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# The Interference of the Court of the Seat with International Arbitration

Giulia Carbone\*

## I. INTRODUCTION

According to Blackaby and Partasides' definition,<sup>1</sup> "[t]he relationship between national courts and arbitral tribunals swings between forced cohabitation and true partnership." By choosing to devolve their dispute to arbitration, parties agree to forgo local remedies to participate in the proceedings administered by a neutral and private means of justice, and to be bound by the award so rendered. This choice relegates national courts to a secondary position, unless the parties or the arbitral tribunal itself seek the assistance of local forums when they need to remove juridical obstacles from the arbitration proceedings.

This does not mean that there is no room for interaction between local courts and arbitration tribunals. Following Blackaby and Partasides, "national courts could exist without arbitration, but arbitration could not exist without the courts. The real issue is to define the point where this reliance of arbitration on national courts begins and where it ends."<sup>2</sup> The support of the courts is an integral and indispensable part of the arbitration mechanism, as no arbitration can achieve its aims without the assistance of the domestic juridical system. This is so even in cases where assistance is confined to the post-arbitration phase of the enforcement of the award.<sup>3</sup> Moreover, the involvement of the public judicial system guarantees that a minimum standard of due process and fairness in the arbitration proceedings is ensured.<sup>4</sup>

The role and the extent of the powers that courts may exercise relating to arbitration vary from country to country, depending mainly on the general approach national legislation takes towards alternative dispute resolution mechanisms, which can range from an open mistrust to full acknowledgment of their autonomy. This article, however, will focus on national courts' pathological interference with

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1. NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 438 (5th ed. 2009).

2. *Id.* at 439.

3. It is emblematic that even a devote defender of arbitration's autonomy admits that "despite the autonomous nature of arbitration, it must be recognized that just as no man or woman is an island, so no system of dispute resolution can exist in a vacuum." Julian Lew, *Does National Court Involvement Undermine the International Arbitration Process?*, 24 AM. U. INT'L L. REV. 489, 492 (2009). William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 650 (1989) ("[t]he fashion for non-national justice and arbitral autonomy, if pushed too far, will ultimately backfire and compromise the integrity of international dispute resolution").

4. MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 84 (2008).

international arbitration, which occurs when courts exercise their powers to impede the effectiveness of the arbitration proceedings. The distinction between simple involvement and interference does not seem to have a formal juridical basis. Instead, it is an intangible and enormous *discrimen* of which practitioners and scholars are fully aware.<sup>5</sup> There is a fine line between helpful assistance and unhelpful hindrance<sup>6</sup> and, as it was wisely noted, “[w]hether court intervention is viewed as supporting or interfering with the arbitral process will depend upon a range of factors including the timing, manner and degree of such intervention.”<sup>7</sup> In other words, the question that arises is “when does ‘involvement’ by a court become ‘intervention’ in the arbitral process; and when does ‘intervention’ become ‘interference’ with a process which is supposed to stand on its own feet?”<sup>8</sup>

However, this indefinable concept seems to have found textual recognition in the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (hereinafter referred to as “UNCITRAL Model Law”), which makes a distinction between “court intervention” and “court assistance and supervision,” excluding the former unless otherwise provided by that Law. The Model Law Explanatory Notes justified the reduced role for local court intervention on international arbitration as follows:

Recent amendments to arbitration laws reveal a trend in favour of limiting and clearly defining court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process. . . . Protecting the arbitral process from unpredictable or disruptive court interference is essential to parties who choose arbitration (in particular foreign parties).<sup>9</sup>

Thus, the principle of parties’ autonomy, on which arbitration is grounded, requires that the role of judicial organs be restricted and that the assertion of court’s powers upon ongoing arbitration proceedings be limited to situations that are statutorily permitted. As mentioned before, this paper will analyze the juridical and factual problems caused by the control and supervision exercised by the courts of the seat of the arbitration over international arbitral proceedings. In order to further define the scope of this research, the issue of interference, as above defined, will be investigated with reference to international arbitration pro-

5. See Martin Hunter, *Introduction: An Overview of the Relationship Between Courts and Investment Treaty Arbitration*, in INVESTMENT TREATY LAW: CURRENT ISSUES VOLUME 155 (Federico Ortino, Audley Sheppard & Hugo Warner eds., 2006). In another work, the author refers to the ‘*supportive*’ role of the courts, using the italics, as to distinguish this kind of role to a non-supportive (interfering?) one: Martin Hunter, *Judicial Assistance for the Arbitrator*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 195, 196 (Julian DM Lew ed., 1986).

6. MOSES, *supra* note 4, at 85.

7. John Lurie, *Court Intervention in Arbitration: Support or Interference?*, 76 ARB.: THE INT’L J. OF ARB., MEDIATION & DISP. MGMT. 447 (2010).

8. BLACKABY ET AL., *supra* note 1, at 443.

9. United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration (as amended 2006) 27, ¶¶ 15-17, available at [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf).

cesses, rather than with arbitral awards. Hence, problems concerning the enforcement of arbitral awards, that are by definition subsequent to the conclusion of the arbitral proceedings and have already been the object of much literature, will not be addressed. As it was noticed, “[m]uch has been written about judicial interference with *arbitral award*, far less about interference with *arbitrators*.”<sup>10</sup>

This article looks upon two fundamental questions: (1) whether arbitrators should comply with a local court’s order aimed at suspending or interrupting the running of arbitral proceedings, and (2) what type of remedies should a party receive when courts unjustly interfere with their right to arbitrate. This article will explore these two questions in four parts. Part II focuses on the interference with international commercial arbitration by the court at the place of the arbitration. It does so by taking into account ICC cases, some relevant national judgments, and deals with the solutions offered by Articles 8 and 16 of the UNCITRAL Model Law. Part III deals with the recent trend of investors bringing claims before ICSID or NAFTA tribunals alleging that courts’ interference amount to a denial of justice and/or a violation of the Fair and Equitable Treatment standard. Part IV draws some conclusions on the basis of the literature and jurisprudence examined. Although rejecting the idea of arbitration as “floating in the transnational firmament, unconnected with any municipal system of law,”<sup>11</sup> it is hard to deny that in choosing to refer their dispute to an international arbitration, the parties have consensually waived resorting to the national legal system. Therefore, if local courts abuse their supervisory powers to the extent that they materially impede the arbitration, the original intentions of the parties (or at least of the party who has not provoked the intervention of the courts) will be thwarted.

## II. THE INTERFERENCE OF THE COURT AT THE SEAT OF THE ARBITRATION

### *A. The Role of the Seat of Arbitration*

Two of the authors who have most significantly contributed to the analysis of the courts’ interference with international commercial arbitration state that a deep distinction should be drawn between cases where the intrusion comes from the court at the place of the arbitration and cases where a “foreign” or “third” court interferes with an arbitration that is seated in a different country.<sup>12</sup> In order to understand this distinction, it is necessary to briefly consider the role of the seat in international arbitration, a role strictly connected with the theories concerning the source of the binding effect of international arbitration awards.<sup>13</sup> Without any pretension to giving a complete overview of a long-running philosophical and juridical debate, it is worth recalling the two main theories that have shaped the

10. Jan Paulsson, *Interference with National Courts*, in THE LEADING ARBITRATOR’S GUIDE TO INTERNATIONAL ARBITRATION 119, 119 (Lawrence H. Newman & Richard D. Hill eds., 2008).

11. Lord Justice Kerr in *Bank Mellat v. Helleniki Techniki S.A.* [1984] 1 Q.B. 291, 301 (Eng.).

12. Paulsson, *supra* note 10, at 124; *see generally* Emmanuel Gaillard, ‘*L’interférence des juridictions du siège dans le déroulement de l’arbitrage*’ in LIBER AMICORUM CLAUDE REYMOND: AUTOUR DE L’ARBITRAGE; MÉLANGES OFFERTS À CLAUDE REYMOND, 84 (Claude Reymond ed., LexisNexis 2004).

13. FOUCHARD, GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, 3 (Emmanuel Gaillard & John Savage eds., 1999).

role of the seat of arbitration over at least the last three decades: territorialism and delocalization.<sup>14</sup>

According to the territorialism theory, arbitrators derive their powers from the law of the place where they perform their duties, as do judges serving in local courts.<sup>15</sup> As a consequence, the arbitration is subject both to the law of the seat and to the jurisdiction of the courts of that seat.<sup>16</sup> The law of the seat sets both the procedural rules, which govern the arbitral procedure in the absence of a different agreement between the parties, and the choice of law rules, which determine the law applicable to the merits of the dispute.<sup>17</sup> Also, the mandatory rules to be applied by the arbitrators are those of the seat.<sup>18</sup> As for the powers conferred to national courts, they have jurisdiction to review awards which were rendered in their country.<sup>19</sup> In addition, when an award is set aside by the court of the seat, it ceases to exist and cannot be enforced by any other jurisdiction.<sup>20</sup>

Delocalization theory, on the other hand, proposes that international arbitral tribunals are detached from controls imposed by the law of the seat of arbitration.<sup>21</sup> Under this theory, parties frequently choose to place the arbitration in a country where the parties' business interests are located, simply because it is convenient for them.<sup>22</sup> Delocalization's main idea is that the sources of the arbitrators' powers derive from the international legal community.<sup>23</sup> Therefore, the local peculiarities of the municipal law of the place where a dispute happens to be heard are not to be imposed on international arbitration.<sup>24</sup> Supporters of delocalization argue that the arbitration procedures should be 'delocalized' and completely freed from the mandatory rules and public policy of the place of arbitration. Accordingly, the arbitrators are not only allowed to disregard the *lex fori*, but may also apply any procedural law they regard as appropriate.<sup>25</sup> Consequently, an award set aside from the country of the seat still can be enforced in any other jurisdiction.

An overview of the literature cited hitherto and of the cases that are analyzed in the following paragraphs shows that international arbitration has gained a level of relative independence from local courts. This does not mean, however, that arbitrators shall simply disregard any undue interference from the court of the

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14. For an overview of the debate on the role of the seat of the international arbitration, see JEAN FRANCOIS POUDET & SEBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 85 (2d ed. 2007).

15. See FOUCHARD, *supra* note 13.

16. *Id.*

17. *Id.*

18. Pierre Mayer, *The Trend Towards Delocalisation in the Last 100 Years*, in *THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE*, 39 (Martin Hunter ed., 1996).

19. See FOUCHARD, *supra* note 13.

20. *Id.*

21. Hong Lin-Yu, *Defective Awards Must be Challenged in the Courts of the Seat of Arbitration – A Step Further Than Localisation?*, 65 *ARB.: THE INT'L J. OF ARB., MEDIATION & DISP. MGMT.* 196 (1999).

22. MOSES, *supra* note 4, at 56.

23. FOUCHARD, *supra* note 13.

24. Jan Paulsson, *The Extent of Independence of International Arbitration from the Law of the Situs*, in *CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION* 141, 141-42 (Julian DM Lew ed., 1987). For more on the delocalisation theory, see Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why it Matters*, 32 *INT'L & COMP. L.Q.* 53 (1983).

25. Yu, *supra* note 21, at 196.

seat. This would be impossible for at least two practical reasons. First, arbitrators proceeding with the arbitration notwithstanding the opposition of the local courts will end up acting in contempt of court.<sup>26</sup> If they (or any of them) are subject to that State's jurisdiction, because they are nationals of that State, or are domiciled or have assets there, they may incur consequences on a personal level, as the local courts may enforce an order opposing the prosecution of the arbitration against the arbitrators through fines, seizure of assets or similar means.<sup>27</sup> Additionally, an award rendered despite opposition from local courts will be set aside by these courts and never be enforced. This can render the arbitration proceedings useless when the losing party's assets are located in the country of the seat, but also can constitute a problem if the award requires enforcement in a State whose courts are reluctant to enforce an award that has been annulled in the state of origin.

For the reasons above, interference by local courts also constitutes a dilemma for the arbitrators who fully support the delocalization theory.

### *B. Issues Connected to the Arbitral Tribunal's Jurisdiction*

The first and most common intervention that arbitral proceedings may experience from the court of the seat is a judgment stating that the national legal system, rather than the arbitral panel, has jurisdiction on the case. As arbitration clauses define arbitrators' authority and power, jurisdictional issues may rise not only from the scope of this clause but also from its validity. When a party regrets its agreement to submit the dispute to arbitration, it can avoid or delay arbitral proceedings by simply challenging of the scope and validity of the arbitration clause before the local competent court.<sup>28</sup>

In order to prevent a party from hampering the effectiveness of an arbitration clause by invoking the arbitrators' lack of jurisdiction, the arbitration law of a number of states, supported by case law and scholars, has given full recognition to the principle of competence-competence (or *Kompetenz-Kompetenz*), which refers to the power of the arbitral tribunal to decide upon its jurisdiction. Notwithstanding the general favor attributed to this principle by national legislations and international arbitration conventions,<sup>29</sup> its application diverges consistently in national practices, which may vary in both the timing and in the extent of a tribunal's decision on jurisdiction.<sup>30</sup>

Under title 9, chapter 1, section 3 of the United States Federal Arbitration Act (FAA), courts may intervene at any moment to judge the validity of the arbitration

26. Luca Radicati di Brozolo & Loretta Malintoppi, *Unlawful Interference with International Arbitration by National Courts of the Seat in the Aftermath of Saipem v. Bangladesh in LIBER AMICORUM BERNARDO CREMADES* 993, 996-97 (Miguel Angel Fernandez-Ballesteros & David Arias eds., 2010).

27. See *Himpurna, Patuha Awards 'Defective,' Counsel for Indonesia Claims*, 15 MEALEY'S INT'L ARB. REP. 1 (2000).

28. See Emmanuel Gaillard, *Les Manœuvres Dilatoires des Parties et des Arbitres dans l'Arbitrage Commercial International*, REV. ARB., 759 (1990).

29. See, e.g., UNCITRAL ARBITRATION RULES, art. 21(1); ICC ARBITRATION RULES, art. 6(2); LCIA ARBITRATION RULES, art. 23.1; ENGLISH ARBITRATION ACT § 1 (1996) (U.K.); GERMAN CODE OF CIVIL PROCEDURE [ZPO], art. 1040; BELGIAN JUDICIAL CODE, art. 1697(1); NETHERLANDS CODE OF CIVIL PROCEDURE art. 1052(1).

30. William W. Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction*, KLUWER LAW INT'L 59 (2007).

agreement without waiting until the award is rendered;<sup>31</sup> conversely, under Article 1458 of the French Code de Procédure Civile (CPC), court's review of jurisdictional issues is delayed until the final award. Both of these approaches have advantages and disadvantages. Submitting the jurisdictional issues to the court at the beginning of the arbitral proceedings certainly hinders the promptness of the arbitration and may be considered a delaying tactic. On the other hand, making the recourse to the court available to parties only after the award has been rendered, while avoiding an unwanted interference with the arbitration, may result in a waste of time and money should the court find that the tribunal never had jurisdiction.

The English Arbitration Act 1996 developed a hybrid solution: under Section 32, the court may decide a preliminary point of jurisdiction only upon agreement of all parties, or if the tribunal grants permission and the court is satisfied that its intervention is appropriate. In the absence of these conditions, a party may challenge the tribunal's jurisdiction before a court only after the award has been rendered. In both cases, the tribunal may continue the arbitral proceedings while the application to the court is pending. The English approach seems to offer a good compromise between the need to prevent disruption of the arbitral proceedings and the need to save costs and avoid arbitration proceedings when the tribunal lacks jurisdiction. However, legal practice often diverges from the original intentions of the Legislator. English case law has shown a repeated inclination of the courts to solve the jurisdictional issues before the tribunal. In *Law Debenture Trust Corp Plc v Elektrim Finance BV*,<sup>32</sup> Mann J. held:

In some cases it would be better for the court to act under Ord 73 r 6; in other cases it may be appropriate to leave the matter to be decided by an arbitrator. The latter course is likely to be adopted only where the court considers that it is virtually certain that there is an arbitration agreement or if there is only a dispute about the ambit or scope of the arbitration agreement. . . . There is no support there for any suggestion that the court should inevitably allow the arbitral tribunal to decide the jurisdiction question and stay the court proceedings in the meanwhile.<sup>33</sup>

Unlike English courts, U.S. courts have sometimes adopted a "wait and see" approach,<sup>34</sup> even if the FAA allows judicial intervention before an award is rendered. In *Pacificare v. Book*,<sup>35</sup> the plaintiffs, a group of physicians, filed a suit

31. See also *Brake Masters System, Inc. v. Gabbay*, 206 Ariz. 360, 363-64 (2003) ("Our arbitration statutes and the weight of authority from other jurisdictions allow either a pre-arbitration or a post-arbitration determination of arbitrability.").

32. *Law Debenture Trust Corp. Plc v. Elektrim Finance BV*, [2005] EWHC (Ch) 1412, [34] (Eng.), available at <http://www.nadr.co.uk/articles/published/ArbitrationLawRep/Law%20v%20Elektrim%202005.pdf>.

33. See also *Al-Naimi v. Islamic Press Agency Inc.*, [2000] EWCA (Civ) 17, [10] (Eng.) ("the existence of the [arbitrators'] power does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed"), available at <http://www.nadr.co.uk/articles/published/ArbitrationLawR/Al-Naimi%20v%20Islamic%20Press%202000.pdf>.

34. *Park*, *supra* note 30, at 28.

35. *PacificCarc Health Systems, Inc. v. Book*, 538 U.S. 401 (2003)

against managed-health-care organizations, alleging the defendants unlawfully failed to reimburse them for healthcare services they had provided to patients covered by defendants' health plans. They brought causes of action under Racketeer Influenced and Corrupt Organizations Act (RICO) that allows inter alia award of treble damages.<sup>36</sup> Nevertheless, the physicians had signed arbitration agreements to resolve disputes with the health care providers; some of these agreements prevented arbitrators from awarding punitive damages.<sup>37</sup> The District Court refused to compel arbitration of the RICO claims on the basis that the arbitration clauses in the parties' agreements prohibited awards of "punitive damages," and hence an arbitrator lacked authority to award treble damages under RICO.<sup>38</sup> The Supreme Court, reversing the lower court's decision, stated:

Since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract. As in *Vimar*, the proper course is to compel arbitration.<sup>39</sup>

In another landmark pronouncement, *First Options of Chicago v. Kaplans*, the Supreme Court recognised the rights of the parties to give arbitrators the final word on some aspects of arbitral power.<sup>40</sup> In this case, an award was rendered against both an investment company (MK Investments) and its owners (Mr and Mrs Kaplan) in relation to debts owed to a firm clearing stock trades (First Options of Chicago).<sup>41</sup> The Kaplans, however, who had not personally signed the document containing the arbitration clause, denied that their disagreement with First Options was arbitrable.<sup>42</sup> The Supreme Court affirmed that the Kaplans were not bound by the arbitration agreement but went further, suggesting "the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances."<sup>43</sup>

A "recommendable example"<sup>44</sup> with respect to the jurisdictional issue is offered by Article 16 of the UNCITRAL Model Law. Article 16 sets out a compromise between the possibility to submit to courts the question regarding the tribunal's jurisdiction during the preliminary stages of the arbitral proceedings, and the necessity to protect proceedings from interruptions or delays due to frivolous jurisdictional challenges. Article 16, significantly entitled "Competence of arbitral tribunal to rule on its jurisdiction," expressly gives the arbitral tribunal the right to rule on its own jurisdiction, both as a preliminary question and in an

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36. *Id.* at 402.

37. *Id.*

38. *Id.* at 401.

39. *Id.* at 407.

40. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). See William W. Park, *The Arbitrability Dicta in First Options v. Kaplan. What Sort of Kompetenz – Kompetenz Has Crossed the Atlantic?* 12 ARB. INT'L 137 (1996) (for an analysis of the decision).

41. *First Options of Chicago, Inc.*, 514 U.S. at 938.

42. *Id.*

43. *Id.* at 943.

44. Paulsson, *supra* note 10, at 126.



award on the merits.<sup>45</sup> Under paragraph 3 of the same provision, “[i]f the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.”<sup>46</sup>

Thus, the Model Law gives first word to arbitrators in relation to their jurisdiction. However, the control powers of the courts on the jurisdictional issues are preserved, subject to two limitations: (1) the court’s judgment on jurisdiction is unappealable, preventing the parties from a long three-instance process; and (2) the judicial review of the arbitral tribunal’s preliminary decision does not interrupt the proceedings before it.<sup>47</sup> This approach has the advantage of allowing the parties to immediately challenge the tribunal’s jurisdictional decision before the court, with an evident savings in time and money should the tribunal incorrectly find that it has jurisdiction. At the same time, it prevents the parties from dilatory measures that may interrupt or delay the arbitral process, as the parties are able to pursue litigation.<sup>48</sup> However, it has been noted that, because arbitrators may choose to delay decisions on jurisdictional issues until the final award, the UNCITRAL Model may represent less of a compromise than originally was intended by its drafters.<sup>49</sup>

Another possible solution may come from national judicial practices: in many legal systems, vexatious litigants may be ordered to pay damages in addition to legal expenses.<sup>50</sup> A number of U.S. decisions have employed monetary sanctions as a tool to minimize frivolous attempts to vacate awards.<sup>51</sup> In *CUNA v. Office & Professional Employees Int’l Union*, the U.S. Court of Appeals stated a company is free not to include an arbitration clause in its collective bargaining contracts.<sup>52</sup> However, it also stated that because the company might have “agreed to include such a clause it will not be permitted to nullify the advantages to the union by spinning out the arbitral process unconscionably through the filing of meritless suits and appeals. For such conduct the law authorizes sanctions that this court will not hesitate to impose.”<sup>53</sup> An identical policy may be followed by future courts to discourage unjustified challenges of the arbitrators’ jurisdiction.

45. UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, 18th Sess., Annex 1, U.N. Doc. A/40/17, art. 16 (June 21, 1985), revised by Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, 39th Sess., Annex, U.N. Doc. A/61/17, art. 16 (July 7, 2006), available at [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf).

46. *Id.* ¶ 3.

47. *Id.*

48. Doug Jones, ‘Competence-competence’, 75 ARB.: THE INT’L J. OF ARB., MEDIATION & DISP. MGMT. 56 (2009).

49. Park, *supra* note 40, at 152.

50. See, e.g., ITALIAN CODE OF CIVIL PROCEDURE, art. 96 (according to which the party who willingly (or with gross negligence) brought an unmeritorious claim (or resisted a clearly meritorious one), may also be condemned to pay to the winning party equitable damages in addition to legal expenses).

51. Park, *supra* note 30, at 145.

52. *CUNA Mut. Ins. Soc’y, v. Office and Prof’l Employees Int’l Union*, 443 F. 3d 556, 561 (7th Cir. 2006).

53. *Id.*

*C. Removal of an Arbitrator*

The majority of national regulations on arbitration contain provisions concerning the removal of arbitrators.<sup>54</sup> They reflect the need for arbitrators to adhere to certain minimum standards of conduct, which are fundamental for the parties and the integrity of the process. The possibility for the parties to challenge arbitrators for failing to comport with these fundamental standards is central to their confidence in the arbitral process.<sup>55</sup> International arbitration practice demonstrates, however, that challenges to the appointment of an arbitrator are often motivated by delay tactics, rather than by a real concern regarding the arbitrator's independence.<sup>56</sup> In order to prevent arbitration proceedings from grinding to a halt upon the challenge of an arbitrator, international arbitral institutions usually have the competence to judge the issue of the disqualification of an arbitrator, such that the national courts can only be resorted to at a later stage when and if the award is ultimately challenged.

Article 11 of the International Chamber of Commerce ('ICC') Rules permits the parties to challenge an arbitrator, whether for an alleged lack of independence or otherwise, through a written statement that must be submitted to the Secretariat:

either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.<sup>57</sup>

In addition, Article 7(3) of the ICC Rules stipulates that the decision of the Court as to the challenge of the arbitrator shall be final. As it was noted, however, this provision is merely intended to state that that decision shall not be the subject of further recourse before the ICC Court.<sup>58</sup> This means it can still be challenged before a national court. This interpretation has been clearly adopted by the English Court of Appeal in *AT&T v. Saudi Cable*.<sup>59</sup> AT&T sought to appeal against

54. See GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: CASES AND MATERIALS* 594 (2011).

55. Daisy Mallett & Nathalic Allen, *Party Instigated Arbitrator Challenges: A Practical Guide*, 77 *ARB.: THE INT'L J. OF ARB., MEDIATION AND DISP. MGMT.* 59 (2011).

56. Gaillard, *supra* note 28, at 761. See also Karl-Heinz Bökstiegel, *Practices of Various Arbitral Tribunals*, in *PREVENTING DELAY AND DISRUPTION OF ARBITRATION; EFFECTIVE PROCEEDINGS IN CONSTRUCTION CASES: INTERNATIONAL CONGRESS PROCEEDINGS (ICCA CONGRESS SERIES NO. 5)* 132 (Albert van Den Berg ed., 1991) (The author affirmed that there is sometimes in practice a third motivation of a challenge, "namely the attempt to intimidate or warn either the challenged arbitrator or the other members of the arbitral tribunal in view of eventual future decisions").

57. See also London Court of International Arbitration Rules, art. 10(4) [hereinafter *LCIA Rules*] (providing that parties must submit a challenge to the LCIA Court (and the Arbitration Tribunal) either within 15 days of the formation of the tribunal, or within 15 days of the challenging party becoming aware of the facts or circumstances on which its challenge is based. Unless the challenged arbitrator withdraws or all other parties agree to the challenge within 15 days of receipt of the written statement, the LCIA Court shall decide on the challenge). A similar provision is stipulated in Articles 8 and 9 of the American Arbitration Association ('AAA') International Rules.

58. Yves Derains & Eric A. Schwartz, *A GUIDE TO THE ICC RULES OF ARBITRATION* 139 (2d ed. 2005).

59. *AT&T Corp. Lucent Technologies, Inc. v. Saudi Cable Co.*, [2000] EWCA (Civ) 154 (Eng.).

the dismissal of its application for the removal of the chairman of an arbitration tribunal and the setting aside of three partial awards in favor of Saudi Cable.<sup>60</sup> The Court dismissed the appeal, holding that there was no substance to the allegations of misconduct or bias.<sup>61</sup> It was held, however, that the Court was not precluded from investigating misconduct by the finality provisions in the ICC Rules. Lord Woolf stated

[t]urning to the express provision of the ICC rules which provides that a decision of the ICC court should be final, I do not accept the view . . . that the finality provision means that the English courts have no power to review the decision of the ICC court. . . . the English courts retain their jurisdiction to determine whether the ICC rules have been breached when entertaining an application to remove for alleged misconduct.<sup>62</sup>

Thus, English courts retain the last word on the challenge of an arbitrator.

On the contrary, in some national jurisdictions a decision concerning the challenge of an arbitrator cannot be annulled *per se*; local courts tend to postpone the decision on the removal of the arbitrator until the award is challenged. In the *Opinter* case, a party challenged an ICC decision refusing to remove an arbitrator before a French court.<sup>63</sup> The *Cour de Cassation* declared the claim as inadmissible, as the ICC Court does not exercise a jurisdictional function.<sup>64</sup> As a consequence, the *Cour* rejected the request of annulment, on the basis that this remedy may apply only to the arbitral award.<sup>65</sup>

U.S. courts have adopted a similar approach. Although the FAA<sup>66</sup> provides that a court may vacate an award where there was evident partiality or corruption in the arbitrators, “it does not provide for pre-award removal of an arbitrator.”<sup>67</sup> In another case it has been stated that “[t]he [Federal] Arbitration Act does not provide for judicial scrutiny of an arbitrator’s qualifications to serve, other than in a proceeding to confirm or vacate an award, which necessarily occurs after the arbitrator has rendered his service.”<sup>68</sup> With specific reference to the decision concerning the removal of an arbitrator rendered within the frame of an institutional arbitration, U.S. courts have held that an arbitral institution (such as the American Arbitration Association) is immune from challenge with respect to “acts arising out of the scope of [its] arbitral functions.”<sup>69</sup>

60. *Id.* at [31]-[34].

61. *Id.* at [55].

62. *Id.* at [49].

63. Cour de cassation [Cass.] Civ. 2, Oct. 7, 1987, Société Opinter France v. S.A.R.L. Dacomex [1987] REV. ARB. 479.

64. *Id.*

65. *Id.*

66. 9 U.S.C. § 10(a)(2) (2011).

67. *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997).

68. *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 174 (2d Cir. 1984). For an extensive review of the U.S. case law on the challenge of arbitrators, see GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS (2 ed., 2001).

69. *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1209-10 (6th Cir. 1982). See W. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 I.C.L.Q., 26, 40 (1989).

*D. Two Remarkable ICC Cases*

The rules that vest the challenge of the arbitrator in the arbitral institution, at least in the first stage, are aimed at reducing the risk of the interference of national courts with the arbitral proceedings. However, the international practice includes some cases where national courts have intervened despite these protections. In the ICC Case *Salini Costruttori S.p.A. v. Ethiopia*,<sup>70</sup> which will be more extensively analyzed in the following paragraphs, the entire arbitral tribunal was subjected to a challenge for bias. The claim arose out of a decision issued by the tribunal stating that the first hearing on the merits of the arbitral proceedings was to be held in Paris, as the majority of witnesses and the participants in the hearing were based in Europe, without prejudice to Addis Ababa, Ethiopia, remaining the place of the arbitration, as contractually agreed.<sup>71</sup> This decision was in compliance with a provision of Terms of Reference that enabled the arbitrators to hold meetings and hearings at appropriate places other than the seat of arbitration.<sup>72</sup> Nevertheless, the respondent submitted to the ICC Court a challenge of all the three arbitrators, pursuant to Article 11 of the ICC Rules, alleging that the tribunal had improperly and abusively prioritised to its own convenience and to the convenience of Salini and its witnesses and had disregarded the convenience of the respondent and of its witnesses.<sup>73</sup> After the ICC Court rejected the request of removal of the three arbitrators, the Ethiopian party initiated appellate proceedings before the Addis Ababa Court of Appeal concerning the ICC Court's decision.<sup>74</sup> Pending its determination of the appeal, the Ethiopian Court issued an injunction ordering the suspension of the arbitral proceedings, threatening that the court would attach the property of, and sentence for contempt of court, any person breaching the injunction.<sup>75</sup> In the Award rendered on December 7, 2001, which will be more extensively examined in the following paragraph, the arbitral tribunal determined it was not bound by the injunctions issued by the Ethiopian Courts and decided to pursue the arbitral proceedings.<sup>76</sup>

In *Saipem v. Petrobangla*, the interference of the local court was even more explicit. The dispute concerned a contract for the construction of a gas pipeline in Bangladesh entered into between Saipem S.p.A., an Italian contractor, and the Bangladesh Oil Gas and Mineral Corporation (Petrobangla), a State entity.<sup>77</sup> The contract was governed by the law of Bangladesh and contained an ICC arbitration

70. *Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia*, Addis Ababa Water and Sewerage Authority, ICC Arbitration No. 10623/AER/ACS (Dec. 7, 2001), available at [http://italaw.com/documents/Salini\\_v\\_Ethiopia\\_Award.pdf](http://italaw.com/documents/Salini_v_Ethiopia_Award.pdf). See Antonio Crivellaro, *Note – Award of 7 December 2001 in case No. 10623*, 21 ASA BULLETIN 60 (2003).

71. *Salini Costruttori S.P.A.*, ICC Arbitration No. 10623/AER/ACS, ¶¶ 60-63.

72. *Id.* ¶ 34.

73. *Id.* ¶¶ 68-70.

74. *Id.* ¶¶ 75-77.

75. In the meantime, the respondent had also started a separate proceeding before the Ethiopian Federal First Instance Court in order to challenge the jurisdiction of the arbitral tribunal. Hence, another injunction was issued by this court “enjoining the Claimant from proceeding with the arbitration pending its decision on the Tribunal’s jurisdiction” *Id.* ¶¶ 88-89.

76. *Id.* ¶ 155.

77. *Saipem S.P.A. v. The Bangladesh Oil Gas & Mineral Corp. (Petrobangla)*, No. 7934/CK, ASA BULLETIN 18, 6, ¶¶ 6-7 (2000).

clause indicating Dhaka as the seat of arbitration.<sup>78</sup> During the arbitral proceedings, the tribunal denied several procedural requests submitted by Petrobangla, which, following these adverse decisions, filed several claims before the local courts seeking to revoke the tribunal's mandate for an alleged miscarriage of justice and to stay of the arbitration.<sup>79</sup> Unlike the preceding case, where the State party brought the challenge to the arbitrators to the ICC Court before resorting to the national courts, Petrobangla brought such an action directly to the Dhaka Court, in violation of Article 11 of ICC Rules.<sup>80</sup> A week later, the Supreme Court of Bangladesh issued an injunction restraining Saipem from proceeding with the ICC arbitration.<sup>81</sup> After few months, the same court issued a decision revoking the authority of the three arbitrators for miscarriage of justice.<sup>82</sup> Nevertheless, the tribunal decided to continue its proceedings "on the ground that the challenge or replacement of the arbitrators in an ICC arbitration falls within the exclusive jurisdiction of the ICC Court and not of the courts of Bangladesh" and that "the revocation of the authority of the ICC Arbitral Tribunal by the Bangladeshi courts was contrary to the general principles governing international arbitration."<sup>83</sup> Several other claims and injunctions followed this decision and when the arbitral panel issued a final award, it was considered as non-existent by the Supreme Court of Bangladesh.<sup>84</sup>

### E. Anti-suit Injunctions

#### 1. The Extent of the Problem

The anti-suit injunction is probably the most powerful and effective instrument available to national courts to intervene in arbitration.<sup>85</sup> Judge Stephen Schwebel referred to the anti-suit injunction as "one of the gravest problems of contemporary international commercial arbitration."<sup>86</sup> The effective extent of the use of anti-suit injunctions restraining international arbitration must be put into perspective.

First of all, anti-suit injunctions originate from common law systems and are rarely used, even if not completely unknown, in civil law jurisdictions.<sup>87</sup> In Swit-

78. *Id.* at 7, ¶ 10.

79. Saipem S.P.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Final Award, ¶¶ 24-25 (June 30, 2009), available at [http://www.lcil.cam.ac.uk/Media/Lectures/Saipem\\_v\\_Bangladesh\\_ICSID\\_Award.pdf](http://www.lcil.cam.ac.uk/Media/Lectures/Saipem_v_Bangladesh_ICSID_Award.pdf).

80. *Id.* ¶ 35.

81. *Id.* ¶ 37.

82. *Id.* ¶ 40.

83. Saipem v. Petrobangla, ICC Case No. 7934/CK, 18 A.S.A. BULL. 2, 12 (2000); *Bangladesh*, No. 7934/CK at 45.

84. *Bangladesh*, No. 7934/CK at 50.

85. Some authors use the term "anti-arbitration injunctions" to refer to injunctions restraining the conduct of arbitration proceedings. See, e.g., Julian D.M. Lew, *Does National Court Involvement Undermine the International Arbitration Process?*, 24 AM. U. INT'L L. REV. 489, 499 (2009).

86. Stephen M. Schwebel, *Anti-Suit Injunctions in International Arbitration – An Overview*, in ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 5, 5-6 (Emmanuel Gaillard ed., 2005).

87. Fernando Pombo, *Arbitration and Anti Suit Injunctions in the Case Law of the European Court of Justice*, in LIBER AMICORUM BERNARDO CREMADES 975 (Miguel Angel Fernandez-Ballesteros & David Arias eds., 2010).

zerland, the Court of First Instance of the Canton of Geneva, in the case *Air (PTY) Ltd. v. International Air Transport Ass'n*, expressly considered them as contrary to the Swiss legal system.<sup>88</sup> In Germany, it is reported that a national court has issued an anti-suit injunction only in one case, and that was not in the context of arbitration.<sup>89</sup> The Italian legal system does not seem to provide for instruments similar to those of the anti-suit injunction.<sup>90</sup> In France, the possibility for a court to restrain a party from pursuing an arbitral proceedings appears to be restricted by Article 1458 CPC, providing that “[i]f a dispute pending before an arbitral tribunal on the basis of an arbitration agreement is brought before a State court, it shall declare itself incompetent.”<sup>91</sup>

Secondly, even in common law systems, where anti-suit injunctions originated and are used widely, arbitration-friendly jurisdictions, such as England, tend to grant injunctions to restrain the arbitration proceedings only in exceptional circumstances.<sup>92</sup> In *Elektrim S.A. v. Vivendi Universal S.A.*, in which an injunction was sought to restrain the respondent from pursuing arbitration before the London Court of International Arbitration, the English Commercial Court affirmed that under the Arbitration Act 1996 “the scope for the court to intervene by injunction before an award is made by arbitrators is very limited.”<sup>93</sup>

Nevertheless, anti-suit injunctions remain a substantial concern in all the cases where arbitration is seated in a jurisdiction which is hostile to arbitration. Those jurisdictions are often developing countries, where significant investments and massive commercial transactions have been made during the last decades.<sup>94</sup> In these cases, it is not rare for commercial parties to be exposed to the improper use of anti-suit injunctions, as Judge Schwebel has stated in the sentence reported above.<sup>95</sup>

## 2. Reviewing the Main Cases

*Salini Costruttori S.p.A v. Ethiopia*. This case has been already examined with reference to the issue related to the challenge of the arbitrators. However, it

88. Tribunal de Première Instance [Court of First Instance], Case No. C/1043/2005-15SP (May 2, 2005) (Switz.), translated in 23 ASA BULL. 739, 747 (2005).

89. Alex C. Lakatos & Mark C. Hilgard, *Anti-Suit Injunctions in Defence of Arbitration: Protecting the Right to Arbitrate in Common and Civil Law Jurisdictions (Part II)*, 2 BLOOMBERG EUR. L.J. 41, 42 (2008), available at [http://www.cbsg.com.br/pdf\\_publicacoes/00273.pdf](http://www.cbsg.com.br/pdf_publicacoes/00273.pdf).

90. See Mariacarla Giorgetti, *Antisuit, Cross-Border Injunction e il Processo Cautelare Italiano*, RIVISTA DI DIRITTO PROCESSUALE, 484 (2003).

91. FRENCH CODE OF CIVIL PROCEDURE [C.P.C.], art. 1458; see also Julian D.M. Lew, *Control of Jurisdiction by Injunctions Issued by National Courts*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 185, 196 (Albert Jan van den Berg ed., 2007).

92. *J. Jarvis & Sons Ltd. v. Blue Circle Dartford Estates Ltd.*, [2007] EWHC (TCC) 1262, [39] (Eng.), available at <http://www.nadr.co.uk/articles/published/ArbitLRc/Jarvis%20v%20Blue%20Circle%202007.pdf>. In refusing an injunction, the court noted that, since Jan. 31, 1997, the Commercial Court has apparently never granted an injunction to halt an arbitration.

93. *Elektrim S.A. v Vivendi Universal S.A.*, [2007] EWHC (Comm) 11, [75] (Eng.), available at <http://www.nadr.co.uk/articles/published/ArbitLRc/Elektrim%20v%20Vivendi%202007.pdf>.

94. See Peter Cornell & Arwen Handley, *Himpurna and Hub: International Arbitration in Developing Countries*, 15 MEALEY'S INT'L ARB. REP. 12, 39 (2000).

95. Schwebel, *supra* note 86; see also Lew, *supra* note 91, at 186 (noticing that although the cases of anti-arbitration injunctions remain relatively few, they “cause serious concerns for all those involved in the arbitration”).

also contains some remarks on the effects of an anti-suit injunction issued by the court of the place of the arbitration.

The dispute arose out of a contract concerning the construction of an emergency raw water sewerage reservoir in Addis Ababa, Ethiopia.<sup>96</sup> The first part of the contract contained general provisions, stipulating that “unless otherwise specified in the contract,” disputes had to be submitted to ICC arbitration.<sup>97</sup> The second part of the contract contained special conditions of application stating that the seat of arbitration would be Addis Ababa and the Ethiopian Civil Code would govern the arbitration. Salini, the Italian contractor, filed a claim with the ICC Court in Paris and Ethiopia immediately objected to the tribunal’s jurisdiction claiming that the parties had agreed upon ad hoc arbitration under the Ethiopian rules of arbitration.<sup>98</sup> As seen above, when the ICC Court dismissed its challenge to all three arbitrators, Ethiopia initiated proceedings concerning the ICC’s decision before the Addis Ababa Court of Appeal.<sup>99</sup> A few days later, Ethiopia brought separate proceedings alleging the tribunal did not hold jurisdiction over the dispute before the Ethiopian Federal First Instance Court.<sup>100</sup> Pending the two proceedings, both the Ethiopian Courts issued injunctions addressed to the Italian claimant and to the arbitral tribunal, enjoining them from proceeding with the arbitration.<sup>101</sup>

With the Award Regarding the Suspension of the Proceedings and Jurisdiction dated December 7, 2001, the ICC tribunal ruled that it was not bound by the injunctions issued by the two Ethiopian Courts and that it was under a duty to proceed with the arbitration.<sup>102</sup> In particular, the tribunal based its decision on three founding principles: (1) the primary source of an arbitral tribunal’s authority is the parties’ agreement to arbitrate; (2) the arbitral tribunal has a duty to render an enforceable award; and (3) a State or State entity cannot resort to the State’s courts to frustrate an arbitration agreement.<sup>103</sup> While the last principle will be analyzed in the following section, the first two statements will be examined now, as they are crucial to understanding the tribunal’s position on the effects of the injunctions on the arbitration.

Concerning the first principle, the tribunal held that, in so far as its authority derived from the parties’ agreement to arbitrate, its primary duty was to the parties to ensure that their agreement to arbitrate was not frustrated. Thus, the arbitrators shall proceed with the arbitration, even where the continuation of the arbitral proceedings could create a conflict with the court of the seat of arbitration.<sup>104</sup> Taking a clear position in the debate on the nature of the arbitration and the role of the court of the seat, the tribunal stated, “an agreement to submit disputes to international arbitration is not anchored exclusively in the legal order of the seat of the

96. Salini Costruttori, S.P.A. v. Fed. Republic Eth., ICC Case No. 10623/AER/ACS, Award Regarding the Suspension of Proceedings and Jurisdiction, ¶¶ 7, 10 (Dec. 7, 2001), available at [http://italaw.com/documents/Salini\\_v.\\_Ethiopia\\_Award.pdf](http://italaw.com/documents/Salini_v._Ethiopia_Award.pdf).

97. *Id.* ¶ 11.

98. *Id.* ¶¶ 13-16.

99. See *infra* text accompanying sub-section 0.

100. *Salini Costruttori S.P.A.*, ICC Arbitration No. 10623/AER/ACS, ¶ 77.

101. *Id.* ¶ 88.

102. *Id.* ¶ 124.

103. *Id.* ¶¶ 125-76.

104. *Id.* ¶¶ 128, 138.

arbitration. Such agreements are validated by a range of international sources and norms extending beyond the domestic seat itself.”<sup>105</sup>

As for the duty to issue an enforceable award, the arbitral panel recognised that complying with the law and the decision of the seat is crucial, as the courts have the power to set aside an award rendered in their country.<sup>106</sup> However, the tribunal held that “the obligation to make every effort to render an enforceable award does not oblige an arbitral tribunal to render awards that are fundamentally unfair or otherwise improper. An arbitral tribunal should not go so far as to frustrate the arbitration agreement itself in the interests of ensuring enforceability.”<sup>107</sup>

While the principles affirmed in the award are convincing and cast clear light on the effects of a national court’s injunctions over international arbitration, some other statements should be subject to a more careful consideration. One of the grounds for denying any effect to the Ethiopian Court of Appeal’s order was that the appeal was improperly made, as the ICC Court had rejected the respondent’s challenge of the arbitrators, and that decision should have been considered as final under Article 11(3) of the ICC Rules.<sup>108</sup> However, as seen above, this provision has been mainly interpreted as not depriving the party of judicial recourse. If this interpretation had been accepted, the appeal brought to the Ethiopian Court against the ICC Court’s decision would have been perfectly legitimate under Article 3342 of the Ethiopian Civil Code,<sup>109</sup> which expressly applies to the arbitral proceedings.<sup>110</sup> Although challenge of the arbitrators brought by Ethiopia sounded groundless and specious, the legitimacy of its right to appeal the ICC Court’s decision is difficult to deny.

*Himpurna California Energy v. Indonesia.* The case arose out of multiple contracts by which two Bermudan corporations, owned by U.S. investors, Himpurna California Energy Ltd. (Himpurna) and Pathula Power Ltd. (PPL) agreed to build an electrical generation plant in Indonesia and sell the electricity produced to an Indonesian State company, PLN.<sup>111</sup> The contract was signed and approved by the Republic of Indonesia, which acted as guarantor for the obligations of its State companies. The contracts provided for arbitration in Jakarta under the UNCITRAL Arbitration Rules.<sup>112</sup>

When the dispute arose, the parties agreed to resolve it through two different arbitrations between the two Bermudan companies, and PLN and Indonesia re-

105. *Id.* ¶ 129.

106. *Salini Costruttori S.P.A.*, No. 10623/AER/ACS, ¶ 140.

107. *Id.* ¶ 144.

108. *Id.* ¶¶ 158-59.

109. See Hailcgaibriel G. Feyissa, *The Role of the Ethiopian Courts in Commercial Arbitration*, 4 MIZAN L. REV. 297, 319 (2010), available at <http://www.ajol.info/index.php/mlr/article/viewFile/63090/50958>.

110. See *Salini costruttori S.P.A.*, No. 10623/AER/ACS, ¶ 263; see also Reza Mohtashami, *In Defense of Injunctions Issued By the Courts of the Place of Arbitration: A Brief Reply to Professor Bachand’s Commentary on Salini Costruttori S.P.A. v. Ethiopia*, 20 MEALEY’S INT’L ARB. REP. 21, 47 (2005).

111. *Himpurna Cal. Energy Ltd. v. Republic Indon.*, Interim Award of 26 September 1999, in YEARBOOK COMMERCIAL ARBITRATION VOLUME XXV - 2000 109, 109-10 (Albct Jan van den Berg ed., 2000).

112. *Id.* at 114.



spectively, such that only if PLN were held liable, the arbitration against Indonesia would proceed.<sup>113</sup>

In May 1999, the arbitration panel rendered an award in the arbitration against PLN, ordering PLN to pay damages.<sup>114</sup> After both PLN and the Republic of Indonesia had denied the payment, the Bermudan companies started arbitration against Indonesia.<sup>115</sup> Shortly after, two different claims were brought before the Central District Court of Jakarta by Pertamina, a State-company which was also a party to the investment contract, seeking to annul the award against PLN and an injunction barring further proceedings against Indonesia.<sup>116</sup> The Indonesian Court granted two injunctions, one ordering the suspension of the enforcement of the first award, the other enjoining the Bermudan companies from proceeding with the arbitration against Indonesia and imposing a daily fine of U.S. \$ 1 million to any party that violated this order.<sup>117</sup>

Nevertheless, the arbitrators, using the powers conferred to them under Article 16(2) of the UNCITRAL Rules, decided to hold the hearings in The Hague, without prejudice of the seat of arbitration, which remained in Jakarta.<sup>118</sup> After failing to obtain an injunction to prevent the hearing, the Republic of Indonesia put pressure upon its appointed arbitrator, forcing him to return to Indonesia.<sup>119</sup> However, the truncated tribunal continued its proceedings and issued an award ordering Indonesia to pay damages to the claimants.<sup>120</sup>

Although the content of both the Interim and the Final Award rendered by the tribunal is significant, as it strengthens the argument that the tribunal's authority lies on the parties' agreement to arbitrate rather than the legal order of the seat of the arbitration,<sup>121</sup> the case has remained famous for the "aggressive"<sup>122</sup> involvement of local courts in respect of the arbitration, culminating in the forced abandonment of the panel by the Indonesia-appointed arbitrator.

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113 *Id.* at 110.

114 *Id.*

115 *Id.*

116 *Id.* at 110, 113.

117. Himpurna Cal. Energy Ltd. v. Republic Indon., Interim Award of 26 September 1999, in YEARBOOK COMMERCIAL ARBITRATION VOLUME XXV - 2000 109, 110 (Albert Jan van den Berg ed., 2000).

118. *Id.* at 145.

119. H. Priyatna Abdurraşvid, *They Said I Was Going to Be Kidnapped*, 18 MEALEY'S INT'L ARB. REP. 18, 29 (2003) (for an account of the kidnapping). See also Jacques Werner, *When Arbitration Becomes War: Some Reflections on the Frailty of the Arbitral Process in Cases Involving Authoritarian States*, 17 J. INT'L ARB. 97, 100 (2000).

120. Himpurna Cal. Energy Ltd. v. Republic Indon., Final Award of 16 Oct. 1999, in YEARBOOK COMMERCIAL ARBITRATION VOLUME XXV - 2000 109, 214 (Albert Jan van den Berg ed., 2000).

121. Himpurna Cal. Energy Ltd. v. Republic Indon., Interim Award of 26 Sept. 1999, in YEARBOOK COMMERCIAL ARBITRATION VOLUME XXV - 2000 109, 168 (Albert Jan van den Berg ed., 2000).

122. Mark Kantor, *International Project Finance and Arbitration with Public Sector Entities: When is Arbitrability a Fiction?*, 24 FORDHAM INT'L L.J. 1122, 1125 (2001).

*F. The “Self-serving Conduct”<sup>123</sup> by a State-party*

It cannot pass unnoticed that all the cases cited above involved a State or a State-owned entity as a respondent. Although this fact alone does not establish that States are in principle responsible for the interference of local courts in the running of an international arbitration, it is not a coincidence. More than a private party, a State or a public entity may be tempted to have recourse to national courts in order to obtain a strategic advantage in arbitration taking place on its own territory.<sup>124</sup> This is true for those constitutional systems where the division of powers is not clearly established, as the executive power may easily succeed in pressuring the judiciary to favor domestic economic interests of the country over those of a foreign company.<sup>125</sup> But even in jurisdictions where courts enjoy more independence, a public entity would be inclined to believe that its interests would be better defended by a “friendly” court, rather than a neutral arbitral panel.

In any case, it would be intolerable for the development of international contractual relationships if States were to be able to frustrate arbitration agreements by having recourse to their own courts. A similar principle has been recognised by a well-established precedent, according to which a State cannot invoke its national law to challenge the validity of an arbitration agreement or otherwise repudiate it.<sup>126</sup> If this is true for national legislation, the same principle may also apply with respect to decisions of national courts. This consequence was drawn clearly in *Salini Costruttori S.p.A. v. Ethiopia*, where the panel held that:

[I]n effect, there is no difference between a state unilaterally repudiating an international arbitration agreement or changing its internal law in an attempt to free itself from such an agreement, on the one hand, and a state going before its own courts to have the arbitral proceedings suspended or terminated [...] on the other hand. Both amount to the state renegeing on its own agreement to submit disputes to international arbitration.<sup>127</sup>

Nevertheless, the tribunal was prompt in specifying that this conclusion did not mean every application made by the State party to its own courts, where they are at the seat of arbitration, would have been objectionable. Indeed, the courts of the seat retained their supervisory role on arbitral proceedings. The problem would arise only when the State entity is resorting to its own courts “in an illegitimate

123. See Jan Paulsson, *Interference by National Courts*, in THE LEADING ARBITRATORS GUIDE TO INTERNATIONAL ARBITRATION 119, 143 (Lawrence W. Newman & Richard D. Hill eds., 2d ed. 2008) (defining “self-serving conduct”).

124. Emmanuel Gaillard, *L’interférence des Juridictions du Siège dans le Déroulement de l’Arbitrage*, in LIBER AMICORUM CLAUDE REYMOND 83, 90 (2004).

125. See Werner, *supra* note 119.

126. *Benteler v. Belgium*, Ad hoc Award (Nov. 18 1983), in REV. D’ARB 1989, 339 (1989); *Elf Aquitaine Iran v. Nat’l Iranian Oil Co.*, Preliminary Award of 14 January 1982, in YEARBOOK COMMERCIAL ARBITRATION 104 (Albert Jan van den Berg ed., 1986); see generally *Framatome v. Atomic Energy Organization of Iraq*, ICC Case No. 3896, Award on Jurisdiction (Apr. 30, 1982); see also Jan Paulsson, *May a State Invoke its Internal Law to Repudiate Consent to International Commercial Arbitration?*, 2 ARB. INT’L 90, 90 (1986).

127. *Salini Costruttori S.P.A.*, *supra* note 96, ¶ 166.

effort to renege upon the arbitration agreement.”<sup>128</sup> The meaning to be attributed to the term ‘illegitimate’ in this context is an issue that will be addressed in the following section.

### *G. Should Arbitrators Comply with the Order of the Courts of the Seat?*

In all the cited cases, the arbitral panels reacted to the interference of the local courts by disregarding their orders and continuing with the arbitral proceedings until the issuance of a final award. The question is whether arbitrators should comply with the orders of the courts of the seat or, on the contrary, be entitled to disregard such orders.

As it was held in *Salini Costruttori S.p.A. v. Ethiopia*, arbitrators have a primary duty towards the parties to ensure that their agreement to arbitrate is not frustrated. In this sense, they should disregard the local court’s order if it is aimed to suspend or disrupt the arbitral proceedings. On the other hand, arbitrators have a duty to render an enforceable award.<sup>129</sup> Consequently, arbitrators are bound to respect orders issued from the courts of the seat of arbitration, if they want their award to be enforced by those courts. Moreover, an award that has been annulled by the court of the seat will lose the privileges on enforcement offered by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“New York Convention”). Under Article 5 of the New York Convention, recognition and enforcement of the award may be refused, among other grounds, when the award “has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”<sup>130</sup> It is also worth recalling that the arbitration is governed by the law of the place in which it is held (*lex arbitri*), or at least by those rules of the *lex arbitri* that are not, and cannot be, derogated by the parties’ agreement. When the parties choose to place an arbitration dispute in a particular country, that placement involves submission to the laws of that country, including any mandatory provisions of its law on arbitration.<sup>131</sup>

Since arbitration finds its legitimacy in the parties’ agreement, it is clear that if none of the parties request arbitration to proceed after the intervention of the courts, it must be suspended or terminated.<sup>132</sup> However, as the cases mentioned so far demonstrate, in practice arbitrators face cases where one party resorts to the courts in order to enjoin the proceedings while the other party insists they continue. In order to address these issues, they must adopt a clear and fair standard to

128. *Id.* ¶ 176.

129. See International Chamber of Commerce (ICC) Rules of Arbitration, effective Jan. 1, 2012, art. 41, available at <http://www.iccwbo.org/court/arbitration/id4199/index.html> (“In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law”).

130. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, article 5 (“1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: . . . (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made”).

131. BLACKABY ET AL., *supra* note 1, at 184.

132. Radicati di Brozolo & Malintoppi, *supra* note 26, at 1000.

determine whether to continue with arbitration or to renounce their powers and refer the dispute to the local jurisdiction.

The easiest solution would be that arbitrators should not comply with an order issued by a national court if it is illegitimate. This solution raises more questions than it answers, as it does not explain under which law the intervention of national courts should be considered as illegitimate.<sup>133</sup> In the absence of any reference, the term recalls the same impalpable difference between intervention and interference, referred to in Part I. It is worth noticing that almost every order issued by a national court would be perfectly legitimate under its national law.

Some scholars refer to the “accepted practice of international arbitration” and the “accepted international law rules applicable to international arbitration,”<sup>134</sup> with specific reference to the principles of competence-competence, separability, and the doctrine that the legality of the arbitral process may only be controlled after an award is made.<sup>135</sup> This solution is attractive but raises two main problems: first, the *renvoi* to the principles of international arbitration law would not satisfy the need for more certainty; secondly, the principles in question are grounded in arbitral case law and national laws, but they are not universally accepted. It is even harder to claim that these principles are part of “international law as it applies to international arbitration.”<sup>136</sup> On the contrary, a review of the relevant case law indicates that they are not shared by those arbitration-unfriendly jurisdictions whose courts are more likely to intervene to hinder the smooth running of arbitral proceedings. It is also very difficult to say that national courts are bound by these principles, unless they are not part of national arbitration law.

As seen in the previous paragraph, the *Salini* award seems to state that arbitrators should decline to comply with an order issued by the court of the seat if it is inconsistent with the parties’ agreement.<sup>137</sup> This is a reasonable solution, but should be better clarified. When is an order inconsistent with the parties’ agreement? First of all, when it is contrary to the provisions of the arbitration clause or violates the rules governing the selected arbitration procedure. In *Saipem v. Petrobangla*, the proceedings brought by Petrobangla before the Bangladeshi Courts concerning the alleged the arbitrators’ misconduct were in open violation of the ICC Rules, applicable pursuant to the arbitration clause, which provide that a challenge to the arbitrators must be submitted to the ICC Court. In this sense, the orders issued by the Supreme Court of Bangladesh restraining Saipem from proceeding with the arbitration and revoking the authority of the arbitral tribunal were inconsistent with the arbitration agreement and with the (original) intention of the parties. In fact, the choice of the ICC arbitration excludes, at least in the first instance, any possibility for the domestic courts to rule on the removal of the

133. See Luca Radicati di Brozolo, *Interference by National Courts with International Arbitration: the Situation After Saipem v. Bangladesh*, in *NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 2009* 1, 11 (Christoph Müller & Antonio Rigozzi, eds., 2009).

134. Lew, *supra* note 91, at 214.

135. *Id.* See also Gaillard, *supra* note 124, at 91.

136. Lew, *supra* note 134, at 217.

137. *Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia*, Addis Ababa Water and Sewerage Authority, ICC Arbitration No. 10623/AER/ACS, ¶ 128 (Dec. 7, 2001), available at [http://italaw.com/documents/Salini\\_v.\\_Ethiopia\\_Award.pdf](http://italaw.com/documents/Salini_v._Ethiopia_Award.pdf); see also Frederic Bachand, *Must An ICC Tribunal Comply With An Anti-Suit Injunction Issued By The Courts Of The Seat Of The Arbitration?*, 20 MEALEY’S INT’L ARB. REP. 16, (2005) (commenting on *Salini Costruttori S.P.A. v. Ethiopia*).

arbitrators. Identical considerations should be made with respect to injunctions issued by the Indonesian Courts in contradiction with the UNCITRAL Rules as in *Himpurna v. Indonesia*.

The guiding principle of the parties' intentions and expectations may be appropriate even when the seat of arbitration's procedural rules apply. This may happen in cases where the national court's order is consistent with the arbitration clause or the arbitral procedure, or in cases where the arbitration clause is silent with respect to the procedural rules to be applied. In the *Salini* case, the tribunal censured the State party for its "illegitimate effort to renege upon the arbitration agreement."<sup>138</sup> Broadening this statement, it can be affirmed that a domestic court's order is inconsistent with the parties' agreement when it is grounded only on the abusive intent of one of the parties to frustrate the agreement through the suspension or the halt of the arbitration. In *Salini Costruttori S.p.A. v. Ethiopia*, if we rely on the interpretation of the ICC Rules that does not impede the recourse to national courts after having unsuccessfully challenged the arbitrators before the ICC Court, the action concerning the alleged arbitrators' misconduct brought by the respondent before the Ethiopian Courts was not inconsistent with the arbitration clause. Nevertheless, as the challenge was brought regarding the arbitrators' conduct—which was fully in compliance with the ICC Rules—it can be stated that the only ground on which the claim relied upon was the intention of Ethiopia to impede the arbitral proceedings. It is a standard not far from that of the "*prima facie* groundless" claim that exists in many domestic jurisdictions and from the doctrine of the abuse of right, which has been widely recognized as a principal of international law.<sup>139</sup>

It may be argued that the proposed criterion is still too vague and leaves broad discretion to arbitrators on whether they should comply with the domestic courts' orders and stay arbitration proceedings or disregard them and continue with the arbitration until the final award is rendered. As vague as it may be, this approach provides arbitrators with flexibility, which is necessary when legal and practical problems are at issue. For example, if the respondent's assets are located predominantly in the country of the seat, the arbitrators should be very careful in ignoring the local courts' decisions, when this would threaten the enforcement of the award.

On the other hand, the proposed criterion is strict in requiring the tribunal to disregard domestic courts' orders only when they are patently groundless and based on the mere intention to hinder the arbitral proceedings. This means these orders should normally be considered as an expression of the supervisory powers of the court of the seat and, therefore, directly applicable to the tribunal.<sup>140</sup> This

138. *Salini Costruttori S.P.A.* ICC Arbitration No. 10623/AER/ACS, ¶ 176.

139. See *Saipem S.P.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Final Award, ¶ 160 (June 30, 2009), available at [http://www.lcil.cam.ac.uk/Media/lectures/Saipem\\_v\\_Bangladesh\\_ICSID\\_Award.pdf](http://www.lcil.cam.ac.uk/Media/lectures/Saipem_v_Bangladesh_ICSID_Award.pdf). It is worth recalling that according to the abuse of right doctrine, the exercise of a right for a purpose that is different from that for which the power was given constitutes an abuse of that right.

140. In this sense, the solution proposed seems able to provide an answer to the concerns of those scholars who give the greater importance to the *lex arbitrii* of the seat. See JEAN-FRANÇOIS POUDET & SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 117 (Stephen V. Berti & Annette Ponti trans., 2d ed. 2007) (affirming that the arbitrators should obey the decisions

rule also seems to reflect the mutual relationship between the court of the seat and the arbitration agreement: by choosing to refer their dispute to arbitration with its seat in a certain country, the parties expressly agreed to be bound by the decisions of the court of the seat and subject to their supervisory powers. As a consequence, these decisions are binding and these powers shall be complied with only if they do not frustrate the arbitration agreement, which is the ground that justifies the exercise of courts' powers upon the parties.

### III. A POSSIBLE REMEDY TO THE COURT'S INTERFERENCE

#### *A. The Courts' Misconduct is a Denial of Justice*

The previous Part focused on the undue interference of the court of the seat on international arbitration and offered a possible solution for the question of whether arbitrators should comply with a court's order. This Part considers the possible scenarios that may occur after a court's intervention has taken place and the solutions parties may resort to after the arbitration has been disrupted by a domestic court.

One possible solution can be found in the doctrine that the wrongful conduct of the national courts is a ground for state responsibility under investment treaties. That the misconduct of domestic courts may lead to an international wrong by the State is not a new development in international law and this principle has already been affirmed by the French-Italian Conciliation Commission in decision No. 136 of 25 June 1952 concerning a dispute over Italian properties in Tunisia, where it was held that: "*La sentence rendue par l'autorité judiciaire est une émanation d'un organe de l'État [...] La non-observance d'une règle internationale, de la part d'un tribunal, crée la responsabilité internationale de la collectivité dont le tribunal est un organe.*"<sup>141</sup> This principle was codified in Article 4 of International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which states that: "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions."<sup>142</sup>

The failure of a national legal system to provide due process to aliens is traditionally subsumed under the concept of denial of justice, which represents a fundamental part of customary international law on the treatment of aliens, usually embodied in the notion of Fair and Equitable Treatment (FET). The concept of denial of justice embraces not only the refusal of access to justice, but also cases where investors resorting to domestic litigation in the host state face proceedings

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issued by the courts at the seat, unless they are manifestly abusive. This argument appears to suggest that when those decision are abusive, the courts themselves violate the law of the seat).

141. U.N. Reports of Int'l Arb Awards [Recueil Des Sentences Arbitrales], French/Italian Conciliation Commission XIII, 438 (Dec. 7, 1955) (interpretation of article 79 of the 1947 Peace Treaty).

142. Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly: *Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR INT'L L. COMM'N 53d Sess., U.N. Doc. A/CN.4/L.602/Rev.1 (2001).

marred by undue delay, illegitimate assertion of jurisdiction, discrimination, corruption or gross incompetence.<sup>143</sup>

Traditionally, denial of justice was a ground to invoke the State's responsibility under the aegis of diplomatic protection. However, with the recent expansion of bilateral investment treaties (BIT) and regional trade agreements, such as the North American Free Trade Agreement (NAFTA) allowing direct access to arbitration, investors who have fallen victim to a violation of their right of access to justice have started to bring their claims before international arbitration tribunals.

In the last decade there have been a number of claims raised by foreign investors whose rights have allegedly been violated by the domestic courts of the State where the investment was made.<sup>144</sup> The various situations in which international liability may arise as a consequence of the actions of domestic courts were analyzed in detail in *Azinian v. Mexico*.<sup>145</sup> In that case the NAFTA tribunal held that a denial of justice that breaches NAFTA's guarantees of fair and equitable treatment arises when a municipal court's decision is "clearly incompatible with a rule of international law," or when the relevant courts "refuse to entertain a suit," "subject it to undue delay" or "administer justice in a seriously inadequate way."<sup>146</sup>

In a second claim under NAFTA Chapter 11, a Canadian company brought an action against the City of Boston for breach of contract to sell property within a redevelopment plan.<sup>147</sup> While the Massachusetts First Instance Court found in favour of the Canadian claimant, the decision was reversed by the Supreme Judicial Court and then by the U.S. Supreme Court. The investor initiated arbitration proceedings against the United States for breach of NAFTA Chapter 11 obligations, alleging that the Massachusetts state court rulings constituted an expropriation of the investment.<sup>148</sup> In dismissing the claim, the tribunal tried to set an applicable standard for denial of justice, holding that "[t]he test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome" and that the decision of the domestic courts should be "clearly improper and discreditable."<sup>149</sup>

In *Waste Management v. Mexico*, the NAFTA tribunal referred to the above mentioned case law to specify the content of the minimum standard of FET, holding that the latter "is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, . . . or involves a lack of due process leading to an outcome which offends judicial

143. All these categories are analysed by JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), which represents the most recent and complete modern treatise on denial of justice.

144. See Alexis Mourc & Alexandre Vagenheim, *Some Comments on Denial of Justice in Public and Private International Law After Loewen and Saipem*, in LIBER AMICORUM BERNARDO CREMADES 843, 848 (Fernández Ballesteros & David Arias eds., 2010).

145. See Robert Azinian v. The United Mexican States, ICSID Case No. ARB(AF)/97/2, First Application of ICSID Additional Facility Rules, ¶¶ 99-103 (Nov. 1, 1999), 14 ICSID Rev. – F.I.L.J. 538 (1999), reprinted in 39 I.L.M. 537 (2000), available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC544\\_En&caseId=C156](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC544_En&caseId=C156).

146. *Id.* ¶ 102.

147. *Mondev Int'l, Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award (Oct. 11, 2002), 42 I.L.M. 85 (2003), available at <http://www.state.gov/documents/organization/14442.pdf>.

148. *Id.* ¶ 2.

149. *Id.* ¶ 127.

propriety.”<sup>150</sup> In this case, the claim of denial of justice was grounded, among others, on the attempt of the City of Acapulco to frustrate an arbitration agreement entered into with the claimant by commencing proceedings before Mexican courts. The NAFTA tribunal rejected the claim only because “it may be inferred from the decisions both of the federal and State courts that they would have enforced the arbitration clause against the City.”<sup>151</sup> It can be gleaned from the wording of the award that if the Mexican courts had upheld the groundless objection raised by the City, Mexico would have been accountable for a violation of international law.

In all the three cases mentioned, the NAFTA tribunals attempted to set a reasonable and acceptable standard of denial of justice, but denied that a violation of that standard was committed by the respondent State. Even in the well-known *Loewen* case, where the occurrence of a denial of justice was patent, the investment tribunal dismissed the investor’s claim, on the basis of the failure to satisfy the rules on the continuous nationality and on the exhaustion of domestic remedies.<sup>152</sup> The experience of NAFTA case-law demonstrates the reluctance of international judges to recognize that a denial of justice has been perpetrated by the host State.

However, in recent years, investment tribunals seem to have abandoned their initial reticence to effectively protecting investors against the abuse of jurisdictional powers perpetrated by the host State. In *Chevron-Texaco v. Ecuador*,<sup>153</sup> the U.S. claimant filed seven breach-of-contract cases against the Government before the Ecuadorian courts, but all the judges failed to rule for thirteen years in any of these cases. The UNCITRAL tribunal addressed the claim as a breach of the provision of the U.S.-Ecuador BIT concerning effective means of asserting claims and enforcing rights, rather than a case of denial of justice.<sup>154</sup> The BIT provision was considered *lex specialis* with respect to the prohibition of denial of justice, requiring a less-demanding test, even if the two concepts substantially overlapped. This way, the tribunal discharged the claimant from meeting the high threshold requested for denial of justice.<sup>155</sup>

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150. *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Final Award, ¶ 98 (Apr. 30, 2004), 43 I.L.M. 967 (2004), available at [http://www.naftalaw.org/disputes\\_mexico\\_waste.htm](http://www.naftalaw.org/disputes_mexico_waste.htm).

151. *Id.* ¶ 123.

152. *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Case No. ARB(AF)/98/3, Final Award (June 26, 2003), 42 I.L.M. 811 (2003), available at <http://naftaclaims.com/Disputes/USA/Loewen/LoewenFinalAward.pdf>. The award was subject to stern criticism: see, e.g., Noah Rubins, *Loewen v. United States, the Burial of an Investor-State Investment Claim*, 21 ARB. INT’L L. 1 (2005); Francesco Francioni, *Access To Justice, Denial Of Justice And International Investment Law*, 20 EUR. J. INT’L L. 729 (2009); JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 182-94 (2005).

153. *Chevron Corp. & Texaco Petroleum Corp. v. The Republic of Ecuador*, Perm. Ct. Arb. Case No. 2009-23, Partial Award on the Merits (Mar. 30, 2010), available at <http://italaw.com/documents/ChevronTexacoEcuadorPartialAward.PDF>.

154. *Id.* ¶¶ 241-43.

155. *Id.* ¶ 244.



*B. Does the Domestic Courts' Interference Constitute a Denial of Justice?*

In all the mentioned cases, the State's alleged responsibility came from the impossibility for the investor to find adequate redress before the local courts. The issue to be discussed in this section is whether an investor may hold the State responsible for its undue disruption of the arbitration proceedings caused by a national court. The idea that the refusal of a State to arbitrate pursuant to an arbitration clause in a contract between that State and an alien constitutes a denial of justice was first formulated by Judge Schwebel with these words:

The right of an alien to arbitration of disputes arising under a contract is a valuable right, at times so valuable that the alien will contract only on condition of contractual assurance of that right . . . . If the alien's right to arbitration is negated by the contracting State, a wrong under international law ensues.<sup>156</sup>

Would it make any difference under international law if the negation of the alien's right to arbitration by the contracting State were grounded on the undue interference of local courts rather than on the refusal of the Government to arbitrate? From a general point of view, the answer should be negative, as an international wrong may be committed by a State through any of its organs, no matter whether governmental or judiciary. As Judge Schwebel in a more recent contribution affirmed, "when a domestic court, an organ of the State in the eyes of international law, blocks access to arbitration through issuance of an anti-suit injunction, that too constitutes a denial of justice for which the State of which the court is part . . . is internationally responsible."<sup>157</sup>

However, an international tribunal has never decided this issue. The first and only attempt to affirm the State's responsibility for denial of justice caused by local courts' undue disruption of an arbitration was *Saipem v. People's Republic of Bangladesh*. This ICSID case is the second episode of a legal saga starting with the ICC case, *Saipem v. Petrobangla*, already mentioned in Part III.<sup>158</sup> After the Supreme Court of Bangladesh considered the ICC award as non-existent, Saipem filed a claim before ICSID under the Italy-Bangladesh BIT. However, this BIT provided for compensation in case of expropriation only and, in addition, Saipem had not attempted to exhaust legal remedies theoretically available in Bangladesh. This is why the claim was pleaded as an expropriation and not as a denial of justice.<sup>159</sup> Saipem argued that misconduct of the Bangladeshi courts expropriated Saipem's right to have the dispute settled by arbitration.<sup>160</sup>

The case was argued and decided by using the conceptual framework and the authorities concerning the denial of justice. The ICSID tribunal held that in revoking the ICC arbitrators' authority, "the Bangladeshi courts exercised their

156. STEPHEN M. SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 66 (1987).

157. Schwebel, *supra* note 86, at 13.

158. *Saipem v. Petrobangla*, ICC Case No. 7934/CK, 18 A.S.A BULL. 2, 12 (2000).

159. *Saipem S.P.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Final Award, ¶¶ 129-34 (June 30, 2009), available at [http://www.lcil.cam.ac.uk/Media/lectures/Saipem\\_v\\_Bangladesh\\_ICSID\\_Award.pdf](http://www.lcil.cam.ac.uk/Media/lectures/Saipem_v_Bangladesh_ICSID_Award.pdf).

160. *Id.*

supervisory jurisdiction for an end which was different from that for which it was instituted and thus violated the internationally accepted principle of prohibition of abuse of rights.”<sup>161</sup> This expression clearly recalled the principles of denial of justice, even without mentioning them. As the case was pleaded as an expropriation, the tribunal held that the rule of exhaustion of local remedies did not apply.<sup>162</sup> However, in obiter the tribunal affirmed that if that requirement applied, Saipem would be deemed to have satisfied it, as recourse to other courts in Bangladesh would have been futile.<sup>163</sup> Indeed, it seems that if the BIT had contained a FET clause, this case would have been the first one in which compensation for denial of justice would have been awarded to an investor.

The tribunal’s qualification of the local courts’ conduct as an expropriation rather than a denial of justice raised some doubts among scholars.<sup>164</sup> However, the *Saipem* case opens the road to redress for investors whose right to settle the dispute by arbitration has been frustrated by the interference of the domestic courts. Although in every case mentioned, the tribunal was very cautious in explaining that investment tribunals are not courts of appeal, as a practical matter, every arbitral panel was ready to review the national court’s decision on the merits.

Obviously, not all situations where arbitration proceedings have been disrupted by the intervention of the local courts may be the subject of a claim before investment tribunals. At least the following prerequisites should exist:

- i) the dispute should arise directly out from an investment;
- ii) there must be an applicable treaty (a BIT or a multilateral treaty) between the State whose investor is a national and the State where the investment has been made;
- iii) the treaty should provide for compensation in case of denial of justice or more generally a violation of FET;
- iv) the interference must come from the courts of the host State;
- v) the investor must have exhausted the local remedies provided by the host State.

As *Saipem* demonstrated, in the absence of the requirement under (iii), the claim may be successfully pleaded as an expropriation of the right to arbitrate. It may be argued, however, that even in this event, the rule of the exhaustion of local remedies should apply, as it seems relevant every time an international wrong rises from a miscarriage of justice. Since the *ratio* underlying this principle resides in the need to resort to the remedies provided by a legal system, before affirming the failure of the entire system, it seems clear that this *ratio* is common to

161. *Id.* ¶ 91.

162. *Id.* ¶ 181.

163. *Id.* ¶¶ 182-84.

164. Mouric & Vagenheim, *supra* note 144, at 864-66; see also Mavluda Sattorova, *Judicial Expropriation or Denial of Justice? A Note on Saipem v Bangladesh*, 13 INT’L ARB. L. REV. 35 (2010).

any form of court's misconduct, should it be considered a denial of justice or an expropriation. On the other hand, *Saipem* showed a more flexible approach in discerning the situations where the attempt to resort to local remedies is futile, through the application of a standard of "reasonable" measures which is lower than the one imposed in the *Loewen* case and is meant to reconcile the need to give the system a "possibility of redemption" and the protection of the investor.

The *Saipem* decision has proved to be controversial and its solutions have not always been shared.<sup>165</sup> In *GEA v Ukraine*, a German investor started ICSID proceedings against Ukraine after having unsuccessfully tried to enforce an ICC award in the Ukrainian domestic courts. The arbitral tribunal determined that "the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself".<sup>166</sup> However, the statement that an award "in and of itself" does not constitute an investment does not appear to be in contrast with the findings of the *Saipem* Tribunal, which held that "the rights embodied in the ICC Award were not created by the Award, but arise out of the Contract." Thus, the *Saipem* Tribunal did not find necessary to state whether the Award itself qualifies as an investment, since the contract rights constituted an investment within the BIT.<sup>167</sup> A halfway approach was adopted in *Frontier Petroleum Services Ltd v. Czech Republic*, where the tribunal determined that, by refusing to recognize and enforce the Final Award in its entirety, the Respondent "could be said to have affected the management, use, enjoyment, or disposal by Claimant of what remained of its original investment."<sup>168</sup>

The *GEA* and *Frontier Group* awards prove the uneasiness of the arbitral tribunals to establish that a domestic court's failure to enforce an award constitutes an expropriation. However, "this is not to say that treaty tribunals will or should desist from reviewing the conduct of national courts."<sup>169</sup> In fact, the interference of a State with international arbitration through the action of the local courts can still be evaluated against the threshold of the principle of denial of justice.

#### IV. CONCLUSION

Generalizing a statement from Judge Schwebel, the phenomenon of the intrusion of local courts into international arbitration proceedings "has generated too little consideration, still less confrontation, and still less cure."<sup>170</sup> The extent of this interference depends upon the national attitude towards international arbitra-

165. Promod Nair, *State Responsibility for Non-Enforcement of Arbitral Awards: Revisiting Saipem Two Years On*, KLUWER ARB. BLOG (Aug. 25, 2011), <http://kluwerarbitrationblog.com/blog/2011/08/25/state-responsibility-for-non-enforcement-of-arbitral-awards-revisiting-saipem-two-years-on>.

166. *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, ¶ 162 (Mar. 31, 2011), available at [http://ita.law.uvic.ca/documents/GEA\\_v\\_Ukraine\\_Award\\_31Mar2011.pdf](http://ita.law.uvic.ca/documents/GEA_v_Ukraine_Award_31Mar2011.pdf).

167. *Saipem v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶¶ 127-28 (Mar. 21, 2007), available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC529\\_En&caseId=C52](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC529_En&caseId=C52).

168. *Frontier Petroleum Servs. Ltd v. Czech Republic*, Perm. Ct. Arb., Final Award, ¶ 231 (Nov. 12, 2010), available at <http://www.italaw.com/documents/FrontierPetroleumv.CzechRepublicAward.pdf>.

169. Nair, *supra* note 165.

170. Schwebel, *supra* note 86, at 5.

tion, which may range between an arbitration-friendly attitude and a suspicion towards alternative dispute resolution mechanisms. Nevertheless, it is a phenomenon that has gained a new momentum in the last decade. As it has been noted, “the interference by sovereign entities is on the rise.”<sup>171</sup>

As mentioned in Part I, this article looks upon two fundamental questions: (1) whether the arbitrators should comply with a local court’s order aimed at suspending or interrupting the running of arbitral proceedings, and (2) what type of remedies should a party receive when courts unjustly interfere with their right to arbitrate. Neither of these questions has a straightforward answer because they rely both on juridical factors, such as the adopted theory on the nature of the arbitration and the interpretation of the parties’ original intent, and on the specific factual circumstances of the case.

Concerning the first question, the solution proposed is grounded on the original intention of the parties, considered as the primary source of the arbitrators’ authority. This does not imply that arbitrators can disregard every decision issued by local courts, nor that arbitration shall exist in a legal vacuum, floating above domestic legal systems. On the contrary, this solution lies on the simple consideration that the parties have originally decided to resort to arbitration because they wanted to avoid submitting their dispute to domestic jurisdiction. As a consequence, the intervention of local courts is justifiable only if it is not in violation of the arbitration agreement. Since a national court is not bound by the rules set by parties or arbitral institutions,<sup>172</sup> it is not the validity of the court’s decisions that must be assessed at this point, but the opportunity for the arbitrators to comply with those decisions.

As outlined before, according to the solution proposed, the arbitrators may ignore the local court’s order when it is inconsistent with the provisions of the arbitration clause or violates the rules governing the selected arbitration procedure, since the arbitrators’ primary duty towards the parties mandates this approach. On the contrary, this cannot apply when the national court’s order is consistent with the arbitration clause or the arbitral procedure or it is in compliance with the local procedural rules applicable to the arbitral proceedings. In these cases, it seems that the arbitrators could reasonably disregard the said order only when it is grounded on the abusive intent of one of the parties to frustrate this agreement through the suspension or the disruption of the arbitration. It is worth noting that the court’s decision may be regarded as illegitimate under international law, and giving rise to a denial of justice, under this latter case. It also seems fair to recognize that while the latter standard has been accepted even by the scholars who pay the utmost respect to the courts of the seat of arbitration,<sup>173</sup> the former would probably be firmly opposed. This is what the arbitrators could do. Turning to the second question, *Saipem* is a landmark decision since it gives new hope to investors, holding that States could be considered liable under international law for the wrongful conduct of their courts hindering the arbitral proceedings.

171. C. Mark Baker, *Section Three: Denial Of Justice in Local Courts*, in INVESTMENT TREATY LAW: CURRENT ISSUES VOLUME I 187, 190 (Federico Ortino, Audley Sheppard & Hugo Warner eds., 2006).

172. See *Saipem S.P.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Final Award, ¶ 138 (June 30, 2009), available at [http://www.lcil.cam.ac.uk/Media/lectures/Saipem\\_v\\_Bangladesh\\_ICSID\\_Award.pdf](http://www.lcil.cam.ac.uk/Media/lectures/Saipem_v_Bangladesh_ICSID_Award.pdf).

173. POUURET & BESSON, *supra* note 140, at 117.

In a certain sense, the threshold adopted by investment tribunals in assessing the commission of a denial of justice is consistent with the second standard proposed above to guide the arbitrators' decisions whether to comply with or disregard the order of courts interfering in the arbitration, as they both borrow some ideas from the doctrine of the abuse of right. It is true that the threshold related to denial of justice is stricter than the standard proposed, as the relevant jurisprudence held that the decision of the local court must be "arbitrary, grossly unfair, unjust or idiosyncratic,"<sup>174</sup> offending "judicial propriety."<sup>175</sup> However, this difference may be mainly attributed to the higher level of gravity that conduct should show to be considered an international wrong rather than a mere standard for assessing the opportunity of a decision.

Apart from the proposed solution, the interference by national courts is often an effect of a wrong choice of the seat of arbitration. Being perfectly aware that in practice lawyers' concerns may give way due to the lack of bargaining power of their clients, nonetheless it seems useful to mention some simple contractual precautions that aim at minimizing the risk of disruption of the arbitral proceedings. The straightforward suggestion would be to avoid seating arbitration in a country that is not arbitration-friendly or has not ratified the New York Convention. Two additional suggestions may be drawn from the *Himpurna* case. First, the arbitration clause should provide that none of the arbitrators be a national or a resident or have assets in the country of the seat.<sup>176</sup> It would also be safer if none of the arbitrators had the same nationality as the parties. Secondly, the arbitration clause should give the arbitrators the power to hold hearings in a place different from the seat of the arbitration. The interference of the local courts is a phenomenon that pertains to the pathological aspect of the relationship between national jurisdictions and international arbitration and, as a consequence, it is difficult to prevent. Nevertheless, a wisely constructed clause may give the arbitration a shelter from any inappropriate interference.

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174. *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Final Award, ¶ 98 (Apr. 30, 2004), available at <http://naftaclaims.com/Disputes/Mexico/Waste/WasteFinalAwardMerits.pdf>.

175. *Id.*

176. This may be a drastic measure, as it means that it would not be possible to appoint an English arbitrator if the seat of arbitration is London. Obviously, this suggestion applies when the arbitration is seated in a country that has a hostile approach towards arbitration.