

‘The Rise of the Anti-Arbitration Injunction’

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Introduction

- 1 By and large, and perhaps overwhelmingly, arbitration has had a very “good run” with the common law courts, including Australian courts. By that I mean that, in numerous areas, common law courts have promoted the importance of arbitration and supported key aspects of the framework of the New York Convention and UNCITRAL Model Law in a way that has made the *arbitration* of commercial disputes the preferred mode of dispute resolution throughout the global community.¹
- 2 Tangible ways in which contemporary judicial support for arbitration can be seen may be readily enumerated and include:
 - First, the embrace of the *kompetenz-kompetenz* principle, that is to say the ability and entitlement of the arbitral tribunal to consider and rule on its own jurisdiction. This is of course explicitly recognised in the Model Law but it is reinforced by the willingness of courts of many countries to refer matters to arbitration even where the existence or enforceability of the agreement is in issue, leaving “jurisdictional disputes” for determination in the first instance to the arbitral tribunal.² This was a

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¹ The Hon Justice AS Bell, ‘An Australian International Commercial Court — Not a Bad Idea or What a Bad Idea?’ (2019) 94 *Australian Law Journal* 24 at 27.

² *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at [141]; *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57; *Star (Universal) Co Ltd v Private Company “Triple V” Inc* [1995] 2 HKLR 62 at 65; *PCCW Global Ltd v Interactive Communication Service Ltd* [2006] HKCA 434; [2007] 1 HKLRD 309 at 320–321 [60]; *Gulf Canada Resources Ltd v Arochem International Ltd* (1992) 66 BCLR (2d) 113; *Dalimpex v Janicki* (2003) 228 DLR (4th) 179; *Harrison v UBS Holding*

principal aspect and focus of the decision of the Full Court of the Federal Court of Australia in *Hancock Prospecting Pty Ltd v Rinehart*,³

- the second obvious illustration of judicial support for arbitration may be seen in the adoption of a very generous approach to construction as to the scope of arbitration clauses associated, in Australia, with *Francis Travel Marketing v Virgin Atlantic Airways*⁴ and *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd*⁵ and in England with *Fiona Trust & Holding Corporation v Privalov*,⁶
- thirdly, the very broad and controversial interpretation given to the concept of “through and under” by a majority of the High Court of Australia in *Rinehart v Hancock Prospecting Pty Ltd*; *Rinehart v Rinehart*,⁷ an interpretation that in my opinion will be likely to generate many more disputes as to who is bound by an arbitration agreement or, more accurately, an award consequent upon such an agreement;
- fourthly, the expansion of the concept of arbitrability or the subject areas that are capable of settlement by arbitration;⁸
- fifthly, judicial restraint in the scrutiny of the quality of the reasoning process in arbitral awards;⁹

Canada Ltd (2014) 418 NBR (2d) 328; *Dell Computer Corp. v Union des consommateurs* [2007] SCC 34; 2 SCR 801.

³ (2017) 257 FCR 442 at [115]–[336].

⁴ (1996) 39 NSWLR 160.

⁵ (2006) 157 FCR 45; cf. *Inghams Enterprises Pty Limited v Hannigan* [2020] NSWCA 82.

⁶ [2008] 1 Lloyd’s Rep 254, HL(E).

⁷ [2019] HCA 13; (2019) 366 ALR 635 (**Hancock Prospecting**).

⁸ *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 279 ALR 772; *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* (2011) 80 NSWLR 398; *Rinehart v Welker* (2012) 95 NSWLR 221; *Francis Travel Marketing* (1996) 39 NSWLR 160 (a *Trade Practices Act 1974* (Cth) claim for misleading or deceptive conduct); *Passlow v Butmac Pty Ltd* [2012] NSWSC 225 (a statutory claim for contribution under the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW)); *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 (an *inter partes* claim under the *Corporations Act 2001* (Cth)); *Re Infinite Plus Pty Ltd* (2017) 95 NSWLR 282 (a shareholder oppression claim).

⁹ *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; [2013] HCA 5 (**TCL Air Conditioner**); *Sauber Motorsport AG v Giedo Van Der Garde BV* (2015) 317 ALR 786.

- sixthly, the adoption of a relatively circumscribed view as to arbitral misconduct,¹⁰ adequacy of notice,¹¹ and bias;¹²
- seventhly, the narrow view as to when considerations of public policy will preclude enforcement of an award;¹³ and
- lastly, but certainly not least, the willingness, by anti-suit injunction, to restrain parties from pursuing court proceedings commenced abroad in circumstances where the moving party in such proceedings is party to an arbitration agreement. Although principally on the basis of breach of contract, examples can also be given of so-called quasi-contractual anti-suit injunctions being granted to restrain non-parties to arbitration proceedings from bringing foreign proceedings “as if” they were party to an arbitration agreement.¹⁴

3 In the quarter century since the English Court of Appeal delivered its famous decision in *The Angelic Grace*,¹⁵ anti-suit injunctions have been one very important and robust way in which common law courts have supported the arbitration process. Indeed, even where there may be an issue as to the existence or currency of an arbitration agreement, or a question as to the parties thereto, there need only be a “high degree of probability” that there is an arbitration agreement for an anti-suit injunction to issue and restrain foreign proceedings brought in the face of it.¹⁶ This robustness has only been reinforced by the United Kingdom Supreme Court’s decision last Friday in

¹⁰ *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214; *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535.

¹¹ *International Relief and Development Inc v Ladu* [2014] FCA 887.

¹² *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287.

¹³ *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361.

¹⁴ *Times Trading Corporation v National Bank of Fujairah (Dubai Branch) (The Archangelos Gabriel)* [2020] EWHC 1078 (Comm) at [44]–[45] (**Times Trading Corporation**); *The Yusuf Cepnioglu* [2016] 1 Lloyd’s Rep 641 (CA) at [32]–[35], [49]–[50] and [55]; *Dell Emerging Markets (EMEA) Ltd v IB Maroc SA* [2017] EWHC 2397 (Comm) at [34]; *The Jay Bola* [1997] 2 Lloyd’s Rep 279.

¹⁵ [1995] 1 Lloyd’s Rep 87.

¹⁶ *Ecobank Transnational Inc v Tanoh* [2016] 1 WLR 2231 at 2250; *Times Trading Corporation*. Of course, where court proceedings have been commenced domestically, the remedy is the more familiar stay of proceedings which has its basis in s 7 of the *International Arbitration Act 1974* (Cth) and cognate provisions in the Uniform Commercial Arbitration Acts of the various states.

Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb (Enka Insaat).¹⁷

- 4 Anti-suit injunctions in this context are based upon the promise implicit in the fact of the arbitration agreement not to bring proceedings in court in a manner inconsistent with the agreement to arbitrate. An arbitration agreement will typically¹⁸ be construed as involving a promise *exclusively* to resolve disputes by arbitration. This is the “(often silent) concomitant” or “negative aspect” of an arbitration agreement referred to by Lord Mance in *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP*¹⁹ (**AES Ust-Kamenogorsk**).
- 5 *The Angelic Grace* was the case in which Leggatt LJ famously said that “[c]ontrary to Mr. Bumble's view, the law is not normally ‘an ass’ and comity does not require it to behave like one,” before continuing:

“For my part, I do not contemplate that an Italian Judge would regard it as an interference with comity if the English Courts, having ruled on the scope of the English arbitration clause, then seek to enforce it by restraining the charterers by injunction from trying their luck in duplicated proceedings in the Italian Court. I can think of nothing more patronising than for the English Court to adopt the attitude that if the Italian Court declines jurisdiction, that would meet with the approval of the English Court, whereas if the Italian Court assumed jurisdiction, the English Court would then consider whether at that stage to intervene by injunction. That would be not only invidious but the reverse of comity.”

Equally robust was Millett LJ who said, of the decision to restrain the moving party in the Italian proceedings, “[i]n my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. ... in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them.”

¹⁷ [2020] UKSC 38.

¹⁸ But not always: see, for example, *HIH Casualty and General Insurance Ltd (in liq) v Wallace* (2006) 63 NSWLR 603.

¹⁹ [2013] 1 WLR 1889; [2013] UKSC 35 at [1] and [22].

- 6 This robust approach of course famously hit a road block with the European Court of Justice's decision in *West Tankers Inc v Allianz SpA (The Front Comor)* (**West Tankers**)²⁰ insofar as court proceedings commenced in Europe in the face of a London arbitration clause were concerned. The European Court held that the grant of anti-suit injunctions were inconsistent with the scheme for the attention and exercise of jurisdiction under the European Regulation. Interestingly, anti-suit injunctions are proscribed within the scheme of jurisdiction established by the *Service and Execution of Process Act 1992* (Cth) in Australia. Post-Brexit, the *West Tankers* road block is, one might have thought, unlikely to remain in place but this will ultimately depend upon the extent to which the United Kingdom continues with a parallel but mirror set of jurisdictional arrangements vis-à-vis the European Union to those contained in the so-called "Recast Brussels Regulation".

Anti-suit and anti-arbitration injunctions

- 7 Now my lecture tonight is not on anti-suit injunctions but on *anti-arbitration* injunctions. Notwithstanding the similarity in their nomenclature, those two creatures could not be described as siblings; "distant cousins" may even be a stretch.
- 8 They have *some* features in common but, in many respects, serve entirely different purposes. When deployed in the context of an arbitration agreement, the anti-suit injunction reinforces the contractual promise to arbitrate whilst the anti-arbitration injunction, on the other hand, seeks to bring an actual or threatened arbitration to a temporary or permanent halt. As such, anti-arbitration injunctions very much go against the broad trend of judicial support for arbitration already referred to. One striking difference, however, is that, unlike anti-suit injunctions which have their antecedents in the common injunction of the English Court of Chancery, anti-arbitration injunctions have on occasion been issued by civilian courts.²¹

²⁰ [2009] ECR I-663; [2009] 1 Lloyd's Rep 413; [2009] 1 AC 1138.

²¹ In the second edition of his definitive work *International Commercial Arbitration* (Wolters Kluwer, 2014) (**Born**), Gary B Born points to examples from Brazil, Ethiopia and Indonesia, commenting that

- 9 I pause here to interpolate, by way of general observation, that there can be ebbs and flows over time in the law and the law's attitude to, enthusiasm and support for particular arrangements and practices or principles. Respect for freedom of contract and party autonomy supplies a good example. At one point of time — the age of Lord Justice Scrutton and famous decisions such as *L'Estrange v Graucob*²² — freedom of contract enjoyed primacy, and the holding of people to their bargains, including in respect of exclusion clauses, was a paramount value.²³ But a combination of judge-made and statute law has tempered that position as doctrines of unconscionability, the expansion of estoppel and the emergence of good faith all gain momentum in the face of a recognition that injustice may result from too rigid and inflexible a respect for freedom of contract.
- 10 “The rise of the anti-arbitration injunction” — my topic for tonight's lecture — may not represent a turning of the tide in judicial support for arbitration of the same kind or dimension as the retreat from freedom of contract but the remedy is a tool by which broad judicial support for arbitration may be moderated and arbitration, to a degree, controlled.
- 11 The enthusiastic embrace of arbitration by common law courts in the various ways already outlined is not necessarily immutable or all one way. The degree of support may vary if the model of arbitration shows itself to be flawed or corrupted or if concerns arise as to the integrity or efficacy of the arbitral process. One area of contemporary concern — the increasingly perceived scope for conflicts of interest by arbitrators — was the subject of the corresponding lecture delivered last year by Her Excellency, the Governor of New South Wales, Margaret Beazley AC QC.²⁴

such injunctions have often been issued in circumstances involving arbitrations against state-related entities or the states themselves: [8.04], 1311.

²² [1934] 2 KB 394.

²³ AS Bell, 'Excluding Exclusion Clauses: Judicial and Statutory Techniques, Freedom of Contract and Public Policy' in S Degeling, J Edelman and J Goudkamp (eds), *Contract in Commercial Law* (LawBook Co, 2016).

²⁴ See 'Apparent Bias and Conflicts of Interest in the Arbitral Process', (Autumn 2020) *Bar News* 57.

- 12 There is an obvious tension between broad contemporary judicial support for commercial arbitration, including and perhaps especially international commercial arbitration, on the one hand, and the very existence of a remedy that entails restraining a party from triggering or continuing an already commenced arbitral proceeding or, perhaps even more radically, restraining an arbitrator him or herself from continuing to conduct the arbitration.²⁵ This tension is reflected in the title of Professor Richard Garnett's recent article in *Arbitration International*: 'Anti-arbitration injunctions: walking the tightrope'²⁶ which, as with all of Professor Garnett's work, is a most valuable contribution to the secondary literature.
- 13 Later in this lecture I will consider the theoretical cases for and against the grant of anti-arbitration injunctions but, as my title suggests, whatever the merits of the arguments *against* the use of this remedy, it is clear that there has been a rise in the number of cases where anti-arbitration injunctions have been granted in recent years and in many different jurisdictions around the world – instances can be cited from the United Kingdom, the United States, Canada, Australia, Malaysia, India, Pakistan,²⁷ Bangladesh, Brazil, Ethiopia and Indonesia²⁸ and there is a growing body of secondary literature in this field.²⁹

²⁵ Such an injunction, *against the tribunal itself*, differs very significantly from an anti-suit injunction which operates *in personam* against the parties to foreign proceedings and not against the foreign court itself. The grant of anti-arbitration injunctions against arbitrators as opposed to parties, however surprising, is not a theoretical construct and, so long as the enjoining court has jurisdiction over the arbitrator and there is a valid basis for the grant of such relief, there is no reason in principle why such relief could not be granted, as the decision in *Weissfisch v Julius* [2006] 1 Lloyd's Rep 716; [2006] EWCA Civ 218 illustrates.

²⁶ (2020) 36(3) *Arbitration International* 347 (**Garnett**)

²⁷ *Hubco v Water and Power Development Authority of Pakistan (WAPDA)* (2000) 16 *Arbitration International* 439.

²⁸ See N Poon, 'The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore' (2013) 25 *Singapore Academy of Law Journal* 244 at 248–249 (**Poon**).

²⁹ See, for example, Garnett (n 26), Poon (n 28); SR Subramanian, 'Anti-Arbitration Injunctions and Their Compatibility with the New York Convention and Indian Law of Arbitration: Future Directions for Indian Law and Policy' (2018) 34 *Arbitration International* 185; G Kaufmann-Kohler, 'How to Handle Parallel Proceedings: A Practical Approach to Issues Such as Competence-Competence and Anti-Suit Injunctions' (2008) 2 *Dispute Resolutions International* 110; JDM Lew QC, 'Does National Court Involvement Undermine the International Arbitration Process?' [2009] *ICSID Review – Foreign Investment Law Journal* 260; AK Loya and V Desai, 'Anti-Arbitration Injunctions: Distinct Lens for International Commercial and Investment Treaty Arbitration' (2019) 22 *International Arbitration Law Review* 11; H Seriki, 'Anti-Arbitration Injunctions and the English Courts: Judicial Interference or Judicial Protection?' (2013) 16 *International Arbitration Law Review* 43.

14 The anti-arbitration injunction, though not necessarily known by that name, is not a wholly modern phenomenon. The well-known decision of the House of Lords in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd*,³⁰ is now almost 40 years old.³¹ In the same year as *Bremer Vulkan*, the United States District Court of Appeals for the First Circuit, in an opinion delivered by then Circuit Judge Breyer, in the first of his now 40 years on the Bench, said:

“To allow a federal court to enjoin an arbitration proceeding which is not called for by the contract interferes with neither the letter nor the spirit of this law. Rather, to enjoin a party from arbitrating where an agreement to arbitrate is absent is the concomitant of the power to compel arbitration where it is present.”³²

15 The United States *Federal Arbitration Act* (9 US Code Title 9) expressly contemplates in §. 16(2) an appeal from “an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title”.

Recent decisions

16 Recent examples of cases in which anti-arbitration injunctions have been granted include:

- the 2018 decision of O’Callaghan J in the Federal Court of Australia in *Kraft Foods Group Brands LLC v Bega Cheese Ltd*³³ (**Kraft**) in which his Honour granted an anti-arbitration injunction preventing Kraft from

³⁰ [1981] AC 909.

³¹ *Bremer Vulkan* sought an injunction restraining South India Shipping Corp from proceeding with an arbitration commenced pursuant to an arbitration agreement between the parties. In the alternative, Bremer sought a declaration that the arbitrator had power to issue a final award dismissing the claim on the basis of the defendant’s gross and inexcusable delay in prosecuting their arbitration causing Bremer prejudice. Lord Diplock (at 979) rejected the general proposition that the High Court had an inherent jurisdiction to supervise the conduct of arbitrators more extensive than those conferred on it by the Arbitration Acts. His Lordship (with whom Lord Edmund-Davies and Lord Russell agreed) held that the Court’s power to grant an injunction arose from the enforcement or protection of some legal or equitable right. Thus, where one party has committed a repudiatory breach of the arbitration agreement and where such repudiation has been accepted by the innocent party, his Lordship accepted (at 981–982) that “the High Court has jurisdiction, in protection of that party’s *legal right* to do so, to grant him an injunction to restrain the other party from proceeding further with the arbitration.” (emphasis added)

³² *Societe Generale de Surveillance, S.A. v. Raytheon European Management and Systems Co.* 643 F.2d 863 at 868 (1981).

³³ (2018) 358 ALR 1; [2018] FCA 549.

proceeding with a New York arbitration pending the determination of the proceedings on foot in the Federal Court. The subject matter of the arbitration and court proceedings had considerable overlap and together were said to pose a real risk of inconsistent findings. The Court issued the injunction relying on its implied power to protect its processes once set in motion in circumstances where, although the dispute the subject of the New York arbitration was within the scope of an arbitration clause, Kraft had brought a cross-claim in separate Federal Court proceedings. Significantly, the anti-arbitration injunction was issued notwithstanding a finding that Kraft had not waived its right to arbitrate;³⁴

- the 2019 decision of the British Columbia Court of Appeal in *Li v Rao*³⁵ in which the moving party in a CIETAC arbitration was temporarily restrained pending the determination of certain questions between the same parties in proceedings in the Supreme Court of British Columbia in circumstances where the Court found that the parties had agreed that one issue would be resolved in court proceedings prior to any arbitration and that contractual promise was breached by the party restrained from pressing on with the arbitration;
- the 2019 decision of the Federal Court of Malaysia, in *Jaya Sudhir Jayaram v Nautical Supreme Sdn Bhd (Jaya Sudhir)*³⁶ in which an anti-arbitration injunction was granted on the application of a non-party to the arbitration agreement restraining Malaysian arbitration

³⁴ The decision of Bromberg J in *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* [2018] FCA 549 in which an interlocutory injunction restraining the continuance of arbitral proceedings in the Fair Work Commission pending the resolution in the Federal Court of an issue relevant to the arbitration should also be noted. His Honour considered that the Federal Court was better placed to determine the controversy, particularly in circumstances where the issue raised was of general importance. The undesirability of inconsistent answers were the matter to be determined in both fora, along with the potential for delay in the Commission, tended in favour of granting the injunction. Bromberg J noted that the scheme of the *Fair Work Act 2009* (Cth) could be distinguished from “Model Law-style” schemes and that the *Fair Work Act*, unlike the Model Law, contained no provisions expressly limiting the intervention or supervision of the Court: at [42].

³⁵ [2019] BCCA 264.

³⁶ (2019) 7 CLJ 395.

proceedings³⁷ in favour of litigation in the Malaysian courts in order to prevent the non-party from being left without any meaningful remedy. This is a wide ranging and important decision of an ultimate appellate court which cited O’Callaghan J’s decision in *Kraft* as well as Allsop J’s 2004 decision in *Incitec Ltd v Alkimos Shipping Corporation*³⁸ as to the importance of all aspects of a dispute being resolved in one forum, a goal *inter partes* arbitration will often be unable to achieve. It also set out limited circumstances where a third party may successfully and somewhat counterintuitively sue to restrain the continuation of arbitration proceedings to which that party is not privy;

- the 2019 decision of the Court of Appeal of England and Wales in *Sabbagh v Khoury*³⁹ (**Sabbagh**) in which a Lebanese arbitration was restrained on the application of a party who had been joined in those proceedings but who had earlier obtained a ruling from the English courts that she was not bound by an arbitration agreement contained in a family company’s articles of association;
- a further 2019 decision of the Court of Appeal of England and Wales in *Minister of Finance (Incorporated) 1 Malaysia Development Berhad v International Petroleum Investment Company Aabar Investments PJS (Minister of Finance)*,⁴⁰ a case arising out of the alleged corruption involving the former Prime Minister of Malaysia, in which there was pending a review by the English courts under ss 67 and 68 of the *Arbitration Act 1996* (UK) of a consent arbitration award, and a subsequent arbitration had been initiated pursuant to an arbitration clause contained in the deed of settlement which gave rise to the consent award. There were issues as to the integrity of the consent award;

³⁷ By restraining the Malaysian arbitration proceedings, I mean restraining the moving party in those proceedings from continuing with the arbitration.

³⁸ (2004) 138 FCR 496.

³⁹ [2019] 2 Lloyd’s Rep 178 (CA); [2019] EWCA Civ 1219.

⁴⁰ [2020] 1 Lloyd’s Rep 93 (CA); [2019] EWCA Civ 2080.

- also in 2019, the American Law Institute issued its proposed Final Draft of the Restatement of the U.S. Law of International Commercial and Investor State Arbitration, with the acclaimed Professor George A. Bermann of Columbia Law School as Reporter. That final draft, the product as with all restatements of deep discussion and national survey, accepted the ability of United States courts to issue anti-arbitration injunctions in a variety of circumstances, and explicitly rejected the view that their issue is inconsistent with the global architecture of international commercial dispute resolution represented by the Model Law and the New York Convention;⁴¹ and
- in 2015, Judge Lewis Kaplan of the United States District Court for the Southern District of New York, in the context of the Lehman Brothers liquidation, restrained an aspect of a dispute going to arbitration. In the course of his judgment, he said:⁴²

“Arbitration of a particular grievance will not be ordered where ‘it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute’.”⁴³

⁴¹ The valuable summary of recent United States case law at 411 of the Final Draft is as follows:

“U.S. case law mostly supports the view that neither the New York Convention nor the FAA precludes the issuance of anti-arbitration injunctions. See. e.g, *In re Am. Exp. Fin. Advisors Secs. Litig.* 672 F.3d 113, 140 (2d Cir. 2011) (“Our decisions do suggest, however, that, at least where the court determines ... that the parties have not entered into a valid and binding arbitration agreement. the court has the authority to enjoin the arbitration proceedings”); *McLaughlin Gormley King Co. v. Teminix Int’l Co., L.P* 105 F.3d 1192, 1194 (8th Cir. 1997) (“If a court has concluded that a dispute is non-arbitrable, prior cases uniformly hold that the party urging arbitration may be enjoined from pursuing what would now be a futile arbitration, even if the threatened irreparable injury to the other party is only the cost of defending the arbitration and having the court set aside any unfavorable award”); *Tai Ping Ins. Co.* 731 F.2d at 1144 (“There is no provision in the Act for a stay of arbitration. Nonetheless, the case law clearly establishes that, in the appropriate circumstances such an order is within the power of the district court”); *CRT Cap. Group v. SLS Cap., S.A.*, 2014 WL 6807701 at *7 (S.D.N.Y. Dec. 3, 2014) (“Because the Court of Appeals has found that federal courts have the remedial power to stay domestic arbitrations, it follows that they have the remedial authority to stay international arbitrations arising under the New York Convention”); see also, e.g *Citigroup Glob. Markets Inc. v. Al Children’s Hosp., Inc.* 5 F. Supp. 3d 537. 542 (S.D.N.Y. 2014) (stating that “courts within the Second Circuit routinely enjoin parties subject to their jurisdiction from pursuing arbitrations occurring outside the court boundaries when they find that the parties have not agreed to arbitrate”); Farrell, 2011 WL 1085017, at *2; *SATCOM Int’l Group PLC v. Orbcomm Int’l Partners. L.P.*, 49 F. Supp. 2d 331,342 (S.D.N.Y.). *affd.* 205 F.3d 1324 (2d Cir. 1999).”

⁴² *In re Lehman Brothers Securities and ERISA Litigation* 706 F Supp 2d 552 at 558 (2015).

⁴³ Other recent United States decisions may be cited where anti-arbitration injunctions have been granted and where it has been held that the party applying for relief is not bound by the arbitration

17 Functional equivalents of the anti-arbitration injunction may also be noted. Thus, in a recent decision in the New South Wales Court of Appeal, *Inghams Enterprises Pty Limited v Hannigan*,⁴⁴ the majority declared that a particular dispute which had been foreshadowed in a notice of dispute fell outside the scope of the arbitration clause. No point was taken that this question should have been left to the yet to be appointed arbitrators to decide. Whilst an injunction was not in terms sought, one would no doubt have been granted had the unsuccessful party sought to pursue arbitration following the Court's declaration as to the scope of the arbitration clause and that the dispute fell outside of it.

18 A second functional equivalent is supplied by the decision of the Full Court of the Federal Court in *Hi-Fert Pty Ltd v Kuikiang Maritime Carriers Inc (No 5)*,⁴⁵ a rare Australian case reported in the Lloyd's Reports.⁴⁶ Although a stay of an aspect of proceedings which fell within the scope of an arbitration clause was ordered and that aspect referred to arbitration, the Court used its power to impose conditions under s 7(5) of the *International Arbitration Act 1974 (Cth)*, arguably controversially, to make the following order:

“The claims brought by the plaintiffs against WBC for breach of the charter contract and the related claims in negligence would be stayed on condition that the reference to arbitration in respect of those claims not proceed until after the final determination of the proceedings in the Federal Court.”

That condition was, to all intents and purposes, an interim anti-arbitration injunction really granted on what amounted to case management grounds.⁴⁷

19 It should not be thought that the trend in favour of the issue of anti-arbitration injunctions is all one way. The Supreme Court of India in its decision of 23 August 2019 in *National Aluminium Company Ltd v Subhash Infra Engineers*

clause said to underpin the arbitration: *Hospira Inc v Therabbel Pharma NV* 2013 WL 3811488; *URS Corp v Lebanese Co for Dev. & Reconstruction of Beirut Central District* SAL 512 F.Supp 2d 199 (2007).

⁴⁴ [2020] NSWCA 82.

⁴⁵ (1998) 90 FCR 1.

⁴⁶ [1999] 2 Lloyd's Rep 782.

⁴⁷ See Garnett (n 26) for an analysis of recent English anti-arbitration injunctions which he identifies as explicable on case management grounds.

*Pvt Ltd*⁴⁸ has held, following an earlier decision in *Kvaerner Cementation India Limited v Bajranglal Agarwal*,⁴⁹ reported in 2012 but delivered 11 years earlier, that an anti-arbitration injunction should not lie where one party disputed that a condition necessary to the existence of the arbitration agreement was unfulfilled, and that this question should be determined by the arbitrator.

- 20 *Kvaerner* had not been referred to in the 2016 decision of the Division Bench of the High Court of Delhi in *McDonald's India Pvt Ltd v Vikram Bakshi*⁵⁰ (**McDonald's**) which gained some international attention and accepted that jurisdiction to issue an anti-arbitration injunction existed, although it was not exercised in that case. In the High Court of Delhi in *Modi v Modi*,⁵¹ in a decision of March this year, Mr Justice Endlaw expressed the view that the Indian *Arbitration and Conciliation Act 1996* was a complete code in itself and that “the Courts cannot interfere with the code pertaining to arbitration laid down in the statute, by exercising jurisdiction to do so, for which equally efficacious relief can certainly be obtained before the Arbitral Tribunal.”
- 21 I pause here to note that in two very recent Australian decisions in the context of the state *Commercial Arbitration Acts*, implementing the Model Law domestically, s 5, which provides that “no court must intervene except where so provided by this Act”, has been interpreted as a code and therefore to exclude any general or residual powers given to the domestic court which are not specified in the Act: *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd*⁵² and *Transurban WGT Co Pty Ltd v CPB Contractors Pty Limited*.⁵³ In the latter case, Lyons J observed that as a consequence “this would appear to include a removal of the Court’s inherent or auxiliary equitable jurisdictions” including the power to issue anti-arbitration injunctions. Lyons J did, however, go on to hold at [144] that:

⁴⁸ [2019] INSC 875.

⁴⁹ (2012) 5 SCC 214.

⁵⁰ (2016) 232 DLT 394.

⁵¹ (unreported, CS (OS) 84 and 85/2020 (3 March 2020)).

⁵² [2020] WASCA 77 at [322] and [465].

⁵³ [2020] VSC 476 at [135]–[138].

“where there are two related arbitrations on foot, the Court would have the power under s 17J to restrain for a period one arbitral process while a related arbitral process was in progress. For example, I consider the Court would have power if the parties to the former arbitral process have themselves agreed that is to happen if the related arbitration is on foot and there is specific prejudice in the absence of relief from the Court. In this regard, I note that the paramount object of the Act is to facilitate the ‘fair’ as well as ‘final’ resolution of disputes by impartial arbitral tribunals without ‘unnecessary [...] expense’.”

22 It should be noted that many courts which have asserted the jurisdiction to issue anti-arbitration injunctions have simultaneously asserted that they should only be issued in exceptional circumstances although it may be noted that O’Callaghan J did not accept such a limitation in *Kraft*.⁵⁴ One feature of some of the recent decisions that I have referred to, including *Kraft*, is that the court issuing the anti-arbitration injunction was not a court of the seat of the arbitration. It is usually the court of the seat of the arbitration which plays the principal role in its supervision.⁵⁵ This is an issue to which I shall return but what is noteworthy is the significant amount of international judicial attention paid to the subject in the last 12–18 months.

Bases for the grant of anti-arbitration injunctions

23 The examples of recent anti-arbitration injunctions already given disclose a range of situations in which such relief has been granted.

24 In some cases, such as *Li v Rao*, the injunction has been based on an express contractual promise *not to arbitrate*⁵⁶ or not to arbitrate until a particular issue (such as whether an arbitration agreement had been formed) had first been determined by the court.⁵⁷ There is nothing heterodox about the issue of an injunction in equity’s auxiliary jurisdiction in this context

⁵⁴ At [99]–[100].

⁵⁵ This was emphasised by Popplewell LJ in *Enka Insaat* at [53] who said: “Questions of the substantive jurisdiction of the tribunal are paradigm issues of curial law assigned to the court of the seat. This curial jurisdiction to determine the arbitrators’ substantive jurisdiction arises notwithstanding the international principle of *Kompetenz-Kompetenz*, reflected in our domestic law in s. 30 of the Arbitration Act 1996, that in the absence of contrary agreement the tribunal may rule on its own substantive jurisdiction. This is because the court of the seat always remains the primary arbiter of the substantive jurisdiction of the tribunal and will examine that jurisdiction not only in a challenge to the tribunal’s ruling on its own substantive jurisdiction, but if necessary in advance of it”.

⁵⁶ See *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd’s Rep 620 at 623 and 642.

⁵⁷ *Albon v Naza Motor Trading Sdn Bhd* [2008] 1 Lloyd’s Rep 1.

(assuming, of course, that that jurisdiction has not been impliedly excluded by arbitration legislation adopting the Model Law).

- 25 Other cases in which anti-arbitration injunctions have been granted rest not on an express contractual right not to be subjected to arbitration such as in *Li v Rao*, perhaps the paradigm case for the grant of anti-arbitration injunctive relief, but rather on the demonstrated absence (or loss, through, for example, waiver or estoppel) of any contractual basis which would underpin and justify any arbitral proceedings including where the applicant for injunctive relief is held not to be party to the arbitration agreement.⁵⁸ Injunctions issued in this context take one outside the auxiliary jurisdiction and cause one to ask what is the “equity” or equitable interest that justifies injunctive relief. It is somewhat strained and artificial to speak of a “right” not to be subjected to arbitration — an applicant for injunctive relief in this circumstance has no contractual or other legal right not to be subjected to arbitration.
- 26 It may simply be that courts characterise the continuation of arbitration in the face of a finding that the dispute falls outside the scope of the arbitration clause, or is not arbitrable, or that, for whatever reason, the arbitration agreement is not operative,⁵⁹ as instances of vexation or oppression in the sense in which that expression has come to be understood in the anti-suit injunction jurisprudence.⁶⁰ *Sabbagh* may be seen as an example of this.
- 27 One of the vices which anti-suit injunctions are often deployed to address is that of overlapping if not entirely parallel sets of proceedings occurring concurrently. In this context, one cannot help but observe that Article 8 of the Model Law may be seen as positively encouraging a multiplicity of proceedings. Thus, whilst Article 8(1) provides in familiar terms that:

“A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties

⁵⁸ *Excalibur Ventures LLC v Texas Keystone Inc* [2011] 2 Lloyd's Rep 289 (**Excalibur**).

⁵⁹ For example, because of a finding of waiver.

⁶⁰ See M Davies, AS Bell, PLG Brereton, M Douglas, *Nygh's Conflict of Laws in Australia* (10th ed, LexisNexis Butterworths, 2019) [9.26] ff (**Nygh**).

to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed”,

Article 8(2) provides that:

“Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.”

- 28 Article 8(2) thus expressly contemplates a circumstance where concurrent arbitral proceedings may be commenced whilst there is litigation on foot but where the court in which such litigation has been commenced has not yet ruled on the referral application. Both the court and the tribunal may thus be simultaneously engaged in the consideration of questions going to the very existence or continuing operation of the arbitration agreement. That lends itself to a situation in which vexation and oppression, at least as understood by common law courts, may be thought to arise.
- 29 It is in this area that the tension between *kompetenz-kompetenz* — the arbitral tribunal’s ability to rule on its own jurisdiction — and the assertion by Anglo-American and other common law courts of an entitlement, perhaps not unqualified, to rule on the existence or continuing efficacy of the arbitration agreement and, depending on the conclusion, to act accordingly by acceding to injunctive relief, is at its most acute.
- 30 In some cases going beyond questions of what I will call arbitral jurisdiction, the continuation of arbitration may be seen as an interference with the processes of a court: the *Minister of Finance* case in the Court of Appeal of England and Wales may be seen as an example of this, as can *Kraft* where the injunction was justified both on this basis and on what was considered to be Kraft’s vexatious and oppressive duplicative litigation. Injunctions granted on this basis will tend to be of an interim or temporary nature and subsist only pending the resolution of duplicative issues in court proceedings which may involve third parties not bound by the arbitration agreement. Such resolution may, in turn, generate some complex questions in relation to issue estoppel.

- 31 The three bases identified for the grant of an anti-arbitration injunction — namely, breach of a contractual right not to be subjected to arbitration, vexation and oppression and the protection of the court’s processes once set in motion — closely resemble the bases for the grant of anti-suit injunctions articulated in *CSR Ltd v Cigna Insurance Australia Ltd*.⁶¹
- 32 It should also be observed that, whichever body — court or tribunal — rules on the existence or continuing operative effect of an arbitration agreement, extremely complicated choice of law questions potentially arise. Here, subject to one possible qualification,⁶² one should have resort to the proper law of the arbitration agreement which of course may not be the same as the proper law of the commercial agreement in which the arbitration agreement is contained, and may not be at all straightforward or easy to identify. One only has to embark on a reading of the UK Supreme Court’s decision in *Enka Insaat* to appreciate this potential complexity.

The cases for and against anti-arbitration injunctions

- 33 At this point, it is convenient to pause to note the theoretical arguments for and against anti-arbitration injunctions. In an excellent paper entitled ‘The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore’,⁶³ Nicholas Poon has written:

“The arguments from principle and policy establish a strong foundation for the issuing of anti-arbitration injunctions. There is mounting acceptance for the idea that early determination of issues concerning the jurisdiction of the arbitral tribunal is in the best interests of the parties and the arbitral process. This must be right. A party that does not have an obligation to arbitrate the particular dispute should have his right not to be subject to arbitration protected by way of an anti-arbitration injunction. A party facing a multifaceted dispute covering both arbitrable and non-arbitrable issues should also be allowed the opportunity of having the non-arbitrable issues resolved prior to the conclusion of the arbitration, by seeking an interim anti-arbitration injunction.”

⁶¹ (1997) 189 CLR 345.

⁶² The one possible qualification is that questions of waiver and estoppel may not necessarily be governed by the proper law of the arbitration agreement: see, generally, TM Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004).

⁶³ Poon (n 28) at 265–266 [39].

- 34 Why should a party which asserts that it is not bound by an operative or enforceable arbitration agreement have to run that argument first before arbitrators who are not necessarily lawyers or lawyers familiar with the proper law of the arbitration agreement, and have to wait until the enforcement stage before it can re-agitate such an argument before a court, or to appeal to the court of the seat of an arbitration to which it has never agreed or contends may no longer be bound?
- 35 This question might be thought to be particularly acute in light of the United Kingdom Supreme Court's decision in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*⁶⁴ in which it was held that an arbitral tribunal's decision as to the existence of its own jurisdiction could not bind a party who had not submitted the question of arbitrability to that tribunal; that a person who denied being party to an arbitration agreement was under no obligation to participate in the arbitration or to take any steps in the country of the seat of the allegedly invalid arbitration; that where an award had been made against such a person by reason of the arbitral tribunal's determination that the person, though not a signatory to the contract which contained the arbitration clause, had nevertheless been a party to it, that person was entitled, in a purely domestic case, to a full determination on evidence of the issue of jurisdiction and, similarly, where an English court was asked to enforce a foreign arbitration award and an application was made to resist enforcement, the court would determine anew the question as to whether or not the non-signatory had been a party.
- 36 No less an authority than Lord Collins of Mapesbury, long time general editor of *Dicey & Morris*, said at [84] that the arbitral tribunal did not have the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it. This may also be thought to be implicit in Article 8 of the Model Law and s 7(2) of the *International Arbitration Act 1974* (Cth).

⁶⁴ [2011] 1 AC 763 (**Dallah**).

37 The combination of *Dallah* and the High Court of Australia's extremely broad view of "through and under" in *Hancock Prospecting* means, as it seems to me, that there are bound to be cases where corporations or indeed individuals not party to an arbitration agreement nonetheless will either seek to initiate or potentially be dragged into arbitrations.⁶⁵ The anti-arbitration injunction may be a powerful remedy in this context.

38 On the other hand, there is a strong case that can be made against the issue of anti-arbitration injunctions at all, a position which appears to have been recently confirmed in India. With perhaps predictably loaded pro-arbitration language, Professor Gary Born has written that:

"Typically, anti-arbitration injunctions are purportedly justified on the grounds that there is no valid arbitration agreement, and that one party is therefore entitled to an order preventing an illegitimate process from going forward. In many cases, anti-arbitration injunctions are part of deliberately obstructionist tactics, typically pursued in sympathetic local courts, aimed at disrupting the parties' agreed arbitral mechanism."⁶⁶

39 Born has suggested that the "issuance of an anti-arbitration injunction against an arbitration subject to the New York Convention is generally contrary to the basic legal framework for international arbitration established by the Convention".⁶⁷ Thus he writes:

"The better view is that issuance of an anti-arbitration injunction against an arbitration subject to the New York Convention is generally contrary to the basic legal framework for international arbitration established by the Convention; that conclusion applies regardless whether the anti-arbitration order is issued by a court in the arbitral seat or otherwise. As discussed elsewhere, this regime involves no supranational authority to interpret and give effect to the Convention's provisions regarding international arbitration agreements (and awards). Rather, individual Contracting States are responsible for carrying out the Convention's provisions regarding the recognition of arbitration agreements and awards, including, the responsibility to do so when other Contracting States have failed properly to fulfil their obligations under the Convention (such as, when a Contracting State wrongfully purports to deny recognition of an arbitration agreement or to wrongfully annul an award on jurisdictional grounds).

...

⁶⁵ Nygh (n 60) at [7.78].

⁶⁶ Gary B Born, *International Commercial Arbitration* (1st ed, Wolters Kluwer, 2009) at 1049.

⁶⁷ Born (n 21) at 1313–1314.

It is thus not the competence-competence doctrine or the existence of obligations to recognize arbitration agreements, standing alone, that preclude a Contracting State from issuing antiarbitration injunctions against international arbitrations seated in other Contracting States. Rather, it is multilateral *international* legal framework under the Convention, in which all Contracting States have mutual obligations to recognize and enforce arbitration agreements, that argues cogently against the issuance of antiarbitration injunctions enjoining international arbitral proceedings and award enforcement, even though such injunctions might well be permissible and sensible in domestic matters." (omitting footnotes) (emphasis in original)

- 40 This argument is not dissimilar to that which was favoured by the European Court of Justice in *West Tankers* which highlighted the incompatibility of the issuance of anti-suit injunctions with the overall framework for the allocation of jurisdiction and enforcement of judgments.
- 41 On its face, Article 5 of the Model Law, which provides that "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law", might be thought to suggest that, unless expressly provided for (which it is not), intervention by anti-arbitration injunction is not permissible.
- 42 In *AES Ust-Kamenogorsk*, Lord Mance considered it significant that s 1(c) of the *Arbitration Act 1996* (UK) effectively modified Article 5 of the Model Law, substituting the phrase, "should not intervene" for the more mandatory "shall not intervene": at [33]. This implied not a prohibition on power but a need for caution in its exercise.
- 43 In Australia, of course, by s 16(1) of the *International Arbitration Act*, subject to Part III, the Model Law has the force of law in Australia. In other words, unlike in the United Kingdom, there is no tempering of the mandatory language "no court shall intervene" in Article 5 of the Model Law. On the other hand, by Article 1(2) of the Model Law itself, other than Articles 8, 9, 17H, 17I, 17J, 35 and 36, the Model Law applies only if the place of arbitration is in Australia. In other words, the proscription on intervention by Article 5 of the Model Law, to the extent it might otherwise be contended to be a

prohibition on the issue of an anti-arbitration injunction, has no application where the arbitration is occurring or is due to occur outside Australia.⁶⁸

- 44 Additionally, the Model Law has been held to have no application in circumstances where the anti-arbitration injunction is sought by a non-party to the arbitration. That was the unusual circumstance that came before the Federal Court of Malaysia in *Jaya Sudhir*.
- 45 In *Sabbagh*, David Richards LJ rejected an argument that the *Arbitration Act 1996* (UK) and the international instruments on which it was based impliedly prohibited the grant of anti-arbitration injunctions where it was said that the pursuit of the arbitration was vexatious or oppressive.⁶⁹ And Article 16 of the Model Law enshrining the *kompetenz-kompetenz* principle has been described as “inclusionary rather than exclusionary”.⁷⁰ It speaks to the competence of an arbitral tribunal to rule on its own jurisdiction without purporting (at least expressly) to derogate from the competence of other tribunals to rule on its jurisdiction, a point made absolutely plain in *Dallah*⁷¹ and *Excalibur*.⁷² The *kompetenz-kompetenz* principle may therefore be described as permissive rather than prescriptive.
- 46 As is evident from the range of recent cases referred to earlier in this lecture, arguments based upon the architecture of international arbitration have not generally prevailed in the courts of most common law countries, including otherwise pro-arbitration jurisdictions, although India may be a notable exception. Such jurisdictions reserve the right to issue anti-arbitration injunctions in appropriate circumstances.
- 47 It is always important, of course, to differentiate between jurisdiction and discretion. Power to grant a particular remedy may exist although it may only

⁶⁸ The position domestically is different in light of the two recent decisions in *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* and *Transurban WGT Co Pty Ltd v CPB Contractors Pty Limited*: see [21] above.

⁶⁹ *Sabbagh* at [90].

⁷⁰ Poon (n 28) 281. See also *Al-Naimi v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522 at 524–525.

⁷¹ At [26]–[30] (Lord Mance) and [84] (Lord Collins).

⁷² At [57].

be exercised sparingly. Courts are jealous as to the existence and extent of their jurisdiction, and in my experience, are unlikely to construe it narrowly. So much is also consistent with well-established authority.⁷³

48 Arguments of the kind made by Born, based upon the structure and system of international arbitration enshrined in the New York Convention and Model Law, have been accommodated by such courts volunteering that the grant of anti-arbitration injunction should be exceptional.

49 But is or should this be the case? Related to this is the issue as to whether, as is the case with anti-suit injunctions, the frequently mentioned but often elusive concept of comity has any role to play in the issue of anti-arbitration injunctions.

Comity and restraint in the grant of anti-arbitration injunctions

50 It is well known and well established that comity does have a role to play in respect of anti-suit injunctions, particularly when issued on the basis that the foreign proceedings to be restrained are vexatious, oppressive or unconscionable as opposed to having been brought in breach of contract.⁷⁴

51 Comity in that context has been recognised as an important matter because of the potential for the anti-suit injunction to be perceived as interfering with the foreign court as opposed to simply operating *in personam* by reference to the unconscientious conduct of the moving party in the foreign court. In this context, it has been held that an anti-suit injunction, even if otherwise warranted, should only be granted if the court from which the injunction is sought is the natural forum for the resolution of the dispute.⁷⁵

52 But why should comity have any role to play in the grant of an anti-arbitration injunction where the proceedings being restrained are, in truth, nothing more than the creature of a private contract between the parties to the arbitration?

⁷³ *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404; [1994] HCA 54.

⁷⁴ *The "Angelic Grace"* [1995] 1 Lloyd's Report 95.

⁷⁵ *Airbus Industrie GIE v Patel* [1999] 1 AC 119.

An arbitral tribunal, after all and unlike a court, is not an emanation of the state whose sovereignty may be perceived to be infringed by an anti-suit injunction, albeit indirectly and in substance rather than form.

- 53 It could be argued that an anti-arbitration injunction does have the *potential* to infringe comity as it may usurp the role of the courts of the seat of the arbitration which are generally regarded as having the paramount role to play in the overall supervision of the arbitral process. The significance of the curial jurisdiction to the court of the seat of the arbitration has already been noted.
- 54 Unlike an anti-suit injunction, however, where the jurisdiction of the foreign court will generally already have been invoked, it is far less likely that an anti-arbitration injunction would cut across any litigation in the courts of the seat of the arbitration. It is difficult to see how any considerations of comity, even indirectly, might be engaged in this circumstance, just as the claims of comity are surely diminished, if not wholly absent, in a case where an anti-suit injunction is granted restraining the *institution* as opposed to the continuation of proceedings in a foreign court. I agree with Nicholas Poon's conclusion that "protests against the anti-suit injunction premised on a breach of state sovereignty are less effective in the context of the anti-arbitration injunction."⁷⁶
- 55 This leads me to consider whether any particular restraint should be exercised in the grant of an anti-arbitration injunction in circumstances where a case is otherwise made out for the grant of such relief.
- 56 There are certainly authorities and statements to the effect that an anti-arbitration injunction should only be granted in exceptional circumstances.⁷⁷ But why should that be so? If there is no proper contractual basis for the arbitration to continue, whether because the dispute falls outside of the scope of the arbitration clause or agreement, or because there is no enforceable arbitration agreement, or because the right to insist on arbitration has been

⁷⁶ Poon (n 28) at 247.

⁷⁷ *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KTF* (2011) 1 Lloyd's Rep 510; [2011] EWHC 345 (Comm); [2011] 2 All ER (Comm) 128 at [34] (**Claxton**); *AmTrust Europe Ltd v Trust Risk Group SpA* [2015] EWCA Civ 437; *Minister of Finance*.

waived or otherwise lost, or because the continuation of the arbitration would be vexatious or oppressive, what is the legitimate objection to asking a court which has jurisdiction over the moving party in such litigation to restrain that party from pursuing what is in essence a contractual remedy on a non-contractual basis or acting vexatiously or oppressively?

- 57 The reference to the need for “exceptional circumstances” may be rather empty. In *Claxton* at [34], endorsed by the Court of Appeal in the *Minister of Finance* case at [67], Hamblen J (as he then was) said:

“In order to establish exceptional circumstances, it will usually be necessary, as a minimum, to establish that the applicant's legal or equitable rights have been infringed or threatened by a continuation of the arbitration, or that its continuation will be vexatious, oppressive or unconscionable, these being the principles which govern the grant of injunctions to restrain proceedings in a foreign court: see the *Elektrim* case [2007] 2 Lloyd's Rep 8 at para 56. However this may not be sufficient as the *Elektrim* decision illustrates.”

- 58 In *Kraft*, the leading Australian case on the subject, O'Callaghan J observed that:

“there is no ‘different prism’ to be looked through or ‘extra caution’ to be exercised in deciding whether to grant an anti-arbitration injunction. The relevant question to be addressed is whether an anti-arbitration injunction should go, consistently with the principles enunciated by the High Court in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345. Of course, caution in the exercise of the jurisdiction to grant any injunction is always needed: *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 396. But no part of the exercise of the court's discretion on an application for an anti-arbitration injunction involves the court asking itself, or needing to determine, whether the relief claimed is ‘exceptional’.”⁷⁸

- 59 A more restrained approach has been taken in England. In *Sabbagh*, David Richards LJ said at [110]–[112]:

“An anti-arbitration injunction involves an interference with a different principle, namely the fundamental principle of international arbitration that courts should uphold, and therefore not interfere with, arbitration agreements. Where it is clear that the dispute is within the terms of a valid arbitration agreement, then the courts should not interfere. When the converse is true, ‘either because it is common ground between the parties or because of a previous determination’ (per Andrew Smith J in *Amtrust Europe v Trust risk Group* at [25]), the court may grant an anti-arbitration injunction but only if the

⁷⁸ *Kraft* at [100].

circumstances of the case require it. Save perhaps in the case of exclusive jurisdiction agreements, the grant of an anti-arbitration remains an exceptional step.

Where the validity or scope of an arbitration agreement is in issue, it may be a difficult question whether the English court should seek to determine the issue. As earlier mentioned, kompetenz-kompetenz is an important principle of international arbitration law. It is implicit in an arbitration agreement that the parties agree that the tribunal may rule on its own substantive jurisdiction, including issues as to the validity of the arbitration agreement and the matters within the scope of the agreement (see section 30 of the Arbitration Act 1996 as regards arbitrations with their seat in England). In *Weissfisch v Julius*, this court said that it was ‘the natural consequence’ of an agreement for arbitration governed by Swiss law with its seat in Switzerland that ‘any issues as to the validity of the unusual provisions of the arbitration clauses would fall to be resolved in Switzerland according to Swiss law’.

It is therefore an exceptional course for the English court to decide these issues in relation to an agreement for a foreign-seated arbitration. Nonetheless, there are cases where the English court may be required to do so. An application for a stay of English proceedings under section 9 is an obvious example, although even then these issues may best be left to the arbitral tribunal. In *Golden Ocean v Humpuss Intermoda*, Popplewell J explored the circumstances in which, on a stay application, the court should decide the issue for itself or leave it to the tribunal.”

60 In the British Columbia Court of Appeal in *Li v Rao*,⁷⁹ Savage J said:

“I accept that courts should exercise caution before granting any injunction affecting the conduct of foreign proceedings whether those be judicial or arbitral in nature. Courts should pay due regard to the objectives of arbitration before granting an anti-arbitration injunction, just as they must pay due regard to comity before granting an anti-suit injunction. On the other hand, neither comity nor the objectives of arbitration justify exceptional diffidence where the injunction is based on a breach of contract, i.e., on a party’s own conduct”.

Conclusion

61 Towards the end of his article, ‘The Use and Abuse of Anti-arbitration Injunctions: A Way Forward for Singapore’, Nicholas Poon states that “[a] tension between the courts and arbitral tribunals is not healthy and should be avoided as far as practicable.”⁸⁰ I am not sure that I entirely agree nor, with respect, do I agree with Professor Garnett’s suggestion, in the context of a discussion of *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd*,⁸¹ that “an English court owes a duty to both the foreign arbitral

⁷⁹ [2019] BCCA 264 at [73].

⁸⁰ See n 28 at [86].

⁸¹ [2013] EWHC 1240 (Comm).

tribunal and the supervising court not to interfere in the absence of exceptional circumstances.”⁸² A measure of deference, maybe, but surely not a duty.

62 As regards Mr Poon’s observation, a tension between courts and arbitral tribunals may, in my opinion, be extremely healthy so long as it is kept in check, and courts only intervene in a principled and measured way. Judicial intervention, or the possibility thereof, may serve as a valuable control mechanism to ensure that the arbitration of a commercial dispute is authorised, justified and conducted fairly. The familiar criteria for intervention largely borrowed from anti-suit jurisprudence and which have been identified in English decisions such as *Claxton*,⁸³ in the draft US Restatement and the decision in *Kraft* make it plain that intervention will not be an everyday remedy.

63 *TCL Air Conditioner*⁸⁴ in the High Court reminds us of the fundamentally contractual nature of arbitration. In most cases, there will be no dispute as to the binding nature and continuing operation and efficacy of the arbitration agreement. But where there is a dispute, if a court has personal jurisdiction to rule on that question and does so, an injunction restraining the commencement or continuation of an arbitration inconsistent with such a conclusion seems to me to be entirely orthodox, as does the restraint of vexatious or oppressive or unconscionable conduct.

64 The privatisation of commercial justice, which is what arbitration is, is here to stay but it was never intended to amount to a wholesale surrender of the dispute resolution process, wholly divorced from the ultimate and transparent oversight of the courts.

65 Whether what I have described in this lecture as the rise of the anti-arbitration injunction reflects something of a recalibration in the enthusiasm for, and judicial confidence in, arbitration and arbitrators is part of a larger topic which

⁸² See Garnett (n 26).

⁸³ See n 77 above.

⁸⁴ See n 9 above.

is for another day (and hopefully one that might be discussed in person in another part of the world to which we can all travel)!
