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A Review of the Power of Arbitral Tribunals to Issue Anti-Suit Injunction in International Commercial Arbitration

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Abstract

Arbitration agreement generally implies that parties have renounced to submit to the court disputes envisaged by the arbitration clause. If a party to international commercial arbitration commences a court action during the pendency of an arbitration proceeding, it constitutes a breach of the binding arbitration clause. One important legal device used in curbing this in international arbitration is the issuance of anti-suit injunction. This paper is a review of the power of an arbitral tribunal in international commercial arbitration to issue anti-suit injunction restraining a party from instituting or continuing with a parallel court proceeding in the face of an arbitration agreement, and to curtail the derailment of the arbitral process by a party who had earlier agreed to arbitration and later seek to escape such obligation. This paper adopts a doctrinal research approach with emphasis on the review of case law, literatures, internet sources, conventions, rules, reports, legislations considered essential in giving effect to the subject matter. This paper notes that the power of an arbitral tribunal to issue anti-suit injunction in Nigeria is not recognized under the Arbitration and Conciliation Act. It therefore, among other things, recommends an adoption of Article 17 of the UNCITRAL Model Law 2006 Revision in the ongoing amendments to the Arbitration and Conciliation Act before the National Assembly.

Keywords: Anti-suit injunction, international commercial arbitration, UNCITRAL Model Law, Arbitration and Conciliation Act, Arbitral tribunal

1. Introduction

In international commercial arbitration, there is a remedial device available in common law jurisdictions to restrain a party from instituting or continuing with proceedings in a foreign court. It is often referred to as anti-suit injunction. The remedy is a discretionary one, exercisable when the aim of justice requires it.[1] The application of the remedy has been extended to arbitration in different jurisdictions. In international commercial arbitration, the remedy is not directed at the foreign court but at the defendant who has promised, through the arbitration clause, not to bring court proceedings.[2]It is therefore imperative that this remedy which protects the obligation to arbitrate in the most direct way should be put in the spotlight. By the same logic, exploring the benefits as well as the potential pitfalls of anti-suit injunctions is a functional approach to adopt before deciding exactly how and when to apply them.

2. Nature of Anti-Suit Injunction

Anti-suit injunction in the context of international commercial arbitration is an injunction ordered by a court or arbitral tribunal to restrain a party from commencing or continuing a parallel proceeding in the face of a subsisting arbitration agreement. Anti-suit injunctions can be analysed

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[1] Taryn Fry, 'Injunction Junction, What's Your Function? Resolving the Split over Antisuit Injunction Deference in Favour or International Comity' [2009](58) *Cath. U. L. Rev.* 1071.

[2] John Verbeck, 'International Arbitration Practice in Europe: Anti-Suit Injunctions' [2010] (1) *Y.B. Int'l Arb.* 185.

under two main categories based on the issuing forums: (i) Anti-suit injunctions by courts, (ii) Anti-suit injunctions by arbitrators (arbitral anti-suit injunctions). The term anti-suit injunction as used in this paper does not refer to all types of injunctions but only refers to those against the defendant to restrain his institution of foreign court proceedings. The reason for the anti-suit injunction in international commercial arbitration is usually that the same issues between the same parties are currently being arbitrated within the jurisdiction of the court issuing the order. When any court restrains a party from bringing a suit in a foreign jurisdiction, questions of international comity comes to play. International comity involves respect for and deference toward another country's laws and court decisions.[3] As a preliminary requirement, the person against whom the injunction is sought must be amenable to the jurisdiction of the court. This means that *in personam* jurisdiction must exist either under the common law on the basis of presence or submission, or under the statutory rules allowing for service ex juris (outside of the jurisdiction). Generally, the jurisdictional rules will be satisfied by the mere fact of an arbitration agreement requiring arbitration in the forum, because either the agreement itself constitutes a submission to the court of the forum or a sufficiently close connection to the forum is made by the agreement.[4]

3. The Issuance of Anti-Suit Injunction by the Court

The courts in common law jurisdictions are favourably disposed to granting anti-suit injunction. The requirement set for the issuance of anti-suit injunction varies from one jurisdiction to the other. In the United States, the position of courts regarding anti-suit injunctions enforcing arbitration agreement is set out in the case of *BHP Petroleum (Americas) Inc. v. Reinhold*.[5] In this case, BHP Petroleum requested that the U.S. District Court for the Southern District of Texas compel Baer to arbitration in Texas and enjoin him from continuing with court proceedings in Ecuador. The court in granting the application for injunction stated:

> An injunction barring a foreign action was proper if the simultaneous prosecution of an action would result in inequitable hardship and tend to frustrate and delay the speedy and efficient determination of the cause. The focus of the inquiry is whether there exists a need to prevent vexatious or oppressive litigation. In light of the strong federal policy favouring arbitration, the court finds that Plaintiffs would be irreparably harmed if Baer were permitted to continue litigating in Ecuador while the same claims were being arbitrated. Therefore, the court grants Plaintiffs' application for injunction.[6]

In England, the Court of Appeal confirmed that the jurisdiction to grant an injunction is discretionary and held that English courts should feel no diffidence in granting injunctions provided they are sought promptly and before the foreign proceedings are too far advanced.[7] In

[3]Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2012) 95.
[4] Geoffrey Fisher, 'Anti-Suit Injunctions to Restrain Foreign Proceedings in Breach of an Arbitration Agreement' [2010](22) *Bond L. Rev.* 4.
[5][1997] Civ. No. H-97-879 (S.D. Tex.)
[6] Ibid.
[7] [1995] 1 Lloyd's Rep. 87, 88 (Eng.).

Aggeliki Charis Compania Maritima S.A. v. Pagnan S.P.A.,[8] the Court of Appeal upheld an injunction preventing a party to an arbitration in England from proceeding with a claim before the court in Italy. Similarly, in *Starlight Shipping Co. v. Tai Ping Insurance Co.*,[9] the English court granted a ship owner an anti-suit injunction to restrain Chinese proceedings commenced in breach of an arbitration clause found in a bill of lading. The defendants claimed that they were not bound to the arbitration agreement as a matter of Chinese law. The court dismiss this claim as being irrelevant to the English courts because the company is part of the dispute arising from a contract with an arbitration clause. The approach of the U.S. courts seems stricter than the English courts. An important criterion for the granting of the injunction in the United States is 'irreparable harm'. This requirement was defined by the U.S. District Court for the Southern District of New York in *Empresa Generadora de Electricidad ITABO v. Corporacio Dominicana de Empresas Electricas Estatales (CDEEE)*.[10] In this case, ITABO, a private company incorporated in the Dominican Republic, requested the court to compel CDEEE, a company owned by the Dominican Republic, to ICC arbitration in New York in conformity with the arbitration agreement contained in ITABO's by-laws. It also requested an anti-suit injunction to enjoin CDEEE from continuing with litigation in the Dominican courts. The court denied both requests. Concerning the anti-suit injunction, the court held that ITABO had not met the heavy burden of establishing irreparable harm. It defined this notion in the following terms:

> Injunctive relief is an extraordinary and drastic remedy which should not be routinely granted. Where necessary to prevent irreparable harm, a federal court may enjoin a party before it from pursuing litigation in a foreign forum. Irreparable harm is injury that is likely and imminent, not remote or speculative, and is not capable of being fully remedied by money damages. The movant is required to establish not a mere possibility of irreparable harm, but that it is likely to suffer irreparable harm if equitable relief is denied.[11]

Nonetheless, when a party pushes the limit too far, a court may grant an injunction against undermining an arbitration. In *Karaha Bodas Co. v Negara*,[12] a U.S federal district court enjoined the losing party, Pertamina, from taking action seeking to prevent the enforcement of an award. The arbitration which had begun in 1998, had taken place in Switzerland. By 2006, the matter seemed to be finally resolved despite numerous efforts by Pertamina to vacate the award or block its enforcement, including more than one petition for certiorari in the U.S Supreme Court. One of the steps Pertamina had taken along the way, after a Swiss court had refused to vacate the award, was to seek the annulment of the award by an Indonesian court. Karaha Bodas Co. (KBC) asked a U.S court to enjoin this action. The U.S court had denied the injunction request, and had essentially ignored the resulting annulment in Indonesia. At the point when KBC was at the verge of finally collecting U.S $260 million, Pertamina brought an action in Cayman Islands. The company alleged fraud and sought both damages and an injunction restricting KBC from disposing of any sum received as a consequence of the fraud, including any

[8] Ibid.
[9] [2007] EWHC (Comm) 1893 (Eng.).
[10] [2005*]* No. 05 Civ. 5004, U.S. Dist. LEXIS 14712.
[11] Ibid.
[12][2006] 465 F. Supp. 2d 283, 296.

benefit from the arbitral award. Pertamina claimed that its action in the Cayman Islands was not an action to set aside the arbitral award but rather a totally new fraud claim. Notwithstanding this claim, the U.S court found that the objective of the suit was to nullify judgments in Texas and New York allowing KBC to recover the award. It stated that the main objective of Pertamina is to have the Cayman Islands court reach out to the United States and frustrate the consummation of the long and difficult litigation in the United States. The court not only enjoined the Pertamina from seeking an order restricting KBC's disposition of the funds received pursuant to the arbitral award, but took a rather unusual step of also issuing declaratory judgment. It ruled that KBC had full rights to the funds, and that if Pertamina should obtain an order from the Cayman Islands court or any other court, purporting to interfere with KBC's rights to dispose of the funds, KBC would have no obligation to comply with such order.

It is possible to infer from the above cases that even though the U.S courts may not always be disposed to the grant of anti-suit injunction and sometimes refuse such grant even when a party believes there are good reasons to enjoin, the more grievous the behaviour of the other party, the more likely that the court will issue anti-suit injunction. Nonetheless, because a court's action may simply be ignored by a foreign court, the success of the anti-suit injunction depends on the amount of coercive power a court can bring to bear over the party subject to its jurisdiction. In Hong Kong, the court in the case of *Giorgio Armani SpA v Elan Clothes Co Ltd*,[13] reaffirmed its power to grant anti-suit relief where overseas proceedings have been brought in contravention of an arbitration clause.

One vital issue arising from the deployment of anti-suit remedy is whether it is appropriate for a court to award injunctions where it has not been seised and is not the seat of arbitration. The Bermuda Court of Appeal considered this issue in *IPOC International Growth Fund Ltd. v. OAO CT-Mobile*.[14] The parties were involved in arbitration proceedings in Europe. IPOC commenced court proceedings in New York and in Russia. The main question before the Bermuda Court of Appeal was whether it was entitled to grant an injunction to restrain a breach of an arbitration agreement on the basis that it has *in personam* jurisdiction over IPOC (as a Bermuda company), or whether, as IPOC argued, the Bermuda court must in addition have some sufficient interest before it can grant an anti-suit injunction. The Bermuda Court of Appeal rejected the argument that only the court at the seat of the arbitration can issue an anti-suit injunction and held *in personam* jurisdiction to be sufficient.[15] This pro arbitration decision is a welcome decision. The caution however is that courts assuming jurisdiction on similar or other grounds may be unjustifiably interfering with the arbitration process.[16] It is preferable that only the court at the seat of arbitration intervene in the arbitral process where the need arises, and even then, only rarely.

[13] [2019] HKCFI 530
[14][2007] Nos. 22 & 23 (Berm. Ct. App.).
[15] Ibid.
[16]Julian Lew, 'Does National Court Involvement Undermine the International Arbitration Processes?' [2009](24) *Am. U. L. Rev.* 489.

There are two cases involving a Nigerian court and a Nigerian party which are considered in this paper. First is *Owners of MV Lupex v Nigerian Overseas Chartering & Shipping Ltd,*[17]where the Nigerian Supreme Court set aside a decision of the lower court refusing stay of proceedings of a suit brought in breach of a foreign arbitration case. In this case the arbitral proceedings had commenced in London. According to the Supreme Court, taking into consideration the agreement to arbitrate, it was crystal clear that the trial court could only have acted judicially and judiciously if it had exercised its discretion by ordering a stay of the proceedings of the suit filed in Nigeria. The suit was stayed in favour of London arbitration. In *Travelport Global Distribution Systems BV v Bellview Airlines Ltd,*[18] anti-suit injunction was granted by a New York court against a Nigerian party, Bellview Airlines Ltd, compelling the Nigerian party to honour an arbitration agreement it had entered into.

The national courts might arguably use the anti-suit injunction whenever they consider it necessary to protect the parties' agreement to arbitrate. In this regard, anti-suit injunction in the international commercial arbitration context are inherently different from injunctions awarded in other contexts. This difference has mostly to do with the nature of international arbitration itself. Other types of injunctions are issued to correct or alter otherwise wrongful or unconscionable conduct. In anti-suit injunction, the court's concern is to restrain a party from attempting to circumvent its promise to arbitrate. In this regard, the court should not be too concerned with issues of oppressive or vexatious conduct, or be overly sensitive to questions of comity. The injunction bites only because the parties have agreed to have their dispute resolved via a mechanism that transcends any individual jurisdiction.

4. The Issuance of Anti-Suit Injunction by Arbitral Tribunal

The question has often arisen as to whether arbitrators in international commercial arbitration may issue an injunction to prohibit a party from escaping the arbitration agreement, when they are confronted with a party's attempt to submit a dispute that is covered by an arbitration agreement to a domestic court or another arbitral tribunal.[19]

The conventional principles of international arbitration law categorically provide the basis for the arbitrators' jurisdiction to issue anti-suit injunctions. These are the jurisdiction to sanction violations of the arbitration agreement and the power to take any measure necessary to avoid the aggravation of the dispute or to protect the effectiveness of the final award.[20]The power of the arbitral tribunal to issue an anti-suit injunction in the form of an interim measure has recently been backed through an amendment made to the UNCITRAL Model Law by the United Nations Commission on International Trade Law on 7 July 2006.[21]According to Article 17(1) of the UNCITRAL Model Law 2006 revisions, the arbitral tribunal may at the request of a party, grant interim measures unless parties agreed otherwise. Article 17(2)(b) of the Model Law 2006

[17] [2003] 15 NWLR (Pt 844) 469 (SC).
[18] [2012] WL SDNY 392.
[19] SI Strong, 'Anti-Arbitration Injunctions in Cases Involving Investor-State Arbitration: British Caribbean Bank Ltd. v. the Government of Belize' [2014](15) *J. World Investment & Trade* 324.
[20] Emmanuel Gaillard, 'Anti-suit Injunctions Issued by Arbitrators' International Arbitration 2006: Back to Basics?' International Council for Commercial Arbitration Congress Series No 13 (Albert Jan van den Berg ed) (Kluwer, 2007) 237.
[21] UNCITRAL Model Law on International Commercial Arbitration 2006.

empowers the tribunal to order a party to 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. The notion that, in issuing anti-suit injunction, arbitrators would make use of powers exclusively vested in national courts, echoes past debates over the power of the arbitrators to award punitive damages.[22] Such power is deeply rooted in well recognized principles of international commercial arbitration law, namely that the arbitrator has jurisdiction to sanction all breaches of the arbitration agreement and to take any appropriate measures either to avoid the aggravation of the dispute or to ensure the effectiveness of their future award.[23]There are however certain considerations to be taken into account by arbitral tribunals in international commercial arbitration when issuing anti-suit injunctions. They are considered below.

a. At what stage of the proceedings can an Arbitral Tribunal Issue an Anti-suit Injunction?

Since anti-suit injunction issued by the arbitral tribunal is a measure meant to protect the integrity of the process, it is more likely that it can be issued at any stage of the arbitral proceedings. If this assumption is right, then the question is whether or not the arbitrators may issue anti-suit injunctions before they have ruled on their jurisdiction. Before an arbitral tribunal has ruled on its own jurisdiction, it should be in a position to direct the parties not to act in any way that would jeopardize its prima facie jurisdiction until such time as it has formed its own judgment on its jurisdiction and established in a final manner whether it has been established on the basis of an existing and valid arbitration agreement and whether the scope of that agreement includes the dispute that has been brought before it.[24] After such a determination has been made, the issuance of anti-suit injunctions is even less problematic. Indeed, once it has been established that there is an arbitration agreement, that it is valid and that the dispute is within the scope of such agreement, there can be no doubt that a party's procedural conduct consisting in bringing the same dispute before domestic courts is in breach of the arbitration agreement and the tribunal's jurisdiction, and can be sanctioned as such.[25]

b. By what means should an Anti-suit Injunction be Issued?

The question here is whether anti-suit injunction should be issued in the form of an award or of a procedural order? The form of an order enjoining the parties to comply with the arbitration agreement depend on various factors, among which is the stage of the arbitral proceeding at which disruptive tactics may be employed. For example, whether or not the tribunal has ruled on its jurisdiction or the type of measure decided which may be a recommendation or binding order; specific performance or award of damages; measure of a temporary or permanent effect. Against this background, it may reasonably be argued that measures of a procedural nature may be addressed through procedural orders.[26] Similarly, before a tribunal has ruled on its jurisdiction and established that it has been constituted on the basis of an existing and valid arbitration agreement, any measure designed to safeguard its prima facie jurisdiction would be taken in the

[22] Scott Donahey, 'Punitive Damages in International Commercial Arbitration' [1993 (10) *J. Int'l Arb*. 67.
[23]Emmanuel Gaillard (n20) 237.
[24] Emmanuel Gaillard, 'Reflections on the Use of Anti-Suit Injunctions in International Arbitration" in *Pervasive Problems in International Arbitration* (Loukas A. Mistelis and Julian D.M. Lew eds.) (Kluwer, 2006) 201.
[25] Ibid.
[26] Michael Buhler and Thomas Webster, *Handbook of ICC Arbitration, Commentary, Precedents, Materials* (Sweet & Maxwell 2005) 69.

form of a procedural order. The form of an award, which by definition has a permanent nature and finally binds the parties with the corresponding protection offered by international conventions such as the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, would be more appropriate for measures designed to definitively sanction a party's disruptive conduct, such as an award of damages. The form of the decision is therefore a question to be decided on a case-by-case basis, depending on the circumstances of each case and the type of party conduct being sanctioned by the arbitral tribunal's anti-suit injunction. It has been suggested that in a case of a permanent injunction, it should be made through a final award.[27]The principle of confidentiality, which covers most arbitral awards and procedural orders in international commercial arbitration, makes it difficult to determine how often arbitrators have actually issued anti-suit injunction in purely commercial matters. A review of reported cases, however, shows that the issuance of such measures by arbitral tribunals is neither recent nor uncommon in international commercial arbitration. The conclusion that arbitrators, as a matter of principle, have jurisdiction to issue anti-suit injunction is consistent with, and confirmed by, international arbitration practice. Anti-suit injunction has been issued in a number of international commercial arbitration proceedings few of which are reviewed below.

In ICC Case No. 8307,[28] the sole arbitrator, Pierre Terrier, sitting in Geneva, issued an Interim Award on a request by party A and party C that party B be enjoined from pursuing the domestic judicial proceedings it had brought against the other two parties on the same object of the dispute outlined in the terms of reference. The arbitrator found that party B's actions in the domestic courts violated the binding arbitration clause between the parties, which granted exclusive jurisdiction to the arbitrator. The arbitrator while concluding that he had power to issue an anti-suit injunction stated that:

> The agreement to arbitrate implies that the parties have renounced to submit to judicial courts the disputes envisaged by the arbitral clause. If a party despite this commence a judicial action when an arbitration is pending, it not only violates the rule according to which a dispute between the same parties over the same subject can be decided by one judge only, but also the binding arbitration clause. It is not contested that an arbitrator has the power to order the parties to comply with their contractual commitments. The agreement to arbitrate being one of them, its violation must be dealt with in the same manner when it is patent that the action initiated in a state court is outside the jurisdiction of such court and is therefore abusive. This is also a guarantee of the efficiency and credibility of international arbitration.[29]

The arbitrator therefore ordered party B to desist from pursuing its actions in the state courts. He added that, should the measures to enforce the anti-suit order be unsuccessful, the parties could seek in arbitration relief for any damages suffered as a consequence of the breach of the arbitration agreement.

[27] Ibid.
[28]ICC Case No. 8307 Interim Award dated 14 May 2001.
[29] Ibid.

An arbitral tribunal composed of Horatio Grigera Naon (Chairman), John Rooney and Emilio Pittier, constituted pursuant to the International Centre for Dispute Resolution Arbitration Rules and having its seat in Miami in US, was asked to settle a dispute arising from a contract for the operation and management of a hotel. The respondent, a corporation organized under the laws of Venezuela, contested the tribunal's jurisdiction, alleging, *inter alia*, the exclusive jurisdiction of the Venezuelan courts over disputes arising from the contract. During the arbitration, the respondent filed various claims with these courts. In response, the claimants, three companies incorporated under the laws of Venezuela, Netherlands and Canada, requested the arbitral tribunal issue an injunction to prohibit the respondent from pursuing the domestic lawsuits.[30] In an unpublished Partial Award of 10 October 2002, the tribunal held that it had jurisdiction and stated that:

> By initiating certain legal actions in Venezuela, respondent has disregarded the arbitration clauses set out in the contracts and failed to honour its obligations thereunder. By upholding and asserting its jurisdiction under such arbitration clauses and finding that all claims under the contracts, including those submitted in claimant's arbitration request and those introduced by respondent through its amended complaint before the Caracas Tenth Court of First Instance, Civil and Commercial Division, the Arbitral Tribunal has signified that respondent's introduction of such complaint and provisional relief obtained *inaudita parte* in the same case and on the same date in support of such complaint constitutes a breach of respondent's obligations to arbitrate under the arbitration clause. The inevitable consequence of these findings by the arbitral tribunal is that respondent must withdraw and desist from continuing legal action on the merits and supportive injunctive relief obtained from the Caracas Tenth Court of First Instance, Civil and Commercial Division, and refrain from initiating or reinstating similar actions, or applying for injunctive relief in support of such actions, from that and any other courts in Venezuela in connection with any, or all, of the contracts.[31]

Finally, the tribunal ordered the respondent:

a. to desist and withdraw from the lawsuit initiated by Claimant against Respondent before the Caracas Tenth Court of First Instance, Civil and Commercial Division and injunctive relief applied for and obtained in such legal suit;
b. to refrain from (i) re-introducing such claims in a new lawsuit, or reinstating such or similar lawsuit, before the Venezuelan courts; (ii) applying for injunctive relief before the courts of Venezuela in connection with, or in support of, any such lawsuits or claims, or (iii) submitting claims to the Venezuelan courts arising out or relating to the Contracts.[32]

In an arbitration that took place in Singapore under the UNCITRAL Rules between two Bangladesh companies, the claimant requested the arbitral tribunal, composed of Michael Lee (Chairman), Michael Pryles and Andrew Rogers, to issue an emergency measure to restrain the

[30] Emmanuel Gaillard 'Reflections on the Use of Anti-Suit Injunctions in International Arbitration' (n24) 258.
[31] Partial Award, 10 October 2002.
[32] Ibid.

respondent from continuing an action it had brought before a national court aiming to obstruct the claimant's participation in the arbitration, and from commencing similar actions concerning issues within the tribunal's jurisdiction. At that time, the arbitral tribunal had not yet decided on its jurisdiction. After granting a temporary emergency restraining order on 31 January 2006, the tribunal heard the parties' arguments on the injunction. In an unreported interim Order of 8 February 2006, it ruled that under UNCITRAL Rules and Art. 12(l)(i) of the Singapore Arbitration Act, it had the power to issue the injunction. Finding that the requirements for the issuance of the order which include prima facie jurisdiction, urgency, irreparable harm had been met and that the measure was appropriate under the circumstances of the case, the tribunal ordered that the respondent be restrained by itself, its servants and agents until further order of the tribunal from arguing otherwise than before the tribunal issues as to the tribunal's jurisdiction and competence to determine all matters arising from the request for arbitration.[33]

In *Maritime International Nominees Establishment (MINE) v. Guinea*,[34] the parties entered into a contract under which a mixed company (Sotramar) was to be established in order to export Guinean bauxite from Guinea to Europe and North America. The contract contained an ICSID arbitration clause. The contract was never performed and a dispute arose between the parties as to which of them was responsible. Claiming that Guinea was refusing to participate in ICSID proceedings, MINE obtained an order from a US court compelling arbitration before the AAA. In the AAA arbitration, in which Guinea did not participate, an award was rendered in favour of MINE. Guinea then appeared in the US proceedings in which MINE moved to confirm the AAA award and sought the dismissal of the motion on the ground that the arbitral tribunal had lacked jurisdiction. MINE eventually filed a request for arbitration with ICSID, seeking both a finding that Guinea was liable and an award for damages. In the meantime, on the basis of the AAA award, MINE had obtained attachments on Guinean assets from Swiss and Belgian courts. Guinea asked the ICSID tribunal to order that the company dissolve all the attachments. The tribunal at first refused to grant the request as premature, because Guinea had not yet presented any defence in the State court proceedings, but the ICSID tribunal later issued an unreported order finding that, by initiating legal action to enforce the AAA award, MINE had breached both the requirement of exclusivity of ICSID arbitration (pursuant to Art. 26 of the Convention), and the ICSID arbitration agreement. Furthermore, the tribunal stated that these actions had harmed the respondent, and it therefore recommended that MINE immediately withdraw and permanently discontinue all pending litigation in national courts and that it commence no new action and dissolve every existing attachment and that it seek no new remedy in any national court. The tribunal also made it clear that, should MINE not comply with the recommendation, it would take this failure into account in its award.[35]

In deciding the dispute before them and assessing the question of whether or not they may order anti-suit injunction, the arbitrators often refer to the principle according to which the parties must refrain from any conduct that may aggravate their dispute. Submission of the matters covered by an arbitration agreement to the domestic courts, or even the risk of such submission, constitutes a

[33] Emmanuel Gaillard 'Reflections on the Use of Anti-Suit Injunctions in International Arbitration' (n24) 259.
[34] [1997] ICSID Case No. ARB/84/4, 59.
[35] Ibid.

factor that may aggravate the dispute between the parties, and that may justify the issuance of an order addressed to the parties prohibiting such conduct. Depending on the facts of each case, it is within the arbitrators' power, as recognized in international commercial arbitration law, to decide whether a decision in the form of an anti-suit injunction directed to one or more parties is the appropriate measure designed to prohibit conduct which may aggravate the dispute.[36] A further principle may justify the recourse by the arbitrators to anti-suit injunction in the context of the protection of the arbitral process. It is an entrenched principle of international commercial arbitration that arbitrators must render an award capable of being recognized and enforced. By submitting to a domestic court a matter that is covered by an arbitration agreement, and creating the risk of multiple, and possibly divergent decisions on such matter including on the question of the existence and the validity of the arbitration agreement, a party may not only breach the arbitration agreement but also undermine the effectiveness of the award to be rendered by the arbitrators. In that context, it is not questionable that the power to issue anti-suit injunction is only one aspect of the arbitrators' power to take all necessary measures to protect the international effectiveness of their future award.[37]

The agreement by which two or more parties undertake to submit to international arbitration the disputes which may arise in relation to their contract unquestionably grants arbitrators the power to decide all questions related to the merits of the dispute brought before them. However, the jurisdiction thus conferred to the arbitral tribunal by the arbitration agreement is not confined to the resolution of the merits of the dispute. The two main effects of the arbitration agreement are to oblige the parties to submit all disputes covered by the arbitration agreement to arbitration, and to confer jurisdiction on the arbitral tribunal to hear all disputes covered by the arbitration agreement. It is thus a fundamental principle of international commercial arbitration law that arbitrators have the power to rule on their own jurisdiction, a principle that is the effect of the principle of the autonomy of the arbitration agreement. Under this latter principle, any claim that the contract containing the arbitration agreement is void or voidable has no impact on the arbitration agreement and the arbitrators' jurisdiction.

Thus, the principle of autonomy allows arbitrators to examine any challenges to their jurisdiction based on the alleged ineffectiveness of the disputed contract. The fundamental principles of international arbitration law allow any disputes related to the arbitration agreement to be decided by the arbitrators themselves, something that has been widely recognized in case law and in domestic arbitration statutes or international arbitration rules. They provide solid grounds to the arbitrators to decide such matters notwithstanding the parties' attempts to frustrate the arbitral process by escaping their contractual undertaking to arbitrate their dispute. Against this background, the arbitrators' jurisdiction to decide disputes relating to the arbitration agreement contains, by definition, the jurisdiction to decide breaches of the obligation to arbitrate. It also contains the arbitrators' power to sanction any breaches that are ascertained on that basis.[38]

[36]Yves Derain and Eric Schwartz, *A Guide to the ICC Rules of Arbitration 2nd edition* (2nd edn, Kluwer Law International 2005).

[37]Guy Wilkes, 'Enforcing Anti-Suit Injunctions against Sovereign States' [2004] (53) *Int'l & Comp. L.Q.* 512.

[38]Emmanuel Gaillard and John Savage, (eds.) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International) 199.

Arbitral jurisdiction would, otherwise, be simply negated. By comparison, a significant body of case law has developed in national systems according to which submitting disputes that are covered by an arbitration agreement to the domestic courts, or refusing to perform the undertaking to arbitrate, amounts to breaches of the arbitration agreement. Domestic courts have further ruled that damages can be awarded on that ground, considering, for the quantification of the damages, the costs incurred by the party brought before a national court in the face of an arbitration agreement.[39]Arbitral case law as reviewed above shows that arbitral tribunals have repeatedly recognized their power to award damages for the breach by a party of its undertaking to arbitrate its dispute, considering the costs incurred by the other party in domestic proceedings notwithstanding the arbitration agreement.[40] Such compensation is nothing more than the restitution, by equivalent, of the breach of the arbitration agreement. In other words, arbitrators have the power to sanction a contractual breach either by an award of damages or by ordering specific performance, the recalcitrant party being ordered to cease such breach and take all necessary measures to restore the situation. In that context, anti-suit injunctions ordered by the arbitrators 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.[41]

5. The Issuance of Anti-Suit Injunction by Arbitral Tribunals Under the ACA

Section 13 of the Arbitration and Conciliation Act and Article 26 of the Arbitration Rules contained in the first schedule to the Act grant the tribunal at the request of any of the party, the power to take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods. The measures contained in the ACA cannot be said to extend to the grant of anti-suit injunction in aid of international commercial arbitration by a tribunal with a seat in Nigeria. The Arbitration Act itself which derives from the UNCITRAL Model Law is only just going through its first review since coming into law. The UNCITRAL Model Law was revised in 2006 by the United Nations Commission on International Trade to grant the powers to issue anti-suit injunction to arbitral tribunal. Some countries that had earlier adopted the 1985 version of the Model Law are increasingly updating their arbitration laws to include the provision of section 17 (2)(b) of the Revised Model Law which empower the arbitral tribunal to 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. It is therefore in the interest of the development of international commercial arbitration in Nigeria that positive steps are taken to effect an amendment to Section 13 of the ACA to expand the scope of interim measures the arbitral tribunal can grant to include the power to issue anti-suit injunction as contained under Article 17(2)(b) of the Revised Model Law or in the alternative adopt the full section of Article 17 of the Revised Model law under the provisions of the Act relating to international commercial arbitration in the current amendment

[39] Ford Mange, 'Anti-Suit Injunctions in International Arbitration: Protecting the Procedure or Pushing the Settlement' [201]) (4) *Disp. Resol. J.* 191.
[40] Geoffrey Fisher (n 4) 24.
[41] Jamie Maples and Tim Goldfarb, 'Anti-Suit Injunctions: Expanding Protection for Arbitration under English Law' [2013](7) *Disp. Resol. Int'l* 169.

of the ACA pending before the National Assembly. This will save parties the time and resources expended when they approach the courts for the grant of such measure. This pro arbitration provisions will also serve as tool for strengthening and protecting international commercial arbitration in Nigeria.

6. Enforcement of Anti-Suit Injunctions Issued by Arbitral Tribunals

The goal of an anti-suit order would be lost if a party against whom it is directed does not comply and the beneficiary of the order is unable to enforce it. Although, there is still the possibility of the party voluntarily complying with the injunction in order to avoid negative consequences before the tribunal, but a party can as well choose to disobey. As seen above, arbitral tribunals have enjoined parties to desist from bringing action before a foreign court on a matter which is already a subject of arbitral proceeding or an existing arbitration agreement. Where a party refuses to comply with the orders of the arbitral tribunal in the form of anti-suit injunction to refrain from foreign proceedings, the question of enforcement of the anti-suit order comes into play.

The question arises whether an anti-suit injunction as a provisional measure is enforceable. While some scholars have argued that the provisions of the New York Convention apply to final awards, others have argued that provisional measures should be enforceable as arbitral awards.[42] Since finality relates to the disposal of the subject matter of an award, this paper supports the view that anti-suit injunctions are enforceable as arbitral awards, as they are final in the sense that they dispose of a request for relief pending the conclusion of the arbitration. Orders that grant interim reliefs are different from interlocutory arbitral decisions that merely decide certain subsidiary legal issues or establish procedural timetables.[43] While anti-suit injunctions can be granted in the form of a procedural order and as an interim award, having the above mentioned in mind, it is more desirable for arbitral tribunals to issue such injunction in a form of an award even if it is a partial award, for it would minimize the concerns of its enforceability.

7. Conclusion

Arbitral tribunals in international commercial arbitration are increasingly engaging the use of anti-suit injunction to restrain a party from instituting or continuing with a parallel proceeding in the face of an arbitration agreement and to curtail the derailment of the arbitral process by a party who had earlier agreed to arbitration and later seek to escape such obligation. The power of the courts to issue anti-suit injunction against erring party is less contentious. It is the issuance of such injunction by the arbitral tribunal that seem contentious among writers. However, the practical application of this power by arbitral tribunals in decisions reviewed in this paper leaves no one in doubt as to the willingness of the tribunals to take all positive steps to preserve the course of international arbitration. That the ACA does not accommodate such power at this time however leaves much to be desired. The principles of international arbitration and its application imposes an obligation on arbitral tribunals to 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

[42] Gary Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn. Kluwer Law International 2001).
[43] MilicaArsic, 'Anti-Suit Injunctions in International Arbitration' [2016] *J Legal & Soc Stud Se Eur* 17.

itself. This power includes the issuance of anti-suit injunction to enjoin a party from sabotaging or truncating the course of international commercial arbitration through the commencement of a parallel proceeding. It therefore becomes imperative that arbitration laws in Nigeria and across jurisdictions reflects these current realities.