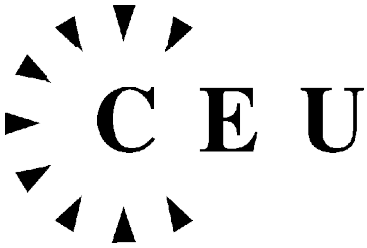

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STATE COURTS' USE OF ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION

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ABSTRACT

State courts should not intervene in arbitration process, unless clearly authorized. Anti-suit and anti-arbitration injunctions are instances of court interference. Discussion in the paper is focused on the court's power to issue these injunctions, as well as on the advantages and disadvantages of use by courts of such injunctions and their legality.

The paper aims to prove that courts should refrain from issuing an anti-suit injunction and should not grant a request for an anti-arbitration injunction. These injunctions by definition infringe jurisdiction of another court in an extraterritorial manner or that of an arbitral tribunal. In addition, no support for such measures can be found in the existing international legal framework.

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Introduction

> The anti-suit enjoinder of international arbitration is a phenomenon that has generated too little consideration, still less confrontation, and still less cure.[1]
>
> Stephen M. Schwebel

Judge Schwebel's statement is true, but level of confrontation with the anti-suit injunctions in the sphere of arbitration is belittled. Professor Gaillard writes that "in the past few years, the use of anti-suit injunctions in the context of international arbitration has been spreading at a disturbing pace"[2]. The orders of Pakistan Supreme Court to stay ICC and ICSID arbitral proceedings are vivid examples.[3]

Issuance by state courts of anti-suit injunctions in the sphere of arbitration raises numerous practical and academic issues, just to name a few: level of independence of arbitrators from the state courts, priority to decide upon the existence and validity of the arbitration agreement, imposition of one jurisdiction over the other, possibility of issuance of the anti-anti-suit injunctions in response to anti-suit injunction and many others. These are exactly the reasons why Stephen Schwebel names the anti-suit enjoinder as "one of the gravest problems of contemporary international commercial arbitration".[4]

In the area of conflict of law, an anti-suit injunction is an order issued by the courts of one country against a person over whom it exercises jurisdiction, requiring that person not to bring proceedings before a foreign court, or where proceedings have already been

[1] Stephen M. Schwebel, *Anti-Suit Injunctions in International Arbitration – An Overview, in* IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 5(Emmanuel Gaillard ed., 2005).
[2] Emmanuel Gaillard, *Introduction* to IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 1(Emmanuel Gaillard ed., 2005).
[3] Supreme Court of Pakistan, June 14, 2000, *The Hub Power Co. (HUBCO) v. Pakistan WAPDA*, 16 ARB. INT'L 439 (2000); Supreme Court of Pakistan, July 3, 2002, *Societe Generale de Surveillance S.A. (SGS) v. Pakistan*, 19 ARB. INT'L 182 (2003).
[4] *See*, Schwebel *supra* note 1, at p. 6.

commenced in a foreign court to discontinue such proceedings.[5] With regard to international commercial arbitration two types of anti-suit injunctions are being used, namely, an anti-suit injunction in support of an arbitration and, *vice versa,* an anti-suit injunction to prevent an arbitration. For the sake of clarity, an injunction in support of arbitration will be termed an anti-suit injunction (hereinafter, ASI) and an injunction to prevent an arbitration will be an anti-arbitration injunction (hereinafter, AAI).

Discussion in the paper is focused on the advantages and disadvantages of the AAI and ASI use by the state courts. Research includes factors that influence court's decision whether to grant injunctive relief or not. What are the justifications for use of the tool and how should an arbitral tribunal or a state court react in response, more importantly is the tool capable to survive – these are the questions the research is directed at. The paper aims to prove that courts should refrain from issuing an ASI and should not grant a request for an AAI. Otherwise, court's power to overrule arbitral tribunal's decision on its jurisdiction may result in direct superiority of litigation over arbitration at any stage of arbitral proceedings. Moreover, autonomy of arbitration should always be respected by state courts.

When conducting research following methods will be used: historical development, detailed analysis of the existing doctrinal and judicial material, comparative analysis of approaches taken in the United States and the United Kingdom.

First Chapter is devoted to the right of state courts to issue injunctions in relation to arbitration. First section covers development of the injunctive relief as a whole and with focus to arbitration. Policy choices of the EU and the United States are discussed in the second section. Last section of the first chapter deals with the philosophy of limited court intervention into arbitral process.

[5] Nigel Meeson QC, *Comparative Issues in Anti-Suit Injunctions, in* Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force 59 (M. Davies ed., 2005).

Second Chapter addresses an ASI and an AAI directly. It starts with an ASI, its advantages and enforceability. Second section examines the anti-anti-suit injunctions that are granted in response to an ASI. Third section is devoted to an AAI, in particular to the meaning and scope of the *Kompetenz-Kompetenz* principle and to the impact that an AAI might have on the enforceability of an award. Fourth section of the second chapter analyzes compliance of an ASI and an AAI with the existing legal framework (New York Convention and Model Law on Arbitration).

CHAPTER 1 – COURT'S POWER TO ISSUE AN ASI

2.1 Anti-Suit Injunctions as a Subcategory of Injunctive Relief

2.1.1 Origin of the Anti-Suit Injunction Tool

An injunction is a tool that originated in the common law legal system. Civil law courts do not possess such a weapon in their arsenal. Common law historical distinction between law and equity played its role in the development of the injunctive relief and, therefore, is worth mentioning.

An injunction is an order directing the defendant to act or refrain from acting in a specified way.[6] According to the Black's Law Dictionary, "to get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted".[7] Remedy at law usually was comprised of monetary award of damages. Injunctions were sought in cases when monetary damages could not adequately redress the injury.[8] Such an order traditionally was perceived as an extraordinary remedy.[9]

When exercising judicial discretion in awarding injunctive relief judges in equity courts examined the matter in light of "reason and conscience".[10] It is important to bear in mind that a case in equity involves "questions of discretion, or judgment, or possibly

[6] HAROLD J. GRILLOT, INTRODUCTION TO LAW AND THE LEGAL SYSTEM 214(3rd ed., 1983).
[7] BLACK'S LAW DICTIONARY (8th ed. 2004), injunction.
[8] WILLIAM WALSH, A TREATISE ON EQUITY §4(c), c.12 (Callaghan and Company 1930); BLACK'S LAW DICTIONARY, remedy.
[9] FISS, THE CIVIL RIGHTS INJUNCTION (1978); Rendleman, *The Inadequate Remedy at Law as a Prerequisite for an Injunction*, 33 U. Fla. L. Rev. 346 (1981).
[10] *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 102 S.Ct. 1798, 72 L. Ed. 2d 91 (1982).

principles of justice and conscience rather than rigid legal rules".[11] As a consequence, strict legal standards do not confine issuance of an injunction, instead notions of justice and fairness prevail. At the present time the underlying concepts and different approaches of law and equity have been retained in the common law legal system, although the formalism that historically distinguished the two has largely disappeared because of their merger.[12]

An ASI is a special type of injunction which was unknown prior to the nineteenth century. Most authors agree that an ASI was first issued by court in England in *Bushby v. Munday*.[13] Bushby was granted an injunction for the other party to stay proceedings in Scotland. Parallel existence of equity and common law courts called for an avoidance mechanism of parallel proceedings between the same parties and regarding the same subject-matter. English courts of equity invented such an avoidance mechanism which later became to be known as an ASI. The court in *Bushby* even held that the same principles would apply if the other court [in that case Scottish Court] were sitting in "Paris or Vienna".[14] Thus, the court's power to issue an ASI and injunction's potential extraterritorial effect seemed at that time to be fair and appropriate. By 1821 it was established in England that courts have jurisdiction to grant an ASI, that the test was "whether the ends of justice required the injunction to be granted",[15] and that the injunction could theoretically stretch to foreign jurisdictions.

After the merger of equity and common law courts, necessity to enjoin parties from proceedings in common law courts vanished. However, "the only jurisdiction that remained

[11] HAROLD J. GRILLOT, INTRODUCTION TO LAW AND THE LEGAL SYSTEM 216(3rd ed., 1983).
[12] DOBBS, HANDBOOK ON THE LAW OF REMEDIES, qtd in 2 PUNITIVE DAMAGES: LAW AND PRAC. 2d § 20:2.
[13] (1821) 5 Madd 297; *see*, Meeson *supra* note 5, at p. 60; J. Arkins, *Borderline Legal: Anti-Suit Injunctions in Common Law Jurisdictions*, Journal of International Arbitration, Vol. 18 No. 6 (2001), at p. 603.
[14] (1821) 5 Madd 297 at 307, 913.
[15] *See*, Meeson *supra* note 5, at p. 62.

was to grant injunctions to restrain parties from litigating in foreign courts, a jurisdiction which could now be exercised in all divisions of the court".[16]

Originated for purely domestic purposes the ASI was later converted into an international enjoinder tool. Principles applied by English courts to the ASI were elaborated in *Societe Nationale Industrielle* (*SNI*) case and amount to four main ones: (i) that the jurisdiction is to be exercised when the 'ends of justice' require it; (ii) that the order is directed not against the foreign court, but against the parties; (iii) the injunction will only be issued to restrain a party that is amenable to the jurisdiction of the local courts; (iv) the exercise of jurisdiction must be done with caution.[17]

Apart from the case law, the power of the English courts to grant an ASI derives from the general power in the 1981Supreme Court Act, section 37(1) to "grant an injunction … in all cases in which it appears to the court to be just and convenient to do so". In accordance with the 1996 English Arbitration Act the court is empowered to grant an interim injunction (section 44(2)(e)) "for the purposes of and in relation to arbitral proceedings" (section 44(1)).

Other common law jurisdictions have their own peculiarities, nevertheless, they uphold the existence of the court's power to grant an ASI. The United States acknowledged that its courts have an inherent power to issue an ASI. It was numerously held that "federal courts have the power to enjoin persons subject to their jurisdiction from prosecuting foreign suits".[18] General principles of granting an injunction are similar to the ones followed by English courts.[19] Canadian and Australian courts have considered legality and availability of an ASI as well. Supreme Court of Canada stressed the role of comity in matters of

[16] *Ibid.*, p. 63.
[17] *Societe Nationale Industrielle Aerospatiale v. Lee Kui Jak & Anor* [1987] AC 871.
[18] *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir.1996); *see also Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1352 (6th Cir.1992); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2nd Cir.1987); *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 926 (D.C.Cir.1984); *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855 (9th Cir.1981).
[19] *Laker Airways Ltd. v. Sabena, Belgian World Airlines* (1984) 731 F. 2d 909. at 926: "the equitable circumstances surrounding each request for an anti-suit injunction must be carefully examined to determine whether the injunction is required to prevent an **irreparable miscarriage of justice**" (emphasis added).

international enjoinder.[20] Main Australian case regarding granting an ASI affirmed that the court's power to issue an ASI comes from law of equity and made it clear that the same principles as English courts follow are applicable.[21] Singapore courts take in consideration the same four basic principles as were outlined in British *SNI* case.[22] Thus, the general approach in common law jurisdictions to issuance of an ASI is consistent with the view taken by the English Court in the *SNI* case.[23]

These types of injunctions are not universally accepted. Civil legal systems did not have a specialized institution dealing with equity, therefore, no duality of courts where recourse could be sought was needed. For the present time, taking international legal practice as a whole, an ASI is "rather uncommon, unknown or not familiar to many legal systems",[24] not surprisingly to those that belong to the civil law tradition. Under some national laws, an ASI is even regarded as contradicting the fundamental constitutional right of a party to apply for court action.[25]

2.1.2 Use of an Injunction in Arbitration

Originally an ASI had only a domestic sphere of application to resolve questions of supremacy between law and equity. After conflict between law and equity disappeared due to the merge of these two courts, an ASI gained an international perspective. International perspective in practice meant collision with the jurisdictions of foreign courts and their resistance to the idea of being enjoined from deciding cases. In response English courts added

[20] *Anchem Products Inc v. British Columbia* (Workers' Compensation Board) [1993] 1 S.C.R. 897.
[21] *CSR Ltd v. Cigna Ins. Austl. Ltd*, Nos S119 and S120, 1996 (High Ct. Aug. 5, 1997). Majority approval that English principles are applicable *see id.* at 432.
[22] *Banks of America National Trust & Savings Association v. Djoni Widjaja* [1994] 2 SLR 816 (Singapore Court of Appeal was citing the same four basic principles from *Societe Nationale Industrielle Aerospatiale, see supra* note 17).
[23] *See*, *SNI supra* note 17.
[24] Note by the UNICTRAL Secretariat, U.N. Doc. A/CN.9/WG.II/WP.138, at para. 76.
[25] OLG Düsseldorf, Order of 10 January 1996 – 3 VA 11/95.

to the requirement of meeting "ends of justice" another requirement of "caution".[26] Later, the United Kingdom judiciary narrowed the list of possible cases when an ASI could be granted to exclusive jurisdiction clauses, arbitration clauses, and when foreign proceedings are vexatious and oppressive. Impact of the ECJ case-law on posing further limits to issuance of an ASI will be discussed in the second section.

The connection between an ASI and arbitration appeared when English courts decided to safeguard by available means parties' intention to arbitrate. Classical situations in which English courts ordered anti-suit injunctions are cases when court intervention would enforce an agreement to arbitrate.[27] In the absence of strong reasons to the contrary English courts will secure compliance with the contractual commitment by means of an ASI.

However, when there is no clear breach of an arbitration agreement, English courts are reluctant to grant an ASI, especially where proceedings in a foreign court are at an advanced stage.[28] The financial and business costs suffered by the injured party when instead of arbitration it went to litigate are perceived as material factors that should also be taken into consideration.[29]

Tool initially designed to promote procedural efficiency and to avoid parallel proceedings started to be used in relation to arbitration to enforce the arbitration agreement. However, an injunction can also be used to serve contrary purposes, to obstruct arbitral process and prevent parties from proceeding with arbitration. Injunctions used for such purposes are called anti-arbitration injunctions (AAI) and will be discussed in the second chapter.

[26] *See*, *supra* note 17. This caution requirement is similar to the international comity principle coined by the United States courts.
[27] *Aggelki Charis Compania Maritima SA v Pagnan SpA* (The Angelic Grace)[1995] 1 Lloyd's Rep. 107; *Donohoe v Armco Inc* [2002] 1 Lloyd's Rep. 425.
[28] *Deuz A.G. v. General Electrics Co.*, April 14, 2000, unreported, qtd in Hakeem Seriki, *Anti-Suit Injunctions and Arbitration: A Final Nail in the Coffin?*, Journal of International Arbitration 23(1): 25-38, 2006.
[29] Carol Mulcahy, *The Impact of the Brussels Convention on Anti-Suit Injunctions in Aid of Arbitration Agreements*, Arbitration: the Journal of the Chartered Institute of Arbitrators, Vol. 71, Number 3, August 2005, at p. 212.

The ASI used to restrain foreign proceedings by definition infringe upon the jurisdiction of another court in an extraterritorial manner. This is the reason why judiciary had to find the way how to balance the interests of foreign court jurisdiction and equitable relief in form of an ASI.

2.2 Policy Choices and Main Concerns

The mere issuance of an ASI or an AAI serves as a manifestation that the enjoining court decides not only its own jurisdiction but decides also jurisdiction of another court or arbitral tribunal. The hidden effect of an ASI or an AAI is that another court or arbitral tribunal is precluded from examining the dispute and from finding on its own jurisdiction. The enjoining court appears to believe that it knows better or has a superior right (e.g. choice of forum clause, court of the country where arbitration takes place) and that the court of the principal action can not be trusted or does not have the legal means to reach the correct conclusion.[30] All of these concerns are treated differently in different jurisdictions.

2.2.1 EU Approach

European Union (EU) common approach to an ASI is reflected in *lis pendens* principle which is contained in Article 27 of the Brussels Regulation.[31] *Lis pendens* principle means that a court first seized with the dispute should first decide its own jurisdiction. However, the UK being the only common law country in the EU strives to retain for its courts power to grant an ASI in support of arbitration. The UK attempts are being slowly defeated by the growing body of the ECJ case-law. The ECJ is likely to outlaw issuance of an ASI at all, however, slight chances for the UK still remain.

[30] Schneider, *Court Actions in Defence against Anti-Suit Injunctions*, *in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION (Emmanuel Gaillard ed. 2005), at p. 42.
[31] Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Art 21 of the Brussels Convention is identical to Art 27 of the Brussels Regulation.

2.2.1.A Brussels Regulation

Within the EU (except for Denmark), Council Regulation No.44/2001 determines, among other matters, which Member State's court has jurisdiction to hear a dispute and the circumstances in which an order made by the court of one Member State must be recognized and enforced by the court of another Member State. The Regulation, which took effect on March 1, 2002, replaced the 1968 Brussels Convention in the case of EU Member States. The 1988 Lugano Convention which governs jurisdictional issues between the EU Member States and Iceland, Norway and Switzerland remains unaffected by the Brussels Regulation. Article 1 of the Regulation provides that it is to apply in civil and commercial matters whatever the nature of the court or tribunal. The Regulation excludes certain matters from its scope, specifically arbitration.[32] However, recent decisions by the ECJ on incompatibility of anti-suit injunctions and exclusive jurisdiction clauses with the Brussels Regulation make it unclear whether anti-suit injunctions with regard to arbitration are also forbidden.[33]

Under the Brussels Convention/Regulation, the primary rule is that defendants should be sued in their country of domicile.[34] The parties are also free by means of an arbitration clause to elect to have the dispute dealt with by arbitration rather than litigation, thereby taking the dispute out of the Brussels Convention regime altogether by reason of the arbitration exception contained at Article 1. Brussels Regulation does not touch specifically upon an ASI, as it is a peculiarity of the English law and, therefore, unknown to other 26 Member States, none of which is a common law country.

The Brussels Regulation has a direct effect only in the EU Member States. Member States are not bound by it in relations with non-EU countries. If a party from non-EU state would address an English court with the request to grant an ASI in support of arbitration to

[32] Council Regulation No.44/2001, Art 1(2)(d): "The Regulation shall not apply to arbitration".
[33] *Turner v. Grovit*, Case C-159/02, [2004] 2 Lloyd's Rep. 169; *Erich Gasser GmbH v. MISAT Srl*, Case C-116/02, [2004] 1 Lloyd's Rep. 222.
[34] Art. 2 of both Brussels Convention and Brussels Regulation.

restrain a court outside the EU, an English court will disregard all the limitations set out in the Brussels Regulation and elaborated in ECJ decisions and will avail itself of its power to grant an ASI.

Interpretation of the Brussels Regulation concerning its impact on an ASI and clarification of the scope of *lis pendens* principle was provided by the ECJ in two quite recent decisions. Judgment in *Erich Gasser GmbH v. MISAT Srl*[35] was delivered on 9 December 2003; in a few months followed the judgment in *Turner v Grovit*[36] on 27 April 2004.

2.2.1.B ECJ case-law

Erich Gasser GmbH v. MISAT Srl

The following reference was made to the ECJ: "May a court other than the court first seized, within the meaning of the first paragraph of the Brussels Convention Article 21, review the jurisdiction of the court first seized if the second court has exclusive jurisdiction under the Brussels's Convention Article 17, or must the agreed second court proceed in accordance with the Article 21 notwithstanding the agreement conferring jurisdiction?"

The ECJ's ruling was: "Brussels Convention Article 21 must be interpreted as meaning that a court second seized whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seized has declared that it has no jurisdiction".[37]

The decision in *Gasser* is not *per se* concerned with arbitration. *Gasser* is about an exclusive jurisdiction clause. However, the ECJ touched upon the principle of trust on which the Brussels Convention is based. The principle of trust served one of the main reasons in the *Turner*.

[35] Case C-116/02, [2004] 1 Lloyd's Rep. 222.
[36] Case C-159/02, [2004] 2 Lloyd's Rep. 169.
[37] *See, Gasser supra* note 35, Operative Part para. 2.

Turner v Grovit

The House of Lords referred the following question to the ECJ: "Is it consistent with the Brussels Convention to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another convention country, when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly brought before the English courts?"

The ECJ decided: "The Brussels Convention is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings".[38]

In its reasoning the ECJ emphasized that the Convention is necessarily based on the trust which the Contracting States accord to one another's legal system and judicial institutions.[39] Both *Gasser* and *Turner* uphold "the mutual trust" principle based on which "compulsory system of jurisdiction" was established, which all the courts within the purview of the Convention are required to respect. Member States waived the right to apply their internal rules on recognition and enforcement of foreign judgments in favor of a simplified mechanism for the recognition and enforcement of judgments.[40] It is "inherent in that principle of mutual trust" that the Convention may be "interpreted and applied with the same authority" by each of the courts of the Contracting States.[41] The ECJ expressly made it clear that an ASI is incompatible with the principle of trust on which the Convention is based. Nevertheless, the United Kingdom is still of the opinion that an ASI in support of arbitration

[38] *See, Turner v. Grovit supra* note 36, Operative Part.
[39] *Ibid,* at para. 24.
[40] *Ibid.*, at para. 24; *see, Gasser supra* note 35, at para. 72.
[41] *See, Turner v Grovit supra* note 36, at para. 25.

are out of scope of the Brussels Regulation, therefore, English courts can still issue an ASI in support of arbitration.

Response of the UK

The Court of Appeal in *The Hari Bhumi*[42] emphasized the reasoning and resulting distinction in *The Angelic Grace*[43] between those proceedings commenced in breach of an arbitration clause, and those proceedings alleged to be vexatious or oppressive. Based on that reasoning it is possible to distinguish ASI in support of arbitration from vexatious and oppressive resort to litigation. English commentators state if distinction would not be rejected by the ECJ, then that distinction is in line with the reasoning of the ECJ in *Turner*.[44] Thus, *The Angelic Grace* and other cases based on it do not contradict the reasoning of the ECJ in *Turner*.

However, the ECJ made clear in *Turner* that an ASI is per se an unjustified interference with the jurisdiction of another court. Injunction is inherently problematic, as it enjoins a party from litigation, thus implicitly affects the jurisdiction of another forum.

To buttress its position on legality of an ASI in support of arbitration the UK extensively relies on the arbitration exception of the Brussels Convention.[45] Though escape that injunction relates to arbitration does not diminish its extraterritorial effect.

2.2.1.C Arbitration Exception

The Report by the group of experts set up in connection with the drafting of the 1968 Brussels Convention states that because arbitration is already governed by Article 220 of the EC Treaty and the 1958 New York Convention "it seemed preferable to exclude

[42] *Through Transport Mutual Insurance Association (Eurasia) Ltd. v. New India Assurance Co. Ltd. (The Hari Bhum)* [2004] EWCA Civ. 1598.
[43] *Aggelki Charis Compania Maritima SA v Pagnan SpA* (The Angelic Grace)[1995] 1 Lloyd's Rep. 107.
[44] International Arbitration Newsletter (Holman Fenwick&Willan), Issue 7, February 2005, at p. 2.
[45] Brussels Regulation Art 1(2)(d); Brussels Convention Art 1(4).

arbitration".[46] The ECJ first judgment on the scope of Article 1(4) of the Brussels Convention construed the arbitration exception broadly. The ECJ held that "by excluding arbitration from the scope of the Convention on the ground that it was already covered by international conventions, the Contracting States intended to exclude arbitration in its entirety"[47] (emphasis added). Moreover, the exception provided by Article 1(4) "must be interpreted as meaning that the exclusion extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation".[48]

However, in the later judgments the ECJ took a more restrictive approach. In *Van Uden* case the ECJ narrowly construed its own 'arbitration in its entirety' and held that provisional measures were not ancillary to arbitration but represented parallel supportive measures and concerned not arbitration but the protection of rights.[49] Arbitration exception was defined to have limits, and "entirety" was not an absolute "entirety" anymore.

The UK reading of the arbitration exception

In *The Ivan Zagubanski* case English court held that "where proceedings in a court or tribunal in a Contracting State will result in a judgment where the principal focus is on arbitration, then those proceedings and any resulting judgment are excluded from the scope of the Convention".[50] *The Ivan Zagubanski* case was decided before *Grovit* and *Gasser*. The position in England did not change even after. In *The Hari Bhum* case the Court of Appeal affirmed that *The Ivan Zagubanski* rule was still applicable and that the right to grant an ASI remained. The Court of Appeal distinguished *Gasser* and *Grovit* cases, naming them "the

[46] Official Journal 1979 C 59, qtd in *Marc Rich & Co. AG v. Societa Italiana Impianiti PA,* Case C-190/89.
[47] *Marc Rich & Co. AG v. Societa Italiana Impianiti PA,* at para. 18.
[48] *Ibid*., at para. 29.
[49] *Van Uden Maritime BV v Kommandingesellschaft in Firma Deco-Line* [1999] 2 W.L.R. 1181.
[50] *Navigation Maritime Bulgare (NMB) v Rustal Trading Ltd. (RT) and others (The Ivan Zagubanski)* [2002] 1 Lloyd's Rep. 106, at 116.

Convention proceedings".[51] Instead the English Court applied earlier ECJ decision (*Atlantic Emperor*) where it was decided that arbitration must be treated as entirely outside the Convention.[52]

The United Kingdom approach is easy to contest. The ECJ position in *Turner* and *Gasser* was that a court could not interfere with a foreign court's power to decide whether or not it had jurisdiction, it could be argued that it does not matter whether the breach arises from a jurisdiction clause or an arbitration agreement. Professor Schlosser describes this argument as "divorced from reality".[53]

English commentators see the negative effect of ECJ judgments on the effective and immediate enforcement of a contractual choice of forum. "In addition to the management and legal costs of having to become embroiled in satellite litigation to establish the correct jurisdiction as provided for in the parties' contract, the delay in being able to prosecute the substantive claim can have serious business implications".[54] Brussels Regulation gives priority to the court first seized with the matter to establish whether it has jurisdiction over the dispute or not.[55] Post-*Gasser* the only way for the party to have litigation in the court it contractually agreed upon is to commence proceedings there first, because exclusive jurisdiction clause is of no effect any more. Whether the same applies to arbitration is not decisively established yet by the ECJ, however, on 2 April 2007 House of Lords already referred for a preliminary ruling to the ECJ the following question:[56]

> Is it consistent with EC Regulation 44/2001 for a court of a Member State to make an order to restrain a person from

[51] *See, The Hari Bhum supra* note 42, at para. 82.
[52] *Ibid.*, at para. 84.
[53] Peter Schlosser, *Anti-suit injunctions zur Unterstützung von internationalen Schiedsverfahren* (2006) RIW 486-492.
[54] *See,* Mulcahy *supra* note 29, p. 213.
[55] Brussels Regulation, Art 27.
[56] Reference for a preliminary ruling from House of Lords made on 2 April 2007 – *Riunione Adriatica Di Sicurta SpA (RAS) v West Tankers Inc.*, Case C-185/07 [OJ 2007/C155/17].

commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?

The reference may result in the English courts being deprived of a substantial element of their supervisory jurisdiction.[57] Some commentators predict that *West Tankers* is likely to be the last time an injunction was issued to protect English arbitration proceedings against a party invoking the jurisdiction of a court of another Member State in breach of agreement to arbitrate.[58]

2.2.2 U.S. approach

Similar to the United Kingdom, the United States also makes use of an ASI when a party to an arbitration agreement tries to avoid either obligation to arbitrate or obstructs the enforcement of the award. An ASI is perceived in a favourable light as an instrument by means of which U.S. courts attempt to protect arbitration proceedings and awards against interference from foreign courts.[59] American courts when faced with the request to grant an ASI have to balance the conflicting interests of international comity and pro-arbitration federal policy.[60] Surprisingly, there is no uniform position among the federal courts on which of the two policies should prevail. As a consequence, the United States Circuits are split between liberal and restrictive approaches.

2.2.2.A Restrictive and Liberal Courts

Restrictive approach relies heavily on the principle of international comity. By comity it is understood "the recognition which one nation allows within its territory to the legislative,

[57] Alexander Trukhtanov, *Anti-Suit Injunctions in Support of Arbitration – Is the ECJ About to Take Away the English Courts' powers?* [2007] Int. A.L.R. Issue 4.
[58] *Ibid.*
[59] Steven Swanson, *Antisuit Injunctions in Support of International Arbitration*, 81 Tul. L. Rev. 395.
[60] *Ibid.*

executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws".[61] Principle of international comity requires abstaining from adopting laws or taking decisions that might have a direct effect on the foreign jurisdictions. Therefore, the approach is restrictive, because it restricts issuance of an ASI. The approach is best reflected in the finding of the United States Court of Appeals for the Sixth Circuit that an ASI should be issued "only in the rarest of cases."[62]

The United States Court of Appeals for the District of Columbia Circuit,[63] the United States Court of Appeals for the Second Circuit,[64] Sixth Circuit[65], and Third Circuit adopted the restrictive approach. A district court in the Eleventh Circuit followed the restrictive approach[66] and the Court of Appeals for the Eleventh Circuit affirmed that approach.

The liberal approach, on the other hand, places a lower value on international comity in deciding international civil disputes. Under the liberal approach, courts do not distinguish between foreign anti-suit actions and domestic actions and apply the same basic standard to both.[67] Supporters of the given approach are Court of Appeals for the Fifth Circuit,[68] Ninth Circuit,[69] Seventh Circuit, and Eighth Circuit.[70]

In 1996, the Supreme Court could end confrontation of liberal and restrictive courts. However, it decided not to and refused to grant certiorari in the *Kaepa* case.[71]

Professor Swanson considers that primary concern in the balancing of interests of two approaches should "be whether the proposed anti-suit injunction will further or hinder the

[61] *Hilton v. Guyot* 159 U.S. 113, 163-64 (1895).
[62] *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1354 (6th Cir. 1992).
[63] *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).
[64] *China Trade & Development Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987).
[65] *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992).
[66] *Mutual Service Casualty Insurance Co. v. Frit Industries, Inc.*, 805 F. Supp. 919, 921 (M.D. Ala. 1992).
[67] George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 Colum. J. Transnat'l L. 589, 595 (1990).
[68] *Zapata Off-Shore Co. v. M/S Bremen* (In re Unterweser Reederei GmbH), 428 F.2d 888 (5th Cir. 1970).
[69] *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981).
[70] *Medtronic, Inc. v. Catalyst Research Corp.*, 664 F.2d 660, 664 (8th Cir. 1981).
[71] *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir.), cert. denied, 519 U.S. 821 (1996).

interests of the international arbitration system".[72] One should not forget the initial purpose behind the issuance of an ASI, namely protection of arbitration proceedings and facilitation in the enforcement of an award. When a party resorts to a court with the request for an ASI the court should decide to what extent granting of the request results in promotion of the "interests of the international arbitration system".

In my opinion which is similar to Professor Swanson's, proper balancing of comity and arbitration policies should generally lead to the conclusion that U.S. courts should rarely issue an ASI in international arbitration cases.[73] Underlying principle is almost the same as in the UK. In the United Kingdom courts exercise "caution", while in the United States courts take into consideration principle of comity. However, both countries should not forget that court's interference in the arbitration process should be limited. Thus, "interests of the international arbitration system" in the first place require arbitration to be independent from the courts. When nonintervention is impossible, only then courts should act so as to support the arbitration process.

2.3 Role of Courts in Arbitration

2.3.1 Interplay between Arbitration and Litigation

Arbitration is an absolute necessity in international trade.[74] By the beginning of 1990s international arbitration had universally become the most frequently used method of resolving disputes in international trade.[75] Arbitration agreement is in essence a contractual

[72] *See*, Swanson *supra* note 59.
[73] *Ibid.*
[74] Peter Schlosser, *The Competence of Arbitrators and of Courts*, Arbitration International, Vol. 8 No. 2 (1992), p.189.
[75] *Marc Rich & Co. AG v. Societa Italiana Impianiti PA*, (C-190/89): Opinion of Mr. Advocate General Marco Darmon, at para. 3.

provision specifying in advance the forum in which disputes shall be solved and the law to be applied to the substance and procedure. Parties' agreement to solve the disputes in the manner they perceive to be the most efficient is "an almost indispensable precondition to achievement of orderliness and predictability essential to any international business transaction".[76]

The 1958 New York Convention was one of the very first steps to establish legal framework for international arbitration. Unmatched success of the New York Convention indicates global acceptance of the basic principles of international arbitration in the present moment.[77] Main principle of the Convention is that foreign arbitral awards have to be recognized and enforced. Article II section 3 of the New York Convention obliges Member States "to refer the parties to arbitration" when there is an "agreement in writing" to arbitrate.

Next significant step in the development of the legal framework for international arbitration was elaboration of the 1976 UNCITRAL Arbitration Rules and the 1985 Model Law on International Commercial Arbitration (hereinafter, Model Law). In the Article 5 of the Model Law it is concisely stated that court interference into arbitration process should be limited.[78]

It is against the concept of arbitration to have court interference of any kind, except for enforcement and a few other circumstances.[79] Some authors consider that international arbitration to reach its *effet utile* has to be "established and conducted according to internationally accepted practices, free from the controls of parochial national laws, and without the interference or review of national courts".[80] "Nightmare scenarios" include AAI

[76] *Ibid.*
[77] As of March 2008, 142 States are parties to the 1958 NYC. Statistics available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html
[78] 1985 UNCITRAL Model Law on International Commercial Arbitration and Reconcilliation, Art. 5: "In matters governed by this Law, no court shall intervene except where so provided in this Law."
[79] Axel Baum, *Anti-Suit Injunctions Issued by National Courts to Permit Arbitration Proceedings, in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION (Emmanuel Gaillard ed. 2005), p. 20
[80] Julian Lew, *Achieving the Dream: Autonomous Arbitration,* Arbitration International, Vol. 22 No. 2 (2006), p. 179.

that are aimed to stop arbitration proceedings at all.[81] Even an ASI which is deemed to support arbitration can result in lengthy litigation that will delay speedy resolution of the dispute by means of arbitration. Therefore it is of utmost importance to discuss interrelation of arbitral tribunals and state courts before turning to an ASI and an AAI directly.

2.3.2 Model Law Art 5

1985 UNCITRAL Model Law, which was adopted in more than 50 jurisdictions,[82] is silent on anti-suit and anti-arbitration enjoinders. Clearly, UNCITRAL in 1985 did not propose transnational rules designed to govern the availability of arbitration-related anti-suit injunctions in a specific and uniform manner.[83] However, the Model Law makes it obvious that judicial assistance and judicial control should be limited.

The spirit of the Model Law is reflected in its Article 5 which provides that "no court shall intervene except where so provided". This fundamental principle is one of the pillars of the Model Law. The Model Law Explanatory Notes confirm the philosophy of reduced role for court supervision over international arbitration.[84] According to the Commission Report, the purpose of Article 5 was "to achieve a certainty as to the maximum extent of judicial intervention, including assistance, in international commercial arbitration, by compelling the drafters to list in the model law on international commercial arbitration all instances of court

[81] *Ibid.*
[82] Australia, Austria (2005), Azerbaijan, Bahrain, Bangladesh, Belarus, Bulgaria, Cambodia (2006), Canada, Chile, in China: Hong Kong Special Administrative Region, Macau Special Administrative Region; Croatia, Cyprus,Denmark (2005), Egypt, Estonia (2006), Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nicaragua (2005), Nigeria, Norway (2004), Oman, Paraguay, Peru, the Philippines, Poland (2005), Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Turkey (2001), Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; in Bermuda, overseas territory of the United Kingdom of Great Britain and Northern Ireland; within the United States of America: California, Connecticut, Illinois, Louisiana, Oregon and Texas; Uganda, Zambia, and Zimbabwe.
Statistics available at
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html
[83] Frederic Bachand, *The UNCITRAL Model Law's Take on Anti-Suit Injunctions*, *in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION (Emmanuel Gaillard ed. 2005), p. 87.
[84] Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, qtd. in *see*, Lew *Achieving the Dream supra* note 80.

intervention".[85] The certainty is needed to protect the parties' and arbitrators' expectations as to when judicial intervention in the dispute resolution process which they have chosen is possible.

In addition, the Analytical Commentary describes the effect of Article 5 as being "to exclude any general or residual powers given to the courts in a domestic system which are not listed in the model law."[86] The Model Law sets an exhaustive list of the instances in which courts may intervene, as can be inferred from the wording of the Article "no court shall intervene" (emphasis added). Articles of Model Law that allow court intervention can be easily identified.[87]

One of the possible justifications for issuance of an ASI under the Model Law is Article 9.

2.3.3 Model Law Art 9

It can be argued that the only basis for court intervention to support granting an ASI can be found in Article 9 of the Model Law. The Article provides that "it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure". Being one of the provisions named in Article 1 section 2 of the Model Law, this provision also applies, regardless of the *lex fori*, to interim measures resulting from arbitrations which take place abroad.[88] The Working Group did not want the provision to be limited by naming

[85] A/40/17: Report of the United Nations Commission on International Trade Law on the Work of its 18th Session (June 3-21, 1985), Official Records of the General Assembly, 40th Session, at para. 63.
[86] A/CN.9/264: Report of the Secretary-General: "Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration", March 25, 1985, at Art. 5, para. 2.
[87] PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURISDICTIONS, at 1-113. The articles of model law are the following: Art. 8 (Arbitration and substantive claim before court), Art. 9 (Arbitration Agreement and interim measures by court), Art. 11 (Appointment of arbitrators), Art 13 (Challenge procedure), Art 14 (Failure or impossibility to act), Art. 16 (Competence of arbitral tribunal), Art. 27 (Court assistance in taking evidence), Art. 34 (Application for setting aside as exclusive recourse against arbitral award), Art 35 (Recognition and Enforcement), Art. 36 (Grounds for refusing recognition and enforcement).
[88] *See*, Binder *supra note 87*, at 2-905.

specific interim measure, "instead, a general formula … was considered as more appropriate".[89] However, as section 2.4.2 of the paper will show Article 9 is limited by the ordering of provisional measures which an ASI is not.

The United States and the United Kingdom have specific provisions in their corresponding legislature that empower courts to issue an ASI. The right to interfere into arbitration process with an aim to enforce arbitration agreement is also developed in the case-law.

Philosophy of limited intervention does not mean that no interaction should be occurring between the two forums. On the contrary, interaction must be present. Such interaction should be for the benefit of international arbitration. Judges should perceive arbitration as an alternative means of dispute resolution that deserves deference.

The courts may be very helpful to arbitrators and arbitrating parties by 'interfering' where such interference is animated by the desire to provide a reliable foundation for commencing arbitration and to arbitration procedures risking the loss of their reliable foundation or even deadlock.[90] In such cases issuance of an ASI and an AAI may seem to be justified.

[89] A/CN.9/245: Report of the Working Group on International Contract Practices on the Work of its Sixth Session, September 22, 1983, at para. 188.
[90] *See*, Schlosser *The Competence of Arbitrators and Courts supra* note 74, p.189.

CHAPTER 2 – ASI AND AAI: PROS AND CONS

2.1 ASI in Support of Arbitration

The anti-suit injunction serves the purpose of avoiding parallel proceedings and making arbitration speedier and more efficient process. There are always at least three parties whom issuance of an ASI effects. They are the court granting an ASI, the court against which the ASI is issued, and the arbitral tribunal whose proceedings are being safeguarded.

From the arbitrator's point of view an ASI is a wonderful tool at the disposal of a state court. Arbitration proceedings in no way suffer by the issuance of the ASI, the victim is the court that is being enjoined. From the point of view of the enjoining court, which, of course, has pro-arbitration bias,[91] parties' agreement to arbitrate should be maintained, as a result the ASI is legitimate. From the standpoint of the foreign court that is being enjoined, the ASI violates principles of comity and infringes jurisdiction of that foreign court.

An ASI is possible during arbitration and post-arbitration stages. At the arbitration stage court seeks to protect arbitration proceedings, e.g. when one of the parties refuses to go to arbitration and instead initiates litigation. At the post-arbitration stage court aims to protect the arbitral award, e.g. to stop a foreign attack on the arbitral award's enforcement.[92]

2.1.1 Advantages of an ASI

It's all about forum shopping and arbitration industry. Some countries want to control and channel international arbitration and litigation through themselves. For arbitration friendly countries an ASI is perceived as an advantage, as an incentive for parties to choose the place where courts will strive to safeguard parties' agreement, even by prohibiting one of the parties to go to the court regarding the dispute covered by an arbitration agreement.

[91] otherwise the court would not issue an ASI in the first place.
[92] Vivid example is *Karaha Bodas Cmpany, L.L.C. v. Perusahan Pertambangan Minyak Dan Gas Bumi Negara et al. (KBC v Pertamina)*, 335 F.3d 357 (2003).

Lord Hoffman in his speech at the House of Lords outlined main reasons why an ASI in support of arbitration should be kept within the arsenal of English courts and kept out of scope of the Brussels Regulation.[93] One of the appealing reasons is the "practical reality of arbitration as a method of resolving commercial disputes".[94] As Professor Schlosser whom Lord Hoffman quoted in his speech observes, "an ASI saves a party to an arbitration agreement from having to keep a watchful eye upon parallel court proceedings in another jurisdiction, trying to steer a course between so much involvement as will amount to a submission to the jurisdiction and so little as to lead to a default judgment".[95] Lord Hoffman in line with Peter Schlosser considered that by having an arbitration agreement parties intended to avoid such a situation.

By resorting to the litigation instead of the arbitration a party to an arbitration agreement often tries to delay arbitration proceedings or gain some tactical advantage. There is a possibility to delay arbitration by bringing an action "before a court which has no jurisdiction and which is less convenient for the other party, so as to bring to a halt any action based on the same contract until such time as that court declares that it has no jurisdiction".[96] Moreover, dilatory practices and parallel proceedings may result in financial burdens. Having to litigate in the jurisdiction or using the procedure other than was previously agreed can prove "costly in both financial and commercial terms in relation to pursuit and enforcement of a claim".[97] An ASI solves such a potential problem by curing the blatant violation of an arbitration agreement.

Moreover, risk of irreconcilable decisions can be significantly reduced.[98] When the same dispute is examined by both the arbitral tribunal that has jurisdiction and the court

[93] *West Tankers Inc v. Ras Riunione Adriatica di Sicurta SpA* (The "Front Comor"), [2007] 1 Lloyd's Rep. 391.
[94] *Ibid.*, at para 19.
[95] *Ibid*, at para. 21.
[96] *Erich Gasser GmbH v MISAT Srl*, (C-116/02): Opinion of Advocate General Leger, at para 68.
[97] *See*, Mulcahy *supra* note 29.
[98] *See*, Opinion of Leger *supra* note 96, at para. 72.

unnecessary waste of time and money occurs. An ASI is aimed to bring to an end parallel proceedings and for the parties to solve the dispute in the forum they initially agreed upon.

Another reason which is peculiar only to the United Kingdom is that the court's power to grant an ASI "may be regarded as one of the advantages which the chosen seat of arbitration has to offer".[99] That is why London is reluctant to lose such a right. Otherwise, other leading centers of arbitration, such as New York, Bermuda, and Singapore that have jurisdiction and are willing to issue injunctive order would be more preferable for the conduct of arbitration proceedings.[100]

English courts extensively use an ASI in support of arbitration because it is one of the most efficient ways to safeguard parties' agreement to arbitrate, remedy from another party's dilatory practices, means to avoid contradictory decisions, and England's attraction as of the seat of arbitration.

2.1.2 Enforceability

Any injunction is worthless and is likely to be ignored if it can not be effectively enforced. An ASI and an AAI are used in an international context, as a consequence, enforcement is not that easy if it were domestic orders.

Continental legal doctrine as well as court practice traditionally mistrusted injunctions, considering them to be "an intolerable interference with foreign justice (and with sovereignty)".[101] Civil law courts' response to the anti-suit enjoinder is best stated in the position taken by the German court.[102] Düsseldorf Regional Court held that:

> Such injunctions constitute a violation of the judicial sovereignty of the Federal Republic of Germany, because German courts themselves decide exclusively, on the basis of the laws of procedure applicable to them and of

[99] *See, West Tankers supra* note 93, at para. 22.
[100] *Ibid*, at para, 23.
[101] Sandrine Clavel, *Anti-Suit injunctions et arbitrage*, 2001 Rev. Arb. 669, 701-06.
[102] *See*, Schneider *supra* note 30, p. 43.

> binding international treaties, whether they have jurisdiction to decide a case or whether they have to respect the jurisdiction of another German or foreign court (including arbitral tribunals). Foreign courts cannot give instructions, whether and to what extent a German court can or may act in a given case.[103]

Nevertheless, common law courts order an ASI. As with any court order, if a party to whom the order is addressed does not follow it, then a court can find that party in contempt of the court and its orders. In addition, if the party who is in contempt of the order has assets or does business in the country that issued the ASI, then the chances are high that the party will act as it was ordered or will file a motion for the purge of contempt. At the end of the day, a country that is capable of enforcing its ASI can properly expect party's compliance with the given order.

2.2 Anti-Anti-Suit Injunctions

Anti-Anti-Suit injunctions seem to be a logical way for courts faced with an anti-suit injunction to respond to an enjoining order of a foreign court. Famous *Pertamina* case serves as an excellent example for study of the anti-suit and the anti-anti-suit injunctions.[104]

The dispute was based on two contracts: one relating to the construction of the power plant in Indonesia and the other concerning the supply of electricity produced by that plant.[105] Dispute was resolved under the UNCITRAL arbitration rules in Geneva, Switzerland. Award was issued in favor of KBC. KBC sought to enforce the award in the United States. District Court for the Southern District of Texas granted request and confirmed the award. After unsuccessful attempts before the Swiss and U.S. courts, Pertamina filed suit in Indonesia seeking an annulment of the award and requesting an anti-suit injunction to prevent KBC

[103] OLG Düsseldorf, Order of 10 January 1996 – 3 VA 11/95, quoted by Berti after ZZP 109 (1996) 222.
[104] *See, KBC v Pertamina supra* note 92.
[105] The present summary relies primarily on Gaillard, *The Misuse of Anti-Suit Injunctions,* 8/1/2002 N.Y.L.J. 3, (col. 1); *see,* Schneider *supra* note 30.

from enforcing the award in any foreign jurisdiction. In response, KBC asked U.S. District Court to grant an anti-suit injunction against Pertamina to stop proceedings in Indonesia. Texas court granted requested remedy. A few days later Indonesian court issued an order enjoining KBC from enforcing the award worldwide and imposing sanctions in the amount of USD500,000 for each day the order is contravened.

In less than a year the Court of Appeals reversed the District Court's preliminary injunction and the contempt order. By reversing decision of the District Court, Court of Appeals "has endorsed the necessity of judicial self-restraint as regards the issuance of anti-suit injunctions in the context of international arbitration".[106] Two U.S. Courts took different positions regarding the same issue. District Court issued an anti-anti-suit injunction, while the Court of Appeals adopted the position of judicial restraint.

The Court of Appeals' reasoning focused on the necessary balance of domestic judicial interests regarding the prevention of vexatious or oppressive litigation and the protection of the court's jurisdiction against concerns of international comity. Having found that the facts in the case do not support 'the prevention of vexatious or oppressive litigation' doctrine, the court focused on international comity. Injunction issued by the District Court was unnecessary, because the award could be enforced in the United States even despite its annulment in Indonesia. Enforcement was possible due to the fact that Indonesia was not a country "in which, or under the law of which, that award was made"[107]. In addition the Court of Appeals considered the injunction to be ineffective.[108]

"The doctrine of comity contains a rule of 'local restraint' which guides courts reasonably to restrict the extraterritorial application of sovereign power…The immediate

[106] Emmanuel Gaillard, *'KBC v. Pertamina': Landmark Decision on Anti-Suit Injunctions*, 10/2/2003 N.Y.L.J. 3, (col. 1); *See,KBC v Pertamina supra* note 92 at 366.
[107] NYC Art V(1)(e).
[108] *See, KBC v Pertamina supra* note 92, *at* 373: "It is true that Pertamina is likely in the wrong here, and that Indonesia's injunction and annulment may violate comity and the spirit of the Convention much more than would the district court's injunction. In reality, however, a U.S. court's injunction is powerless to prevent or terminate such foreign actions".

issue in this case is whether an injunction, which effectively attempts to arrest the judicial proceedings of another foreign sovereign – here, Indonesia – sufficiently upsets our interests in preserving comity among nations".[109]

The court also decided that "the Convention [1958 New York Convention] already appears to allow for some degree of forum shopping, and, as with many treaties, the efficacy of the Convention depends in large part on the good faith of its sovereign signatories. Upholding the district court's injunction could only further exacerbate the problem, diplomatically if not legally as well."[110]

Scholars support the position taken by the Court of Appeals that judicial restraint should be maintained from intervening in arbitration matters abroad even when courts are faced with an ASI by foreign courts and "dubious" conduct by litigants abroad.[111] This position best balances conflicting interests (need to protect the court's jurisdiction versus comity) and closes the door to any possible battle of anti-suit injunctions. Otherwise, arbitration will be lost in the myriads of litigation over the injunctions which opposing courts would throw on each other. In such a case the winner will be the best enforcer, however, if both courts can not enforce their enjoinders, then the battle is fought in vain.

Professor Gaillard wrote two articles regarding the Pertamina case. First article was a response to the District Court Decision and Gaillard took the following viewpoint: "National courts should ensure the lowest level of court interference in the arbitration by limiting the possibility for the parties to resort to such devices as anti-suit injunctions, which may or may not be legitimate in the context of ordinary judicial matters, but which, when transposed automatically into the realm of international arbitration, are clearly inappropriate".[112] Second article followed the Court's of Appeals decision. This time Professor Gaillard named his

[109] *Ibid.*, at 371.
[110] *Ibid.*, at 373-374.
[111] *See*, Schneider *supra* note 30, p. 64; position taken by the U.S. Court of Appeals for the Fifth Circuit in the *KBS v Pertamina.*.
[112] Emmanuel Gaillard, *The Misuse of Anti-Suit Injunctions*, 8/1/2002 N.Y.L.J. 3, (col. 1).

article *'KBC v. Pertamina': Landmark Decision on Anti-Suit Injunctions* and in it he praised the reasoning of the U.S. court for "endorsing the salutary and valuable principle of judicial self-restraint".[113]

Pertamina case showed that anti-anti-suit injunctions at the enforcement stage are unnecessary, ineffective and are contrary to the principle of international comity. Therefore, state courts should avoid issuing anti-anti-suit injunctions.

2.3 Anti-Arbitration Injunction

The most onerous, "nightmare" scenario is the AAI.[114] An AAI is issued to prevent an arbitral tribunal from continuation of arbitral proceedings. The injunction contravenes such fundamental principles of arbitration as *Kompetenz-Kompetenz* and parties' autonomy to solve disputes by means of arbitration.

The ICC General Council has estimated that in the last three years, while there have been approximately 1,500 cases referred to ICC, there have probably been about fifteen ICC cases where an anti-arbitration injunction has been involved in the process.[115] Although this figure amounts just to 1 percent of all the ICC cases, still the problem exists and arbitrators face it.

In practice, where a party refers a matter to a court in order to obtain an anti-suit injunction, such as to prevent an arbitral proceeding from being continued, that party is convinced of the illegitimate nature of the arbitral proceedings and wishes to avoid them

[113] Emmanuel Gaillard, *'KBC v. Pertamina': Landmark Decision on Anti-Suit Injunctions*, 10/2/2003 N.Y.L.J. 3, (col. 1).
[114] *See*, Lew, *Achieving the Dream supra* note 80.
[115] Julian Lew, *Anti-Suit Injunctions issued by national courts to prevent arbitration proceedings, in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION (Emmanuel Gaillard ed. 2005), p. 33.

altogether, especially when a state entity is party to an arbitration agreement.[116] Bangladesh,[117] India,[118] Pakistan,[119] Indonesia[120] resorted to such a mechanism to avoid arbitration. However, this is not a practice to follow.

Judge Schwebel indicates multiple illegalities that an AAI causes.[121] Granting of an AAI results in violation of conventional (1958 New York Convention) and customary international law rules (denial of justice, arbitrary or tortuous confiscation of an alien's contractual right to arbitration). The Tribunal in recent ICC case also held that to comply with the order of the court (the AAI) would amount to a denial of justice to the parties to arbitration agreement.[122]

Nevertheless, it would "be naive to think that, in practice, an arbitral tribunal is in all circumstances in a position to resist pressure from a State determined to derail an arbitration".[123] Where the State's refusal, as party to or host of an arbitration, to submit to arbitral procedure is a policy, rather than the fruit of a misunderstanding of the nature of international arbitration, the arbitrators will always face problems.[124] Still, there are no legal grounds to justify state court's interference with the arbitral process. Excuses that a State must protect its interests at all costs are not valid.

[116] *Oil & Natural Gas Commission Ltd. v. Western Co. of North America*, [1987] A.I.R. SC 674, XIII Y.B. Com. Arb. 473 (1988).
[117] ICC Case No. 7934/CK, 4 ASA Bull. 821-829 (2000).
[118] *See, Oil & Naturak Gas supra* note 116.
[119] *See, HUBCO, WAPDA supra* note 3.
[120] Final award of 4 May 1999 (*Himpurna California Energy Ltd. (Bermuda) v. PT. (Persero) Perusahaan Listruik Negara (Indonesia*)), Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XXV (2000).
[121] *See*, Schwebel *supra* note 1, at p. 8.
[122] ICC case No. 10623, 21(1) ASA Bull. 59, 82 (2003)(excerpts).
[123] Note – High Court, Dhaka, 5 April 2000, ASA Bulletin, Vol. 18 - N° 4 (2000), pp. 828 – 829.
[124] Jacques Werner, *When Arbitration Becomes War - Some Reflections on the Frailty of the Arbitration Process in Cases Involving Authoritarian States*, in 17 Journal of International Arbitration 97 (2000).

In addition, if state courts are willing to rely on an AAI and to order arbitral tribunal to stop arbitration, then "parties will have to consider very carefully whether they want to use arbitration at all".[125]

2.3.1 *Kompetenz-Kompetenz* principle

An AAI should not be issued at the pre-arbitration stage, when a tribunal has not decided yet, whether it has jurisdiction or not because such an order would contradict the fundamental principle of arbitration *Kompetenz-Kompetenz*.

An arbitral tribunal is competent to rule on its own jurisdiction.[126] The *Kompetenz-Kompetenz* principle is recognized by the main international conventions on arbitration, by most modern arbitration statutes, and by the majority of institutional arbitration rules.[127] As a result, national court can not preempt arbitral tribunal by deciding whether it has jurisdiction or not.

However, diverging opinions as to the scope of *Kompetenz-Kompetenz* principle exist. When existence and validity of arbitration agreement is challenged it is not entirely clear whether a court or an arbitral tribunal should exercise their jurisdiction. The United States and Mexican Supreme Courts chose the former.[128] Both decisions by Supreme Courts are recent and were made in the year 2006. In such a case, the real question as to the priority and interplay of the two forums arises. State courts seem to be justified to issue an AAI, because the matter is for the court to decide and there is a genuine issue whether an arbitration

[125] Neil Kaplan, *Arbitration in Asia – Developments and Crises* – Part 2, Journal of International Arbitration, Vol. 19 No. 3 (2002), p. 250.
[126] 1985 Model Law on Arbitration Art 16(1); ICC Interim Award in Case No. 4367 of 1984; ICC Final Award in Case No. 3572 of 1982; FOUCHARD, GAILLARD & GOLDMAN, ON INTERNATIONAL COMMERCIAL ARBITRATION, pp. 399-400; REDFERN & HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, pp. 264-267; VARADY, BARCELO & VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION – A TRANSNATIONAL PERSPECTIVE, at p. 87.
[127] *See*, FOUCHARD, GAILLARD & GOLDMAN, ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard, J. Savage eds., Kluwer Law International 1999), at 653-656.
[128] Mexico: Contradiction 51/2005, SCJN, 1st ch., January 11, 2006; USA: *Buckeye Check Cashing, Inc. v. Cardegna et al.*, 546 US 440 (2006).

agreement was concluded at all. Faced with such an issue an experienced arbitrator would continue the proceedings if the challenge before the court were without merit (used only to delay proceedings) and would suspend them if the challenge had some merit.[129] When the existence and validity of arbitration agreement are challenged, then the court may be justified to issue an AAI. However, in such a case a tribunal would usually stay its proceedings and await the decision of the court.

English courts recently revisited the doctrine of separability and *Kompetenz-Kompetenz* principle and affirmed that arbitrator's *Kompetenz-Kompetenz* is almost absolute "there is very little that can now be argued as falling outside of the jurisdiction of the arbitrators".[130] The decision of the UK Court of Appeal states that "it is contemplated by the [1996 Act] that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute"[131], i.e. before the courts. It seems unlikely that English courts will grant a genuine anti-arbitration injunction on the basis of an alleged lack of jurisdiction of the arbitral tribunal before the tribunal has been given the chance to determine that issue.[132] In this respect position taken by English judiciary contrasts with the decisions taken by Mexican and the U.S. courts.

The Tribunal in ICC case #10623 held that "it would be a clear breach of the fundamental principle of *Kompetenz-Kompetenz* if an international Arbitral Tribunal were obliged to stay its proceedings in deference to a court proceeding".[133] Notwithstanding the AAI issued by the Ethiopian court in that case the tribunal continued proceedings and rendered an award.

[129] Francisco Gonzalez de Cossio, *The Competence-Competence Principle, Revisited*, Journal of International Arbitration 24(3) 2007, p. 247.
[130] Nicholas Pengelley, *Separability Revisited: Arbitration Clause and Bribery: Fiona Trust & Holding v. Privalov*, Journal of International Arbitration, 24 - No. 5 (2007), pp. 445 – 454.
[131] *Fiona Trust & Holding Corp v. Yuri Privalov*, [2007] EWCA Civ 20.
[132] Patrick Angenieux, *Anti-Arbitration Injunctions Restraining Arbitrations Subject to the Arbitration Act 1996* [2007] Int. A.L.R., Issue 4.
[133] *See*, ICC case No. 10623 *supra* note 122.

As practice shows, Arbitral Tribunals for the most part disregard an AAI issued by the courts and continue with arbitral proceedings.[134] Injunctions are often not directed to the tribunals but to the parties or the arbitrators themselves.[135] Even when they are directed at the tribunals, tribunals do not regard themselves as authorities of the seat of arbitration, and their main "duty is *vis-à-vis* the parties to ensure that their arbitration agreement is not frustrated".[136] Thus, continuation of arbitral proceeding represents "the fulfillment of the Tribunal's larger duty to the parties".[137]

2.3.2 Impact on the enforceability of an award

Regardless of the position taken by different countries with respect to *Kompetenz-Kompetenz* principle, Article 8 of the Model Law allows arbitration to continue, despite pending substantive claim before the court.[138] Hence, arbitrators can not be deprived of the competence to solve the dispute when parties agreed on arbitration. Court control, of course, can not be fully excluded. Preliminary ruling of arbitrators on their jurisdiction can be challenged before the court.[139] Court supervision also is inevitable at the stage of recognition and enforcement of the award. An AAI may pose obstacles at that stage, which may be surmountable or sometimes insurmountable. In such a situation two scenarios should be distinguished. First scenario is that an AAI was issued by the court of the country in which, or under the law of which, the award will be made. Second scenario – an AAI was issued by any court but the one mentioned in the first scenario.

In accordance with the first scenario, if a state court has decided that arbitration needs to be stopped it is likely that the same reasons would serve as a basis for setting aside of the

[134] ICSID Case No. ARB/01/13; ICC case #8307 Interim Award, May 14, 2001; Final award of 4 May 1999 (*Himpurna California Energy Ltd. (Bermuda) v. PT. (Persero) Perusahaan Listruik Negara (Indonesia*)).
[135] Jose Rozas, *Anti-Suit Injunctions issued by national courts – Measures addressed to the parties or to the arbitrators*, *in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION (E. Gaillard ed. 2005), p. 83
[136] *See*, ICC case No. 10623 *supra* note 122.
[137] *Ibid.*
[138] Model Law, Art. 8(2).
[139] *Ibid*, Art. 16(3).

award. The mere existence of an anti-arbitration injunction will most likely be sufficient proof of the irregularity of the arbitral proceedings in the eyes of the local courts asked to recognize or enforce the award, and they will refuse enforcement on the ground of Article V, paragraph (1)(a), of the New York Convention.[140] Indeed the prevailing view is that the award that is set aside in its country of origin loses the benefit of the New York Convention, as a consequence it would not be recognized and enforced.[141]

However, diverging views and state practice exist as well. Professor Gaillard analyzed the wording of Article V of the New York Convention and concluded that "the fact the New York Convention expressly provides that enforcement may, rather than must, be refused in such a case, shows that under the New York Convention, the enforcement authorities in each country determine whether or not an award meets the enforcement conditions of the laws and standards applicable in that country".[142] There is sufficient case law to support that position.[143] In *Chromalloy* case the decision by the U.S. court to enforce an arbitral award annulled in Egypt (its country of origin) was grounded on the discretionary wording of the New York Convention Article V and on the United States pro-arbitration public policy.[144] In France there is no legal ground in the national law for setting aside the award in the country where it was made.[145] Therefore, at least in the United States and France an award is likely to be enforced despite it being set aside in the country where arbitration took place, or under the law of which an award was made.

Under the second scenario, an AAI issued by the court of the country other than that where, or under the law of which, an award was made will have no implications on the

[140] *See*, Rozas *supra* note 135, p. 85.
[141] *See*, Fouchard, Gaillard & Goldman *supra* note 127, at. p. 978 section 1687.
[142] *See*, Gaillard *supra* note 113.
[143] USA: *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 FSupp 907 (DDC 1996); *Karaha Bodas Cmpany, L.L.C. v. Perusahan Pertambangan Minyak Dan Gas Bumi Negara et al. (KBC v Pertamina).* France: *Norsolor v. Pabalk Ticaret Sirketi*, Cass. 1e civ., Oct. 9, 1984; Cass. 1e civ., Mar. 10, 1993, *Polish Ocean Line v. Jolasry*, 1993 Rev. Arb. 255.
[144] *See*, Gaillard *supra* note 113.
[145] *See*, Fouchard, Gaillard & Goldman *supra* note 127, at. pp. 134-135, section 270.

enforcement of an award. In the *Pertamina* case, although an award was set side in Indonesia, it was still recognized not only in the United States, but in Hong Kong as well.

A generally accepted principle of international arbitration compels the Tribunal to make every effort to ensure that any award it renders is enforceable at law.[146] In this context complying with the law and the judicial decisions of the seat of arbitration is clearly an important objective, in light of the fact that the courts have the power to set aside an award rendered in their country.

2.4 NYC and UML Attitude towards ASI and AAI

2.4.1 NYC

The New York Convention fundamental rule is that if there is no arbitration agreement, or the arbitration agreement is null and void or incapable of being performed, only then can the courts interfere with the arbitration proceedings.[147] Principle of limited court interference is also implicitly reflected in the Convention.

2.4.1.A ASI

Position of English judiciary in relation to the compatibility of the ASI with the New York Convention is the following. Article II, paragraph 3 of the New York Convention does not mention the court's intervention through the means of an application for an anti-suit injunction, it does not prohibit such a possibility either.[148] Thus, English courts opined that NYC is silent in regard to the ASI, therefore, it is not possible to violate the Convention which does not cover the ASI.

[146] ICC Rules, Art 35; *See*, ICC case No. 10623 *supra* note 122, para. 140.
[147] *See*, Lew *supra* note 115, p. 32.
[148] *See*, *The Angelic Grace supra* note 43.

2.4.1.B AAI

Majority of authors concede that issuance of an AAI is at odds with the wording and spirit of the NYC,[149] specially its Articles II(3), III and V.[150] By issuing an AAI, the state court would fail to "refer parties to arbitration" and would breach the *Kompetenz-Kompetenz* principle.[151] Article 16 section 3 of the Model Law provides for a possibility of court review of the arbitral tribunal's decision on its jurisdiction. In such a case scenario, the arbitral tribunal would first decide if it has jurisdiction and whether arbitration agreement exists between the parties in line with *Kompetenz-Kompetenz* and separability principles. Moreover, court review is also maintained in the procedure for setting aside. Issuance of an AAI attempting to prevent the arbitration from taking place amounts to an attempt to anticipatorily prevent any possibility that the courts of other NYC signatories decide whether to "recognize arbitral awards as binding and enforce them",[152] and on grounds that do not, or may not, fall within the scope of Article V NYC.[153]

2.4.2 UNCITRAL Model Law

An ASI and an AAI are forms of judicial intervention. The Model Law prohibits the issuance of such injunctions whenever Article 5 is applicable.[154] Article 9 of the Model Law does not authorize either. Interim measures of protection and ASI have different scope of

[149] *See,* Schwebel *supra* note 1, pp. 9-11; *See,* Lew *supra* note 115, pp. 31-32; Philippe Fouchard, *Anti-Suit Injunction in International Arbitration – What Remedies?, in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION, pp. 154-155.
[150] *See,* Schwebel *supra* note 1.
[151] Article II(3) NYC; Philippe Fouchard, *Anti-Suit Injunction in International Arbitration – What Remedies?, See,* Schwebel *supra* note 1.
[152] Article III NYC.
[153] *See,* Schwebel *supra* note 1; Marco Stacher, *You Don't Want to Go There – Anti-Suit Injunctions in International Commercial Arbitration*, 23 ASA Bull 4/2005.
[154] Frederic Bachand, *The UNCITRAL Model Law's Take on Anti-Suit Injunctions, in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION (E. Gaillard ed. 2005), p. 91.

application. Interim measures are aimed at ensuring the effectiveness of the adjudicative process, while an ASI is aimed at enforcing the right not to be sued.[155]

I would like to conclude this chapter by commenting on a paradox that is observed from the recent amendments to the Model Law. While it is not clear whether state courts should resort to an ASI, 2006 amendments to the Model Law expressly empower arbitral tribunals to issue an ASI to protect their own process.

Recent amendments to the UNCITRAL Model Law on Arbitration, especially amendment of Article 17 on the power of tribunal to order interim measures, show the intention of the UNCITRAL Working Group to introduce an anti-suit injunction measure within a tribunal's arsenal of interim measures. The Model Law amended in 2006 provides tribunal with the power to "take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm, or to prejudice the arbitral process itself".[156] This new Article can and should be read as directly encompassing anti-suit injunctions. The draft of the Article reflects the decision of the Working Group that, for the sake of clarity, the power to issue an ASI should expressly be conferred upon arbitral tribunals and that, for that purpose, the words "or to prejudice the arbitral process itself" should be added.[157]

The UNCITRAL Working Group stated that anti-suit injunctions under amended Article 17 are becoming more common and serve an important purpose in international trade.[158] The Working Group also came to the conclusion that an ASI was designed to protect the arbitral process and that it was legitimate for arbitral tribunals to seek to protect their own process.[159] Moreover, some State courts had identified the power to order anti-suit injunctions

[155] *Ibid*, p. 102; *See*, Clavel *supra* note 101.
[156] 2006 Model Law on Arbitration, Art 17 2(b).
[157] U.N. Doc. A/CN.9/WG.II/WP.138: Note by the UNICTRAL Secretariat on Interim Measures of Protection, at para. 10.
[158] U.N. Doc. A/CN.9/589: Report of the UNCITRAL Working Group on Arbitration and Conciliation on the work of its forty-third session, at para 23.
[159] *Ibid*, at para 24.

and to prevent other obstructions of the arbitral process as an inherent power of the arbitral tribunal.[160]

Thus, while the Model Law prohibits issuance of an ASI by state courts, it empowers arbitral tribunals do the same. Arbitral tribunals are better aware when parties are using dilatory practices and what is more efficient for the arbitral process at that moment. In conclusion, purpose that ASI are designed to achieve is a noble one – safeguarding parties agreement to arbitrate and enforcing it against the party which deliberately goes to litigation instead of arbitration. However, that power should be given to arbitral tribunals not the courts in order to avoid lengthy litigation and considerations of comity.

[160] *Ibid*, at para 24.

Conclusion

The demand for fast, flexible, and confidential dispute resolution system is increasing. Arbitration is such a dispute resolution system. For further development of arbitration it needs to be free from parochial national laws and independent from state courts. Courts should intervene only when they are allowed to, for the parties and arbitrators to be certain that arbitration will be conducted the way parties agreed without any external interference.

Such interference may come in form of an AAI. Two Pakistani cases mentioned in the introduction showed that Supreme Court of the country did not hesitate to order an AAI which are clearly in contradiction with the legal standards. Although at the very beginning of the research I disagreed with Judge Schwebel's firm position that anti-arbitration injunctions lack any legal basis. According to him, such practice violates conventional and customary international law, international public policy and the accepted principles of international arbitration.[161] At the end of my research I uphold learned Judge's opinion.

Moreover, an AAI raises the question of the true meaning and scope of the fundamental principles of *Kompetenz-Kompetenz* and of the autonomy of the arbitral process.[162] Professor Rozas agrees that "the issue is not one of judicial sovereignty, but rather that of the respect of the *Kompetenz-Kompetenz* principle".[163] National court can not preempt arbitral tribunal by deciding whether it has jurisdiction or not.

In international arbitration, indifference is a virtue.[164] ASI by definition infringes upon the jurisdiction of another court in an extraterritorial manner or that of an arbitral tribunal.

[161] *See*, Schwebel *supra* note 1 at p. 5.
[162] Emmanuel Gaillard, *Introduction* to IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION (Emmanuel Gaillard ed., 2005).
[163] *See*, Rozas *supra* note 135, at p. 80.
[164] Philippe Fouchard, *Anti-Suit Injunction in International Arbitration – What Remedies?, in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION (E. Gaillard ed. 2005), pp. 154-155.

Balancing of comity, trust, national interests comes into play. Therefore, in order to avoid any complications judicial restraint must be exercised.

When arbitrators come to the conclusion that they do have jurisdiction to rule on a given dispute, it is their duty to give effect to the arbitration agreement by deciding on the merits of the dispute.[165] Courts should not be seduced by opportunities to intervene. The purpose of the paper was to prove that courts should refrain from issuing an ASI and should not grant a request for an AAI. When needed arbitral tribunals may issue an injunction to stop any prejudice of the arbitral process itself.

[165] *Ibid*, at p. 156.

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