistelis, and Kröll *Comparative International Commercial Arbitration*, above n 1, at [23-122].

<sup>280</sup> UNCITRAL Model Law, art 17(2)(b).

<sup>281</sup> Vishnevskaya "Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?", above n 3, at 193.

<sup>282</sup> At 193.

<sup>283</sup> *Gazprom OAO*, above n 11, at [35].

<sup>284</sup> *Gazprom OAO*, above n 11, at [41].

<sup>285</sup> At [37]. Refer to Part IV(E).

<sup>286</sup> Refer to discussion in Part III.

<sup>287</sup> Refer to discussion in Part III.

### *K Suggestions on Reducing the Scope of Tribunal-Ordered Anti-Suit Injunctions*

Various restrictions have been put forward to narrow the scope of tribunal-ordered anti-suit injunctions.

These include:

- Restricting the form anti-suit injunctions can take;<sup>288</sup>
- Tightening the definition of parallel proceedings, so that an arbitrator may only issue an injunction against a party if the parallel proceedings impinge upon the jurisdiction of the tribunal;<sup>289</sup>
- Requiring “competing jurisdiction” to have actually been created through a ruling in the parallel forum;<sup>290</sup> and
- Restricting tribunals’ ability to issue anti-suit injunctions to instances where parties have been aggressive, committed fraud, or commenced parallel proceedings to delay or frustrate arbitration proceedings.<sup>291</sup>

The author rejects these restrictions, and argues that instead the conditions outlined in part II and the limitations that apply to provisional measures generally are sufficient. Imposing criteria, beyond established requirements and provisions in international arbitration rules, is unnecessary: whether a tribunal orders an anti-suit injunction should depend on the circumstances of each particular case.<sup>292</sup>

Arbitral tribunals should have the power to issue anti-suit injunctions both before and after determining their jurisdiction, because they need to be able to order injunctions if necessary to ensure parties do not prejudice the arbitral proceedings through parallel proceedings.<sup>293</sup> Requiring abusive behaviour, or delaying/frustration tactics, from a party before a tribunal may order an anti-suit injunctions adds an additional hurdle to a mechanism that is already wrought with enforcement difficulties in certain jurisdictions.<sup>294</sup>

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<sup>288</sup> Vishnevskaya “Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, above n 3, at 178.

<sup>289</sup> At 188.

<sup>290</sup> At 191.

<sup>291</sup> At 203. Lévy “Anti-suit injunctions issued by arbitrators”, above n 9, at 126.

<sup>292</sup> Gaillard “Anti-Suit Injunctions Issued by Arbitrators”, above n 236, at 261 and 264-265.

<sup>293</sup> At 265-266.

<sup>294</sup> At 263.

## V Conclusion

The insertion of article 17(2)(b) of the UNCITRAL Model Law, to provide explicitly for tribunal-ordered anti-suit injunctions as interim measures, and article 17H, which provides for the enforcement of provisional measures, is evidence of the growing acceptance internationally of anti-suit injunctions.<sup>295</sup> The injunctions have been recognised as a necessary tool in ensuring the efficient resolution of disputes, and are an important part of ensuring the continued flow of international trade.<sup>296</sup> UNCITRAL's express acceptance of the injunctions as a legitimate interim measure available to arbitrators lends great support to the argument that the scope of injunctions does not need the restrictions suggested in Part IV(K).<sup>297</sup>

Commercial reasons support the use of anti-suit injunctions by arbitral tribunals in support of arbitration.<sup>298</sup> Ensuring arbitral tribunals have the power to order anti-suit injunctions means that parties to private agreements can be reassured that exclusive arbitration clauses are not meaningless in the face of recalcitrant parties pursuing parallel proceedings in domestic courts. This certainty may be the extra reassurance needed to ensure parties continue to conclude contracts with others situated in less developed countries with judiciaries that may not be perceived of as neutral.<sup>299</sup> Therefore, in some circumstances ensuring tribunals have the power to enforce exclusive arbitration agreements via anti-suit injunctions may enable, or at the very least lubricate, international trade.<sup>300</sup>

Enabling tribunals to order anti-suit injunctions means they are able to prevent conflicting decisions from arising, by staying proceedings before judgments are made in domestic courts.<sup>301</sup> The risk of conflicting decisions poses a threat to international commercial arbitration as a whole, for if parties are unable to enforce awards from arbitral tribunals, there is little point in agreeing to arbitration at all. To ensure the entire arbitral process is not undermined, anti-suit injunctions must be available to arbitral tribunals faced with parties in breach of exclusive arbitration agreements. The injunctions also ensure that parties do not expend unnecessary resources by having to defend claims in more than one forum.

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<sup>295</sup> *Report of the Working Group on Arbitration and Conciliation on the work of its forty-third session* A/CN.0/589 (2005) at [23]. See discussion at Part IV(A).

<sup>296</sup> At [23]. See discussion at Part II(B)(3).

<sup>297</sup> At [23].

<sup>298</sup> Refer to discussion in Part IV(B).

<sup>299</sup> See discussion on the importance of exclusive jurisdiction clauses to international trade in *The Chaparral*, above n 224, at 320-321.

<sup>300</sup> This echoes comments made by UNCITRAL in relation to the necessity of the 2006 amendments. See *Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session*, above n 75, at [88].

<sup>301</sup> Refer to discussion at Parts IV(C) and (I).

The lack of precedent followed by arbitral tribunals, while in contrast with the precedents available to, and followed by, courts in Commonwealth jurisdictions, is less of an issue considering the sparing use of anti-suit injunctions by arbitral tribunals.<sup>302</sup> Provided the conditions and limitations surrounding the issuance of provisional measures are met,<sup>303</sup> tribunals should have the discretion to issue anti-suit injunctions where it is necessary to uphold contractual agreements to arbitrate.

Anti-suit injunctions at their core seek to uphold private contractual arrangements between parties, and so are less abhorrent than court-ordered anti-suit injunctions, which are ordered by representatives of sovereign states.<sup>304</sup> Their use is supported by various principles,<sup>305</sup> and does not infringe upon the principle of mutual trust or courts' competence-competence.<sup>306</sup> The injunctions are *in personam* against parties, rather than directly against courts, so do not interfere directly with court proceedings,<sup>307</sup> and do not restrict parties' access to justice.<sup>308</sup> Moreover, enforcement of anti-suit injunctions is up to the courts, so parties do not lose the right of access to courts, as courts ultimately have the final say.<sup>309</sup>

Enforcement difficulties are less of an issue following the insertion of article 17H. Its further adoption by jurisdictions, along with the other 2006 amendments, will ensure that tribunal-ordered injunctions are enforceable.<sup>310</sup>

Last, tribunal-ordered anti-suit injunctions differ from court-ordered anti-suit injunctions, so it makes little sense for them to be treated identically.<sup>311</sup> The differences between the injunctions was recognised in *Gazprom*,<sup>312</sup> and this difference means that tribunal-ordered anti-suit injunctions are still be enforceable in certain EU member states, whereas court-ordered anti-suit injunctions are not because of their incompatibility with the Brussels I Regulation.<sup>313</sup> Moreover, according court- and tribunal-ordered anti-suit injunctions the same

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<sup>302</sup> See *Millicom v Senegal*, Decision on Provisional Measures, above n 22, at [38] and [50] for discussion on the temporary nature and sparing use that should be accorded anti-suit injunctions.

<sup>303</sup> Refer to discussion in Part II(B).

<sup>304</sup> *Gazprom OAO*, above n 11, at [37]. See discussion in Part IV(E).

<sup>305</sup> See Gaillard and Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration*, above n 45, at [627]; Schreuer *The ICSID Convention: a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, above n 49, chapter on article 26 at [6]; and Barcelo "Anti-Foreign Suit Injunctions to Enforce Arbitration Agreements", above n 245, at 108.

<sup>306</sup> Refer to discussion in Part IV(E) and Part IV(F).

<sup>307</sup> As evidenced by UNCITRAL Model Law, art 17(2)(b).

<sup>308</sup> Refer to discussions at Part IV(G).

<sup>309</sup> Gaillard "Anti-Suit Injunctions Issued by Arbitrators", above n 236, at 242.

<sup>310</sup> Moses *The Principles and Practice of International Commercial Arbitration*, above n 275, at 106-107. See Parts IV(H) and II(B)(3) and (4).

<sup>311</sup> Refer to discussion in Part IV(J).

<sup>312</sup> *Gazprom OAO*, above n 11, at [35].

<sup>313</sup> At [41]. Refer to discussion in Part III(B).

treatment would itself prove problematic considering the non-universal treatment of injunctions from both forums in different jurisdictions.<sup>314</sup> As more jurisdictions adopt the amendments to the UNCITRAL Model Law, the place of tribunal-ordered anti-suit injunctions becomes further cemented as an interim measure available to arbitral tribunals in support of arbitration.

For the above reasons, the use of tribunal-ordered anti-suit injunctions need not be curtailed by the restrictions suggested in Part IV(K). They are important in an increasingly globalised world, and are necessary to ensure commercial certainty in international trade is not diminished. The 2006 amendments to the UNCITRAL Model Law reinforce their importance. Therefore, the proper scope for anti-suit injunctions is not one weighed by heavy restrictions, but rather subject only to existing conditions and limitations.<sup>315</sup>

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<sup>314</sup> Refer to discussion in Part III.

<sup>315</sup> Refer to discussion in Part II(B).

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