ANTI-SUIT INJUNCTION IN INTERNATIONAL COMMERCIAL ARBITRATION: A Critical Analysis

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International commercial arbitration has been referred to as a means of resolving disputes arising under international commercial contracts. It is used as an alternative to litigation and is controlled primarily by the terms previously agreed upon by the contracting parties, rather than by national legislation or procedural rules. The parties can specify the forum, procedural rules, and governing law at the time of the contract. It can be either "institutional" where there is an institution or arbitral body handling the dispute or *"ad hoc"* if the parties have set up their own rules for arbitration. It covers matters arising from all relationships of a commercial nature, whether contractual or not which include, but not limited to the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.[1]

International commercial arbitration began to flourish in Continental Europe in the 1920s. As a result of two major difficulties encountered in international commercial arbitration in Europe, in which an agreement to arbitrate was limited only to an existing dispute and to the recognition/enforcement of foreign arbitral awards, the Protocol on Arbitral Clauses was adopted. In 1927, the League of Nations adopted

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1 An Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes. Sec. 21 (2004).

the Geneva Convention to resolve the problem on the execution of foreign arbitral awards. Contracting states agreed to enforce arbitral awards in the territory of another contracting state. The Geneva Convention and the Protocol on Arbitral Clauses were adopted by a large number of States and were generally successful. Meanwhile, the International Chamber of Commerce (ICC), succeeding from the League of Nations, found it advantageous to combine the provisions of the 1923 Protocol on Arbitral Clauses and 1927 Geneva Convention into a single Convention which resulted in the enactment of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, popularly known as the New York Convention. The principal change is its consideration of the arbitration agreement and the arbitral award as prima facie evidence of the award's enforceability. Thus, the Courts or any Tribunal must enforce the arbitral award unless the party opposing the enforcement proves that the subject matter of the dispute is not capable of settlement by arbitration under the law of the country or that the recognition or enforcement of the award would be contrary to the country's public policy. The New York Convention has been said to be the driving force behind the modern international arbitration as it revolutionized the arbitration process. It became a guide to the United Nations Commission of International Trade Law (UNCITRAL). Although the main purpose of the New York Convention is the enforcement of awards, it also deals with the enforcement of arbitration agreements. Under Article II of the Convention, there is an obligation in all States that the parties to that Convention to stay court proceedings in favor of arbitration. This provision seems to suggest that if there is a valid arbitration clause, the courts should not issue injunctions to stop arbitration. It also requires national courts not to interfere with arbitration proceedings. The only qualification to this is that they should not interfere unless the arbitration agreement is "null and void, inoperative or incapable of being performed" or when the arbitration agreement is contrary to public policy. It could also be that the claim is time-barred or that the subject is not arbitrable or not covered by the agreement.[2]

In 1961, the European Convention on International Commercial Arbitration was adopted where the term "international commercial arbitration" was first used in the Title. It paved the way for the drafting of internationally acceptable rules of procedure that led to the adoption of the popularly known UNCITRAL Model Law on International Commercial Arbitration on June 21, 1985. The Model Law was crafted as a suggested framework to assist States in reforming and modernizing their arbitral laws, especially those that did not have a modern law on arbitration, albeit embracing the needs of international commercial arbitration. The Model Law was drafted to govern only international commercial arbitration, with the expectation that a State that enacted it might have a separate law governing domestic arbitrations that arbitral tribunals or institutions must respect. The first country to adopt the Model Law was

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[2] Id. at pp. 31 to 39

Canada and subsequently by 80 states in a total of 111 jurisdictions.[3] Developed countries that have adopted the Model Law are Australia, Canada, Germany, Japan, New Zealand, Singapore, and Spain.

The Philippines, to keep pace with the trends and development in international trade, enacted its comprehensive alternative dispute resolution law, Republic Act No. 9285 (*Alternative Dispute Resolution Act of 2004*). It recognized the international application of the alternative dispute resolution system and it principally governs arbitration in the Philippines. This law paved the way for the Philippines to be a venue for international commercial arbitration. Like other States, the Philippines ensured that international commercial arbitration would be governed by the UNCITRAL Model Law on International Arbitration. The enactment of R.A. 9285 was the Philippines' solution in making arbitration an efficient and effective method in dispute resolution especially for international commercial arbitration. It must be noted that prior to May 10, 1965, through Senate Resolution No. 71, the Philippines already adhered to the 1958 New York Convention. In line with this, foreign arbitration, as a system of settling commercial disputes, was already recognized by way of giving reciprocal recognition and allowing enforcement of international arbitration agreements between parries of different nationalities within a contracting state.[4]

On July 07, 2006, the Model Law was amended by UNCITRAL. The revisions or modifications, apart from limiting and clearly defining court involvement in international commercial arbitration, concentrated on a more comprehensive legal regime dealing with interim measures in support of arbitration. The amendment, as adopted by the commission at its 39th session in 2006, among others, provides for the power of an arbitral tribunal to grant interim measures at the request of a party. It likewise defined an interim measure as any temporary measure, whether in the form of an award or in another form, in which, at any time prior to the issuance of the final award and the dispute is finally decided, the arbitral tribunal orders a party to: (a) maintain or restore the *status quo* pending determination of the dispute; (b) take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award may be satisfied or (d) preserve evidence that may be relevant and material to the resolution of the dispute.

Thus, the conditions for granting interim measures were also established such that a party requesting for an interim measure shall satisfy the tribunal that (a) harm not adequately reparable by an award of damages is likely to result if the measure is

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3 United Nations. United Nations Commission on International Trade Law. Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006., https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status

4 Gabriel T. Robeniol. Alternative Dispute Resolution. (Revised Ed. Central Books Supply. Inc.)

not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. Furthermore, the arbitral tribunal may modify, suspend, or terminate an interim measure it has granted, upon application of any party or in exceptional circumstances and upon prior notice to the parties on the arbitral tribunal's own initiative. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure, unless the arbitral tribunal considers it unnecessary.

The interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided, it is enforced upon application to the competent court, irrespective of the country where it was issued, and subject to the following: a) the party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure; and b) the court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties. However, such arbitral award may be refused recognition or enforcement, such as when the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; when the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or if the court finds that the interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance. The court shall have the same power to issue an interim measure in relation to arbitration proceedings, irrespective of whether its place is in the territory of this State, as it has in relation to proceedings in courts.

In light of these 2006 revisions in the provisions on Interim Measure of Protection in the 1985 UNCITRAL Model Law, the United Nations General Assembly issued at its 64th Plenary Meeting on 04 December 2004 Resolution 61/33, stating, among others, that on the matter of interim measures, it is recommending that *"all States give favorable consideration to the enactment of the revised articles of the Model Law or the revised Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law when they enact or revise their laws, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice."*

In relation to and in support of international commercial arbitrations, anti-suit injunctions are often sought. More often than not, a party to the arbitration agreement seeks to avoid litigation in another jurisdiction or to prevent a party from proceeding with litigation commenced in a foreign venue contrary to the terms of a valid arbitration agreement. Thus, the need for an anti-suit injunction arises when a party commences a proceeding in a foreign court to gain a strategic or substantive advantage even though it has agreed to arbitrate the dispute on a valid arbitration agreement. Anti-suit injunctions also have significant implications with respect to the principle of international comity that encourages courts to refrain from interfering with the laws and decisions of other jurisdictions.

Seemingly, anti-suit injunctions are now trending in international commercial arbitrations and resorting to the traditional judicial process to settle disputes are now fast coming to passé. Most of the reasons advanced in this regard are that submission of the dispute to local courts will only meddle the issues because it will somehow appear to be a breach of the parties' contract/agreement that mandates disputes in the implementation to be submitted to arbitration. On the other hand, if the courts have already taken cognizance of the dispute, there is doubt as to whether it would readily agree to relinquish its jurisdiction over the arbitrable dispute.

Data gathered by this Writer shows that anti-suit injunctions issued by state courts can have two diverging effects: (a) It can either prohibit one of the parties from pursuing legal proceedings initiated in breach of an arbitration agreement entered into beforehand and considered valid by the courts or (b) It can also prohibit one of the parties from continuing arbitration proceedings that it deems to have been initiated in the absence of a valid arbitration agreement.

In general, anti-suit injunctions in international arbitration must be analyzed based on the differing practices in various jurisdictions. The Federal Constitutional Court of Germany, for example, introduced a jurisprudential doctrine which is known as *kompetenz-kompetenz* that has been important in international commercial arbitration and widely used by States. The doctrine gives the court or arbitral tribunal the competence of jurisdiction to rule as to the extent of its competence on a particular dispute.

Study shows as well that anti-suit injunctions started in the English courts where they have been applied for the first time in *Bushby v. Munday (1814-23) All E.R. Rep. 304*, where the Court prevented a party from litigating in the courts of Scotland. This ruling of the English court paved the way for the rapid increase in the utilization of anti-suit injunctions in different countries. Companies around the globe,

especially the huge and financially viable corporations, never forget to include in their commercial agreements/contracts provisions that allow for international commercial arbitration to protect their businesses. It is also not forgotten to include whatever law they desire to govern disputes, if any would eventually come out, and necessarily the venue of arbitration.

For the past decade, arbitral institutions have tremendously increased as arbitration has been found to be a speedier, less expensive, and more effective means of resolving commercial disputes. In several jurisdictions, courts generally defer to arbitration proceedings and order a stay of court proceedings except in certain limited situations such as when a party to the agreement acted in breach thereof and commenced proceedings elsewhere. It could likewise be that the agreement is found null and void, inoperative or incapable of being performed. A court always scrutinizes whether it is the appropriate forum so as not to interfere with the arbitral process or overrule arbitral awards. As embodied in the Model Law, *as amended*, courts are involved only in the following instances as grouped. Under the first group: issues of appointment, challenge and termination of the mandate of an arbitrator in Articles 11, 13 and 14, jurisdiction of the arbitral tribunal in Article 16, and setting aside of the arbitral award in Article 34. These instances are listed in Article 6 as functions that should be entrusted, for the sake of centralization, specialization, and efficiency, to a especially designated court, or with respect to Articles 11, 13 and 14, possibly to another authority, *for example*, an **arbitral** institution or a chamber of commerce. The second group comprises issues of court assistance in taking evidence in Article 27, recognition of the arbitration agreement, including its compatibility with court-ordered interim measures in Articles 8 and 9, court-ordered interim measures in Article 17J, and recognition and enforcement of interim measures in Articles 17H and 17I, and of arbitral awards in Articles 35 and 36. As envisaged, beyond these two groups, *"no court shall intervene in matters governed by this Law"*. Thus, Article 5 guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model Law, except for matters not regulated by it, *for example*, consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits. Protecting the arbitral process from unpredictable or disruptive court interference is essential to parties who choose arbitration in particular foreign parties.[5]

Interestingly, *Frederic Bachand*, in his paper, concludes that Article 5 of the Model Law has the effect of rendering inoperative in international commercial matters, domestic rules on the basis of which courts could normally issue arbitration-related anti-suit injunctions.[6] Upon the other hand, *Fouchard, Gaillard, Goldman on*

5 Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law, as amended.

6 Anti-Suit Injunctions In International Arbitration Seminar, November 21, 2003, Paris, France -

International Commercial Arbitration add that courts and arbitral tribunals can generally hear applications for a variety of conservatory measures that include some very diverse concepts. There are conservatory measures intended to prevent irreparable harm, to preserve evidence and those that facilitate the enforcement of an award. With respect to conservatory measures intended to prevent irreparable harm, it may sometimes be necessary to take urgent measures even when there is an arbitration agreement or when arbitral proceedings are pending. In domestic arbitration, French courts consistently hold that *"where a state of urgency has been duly established, the existence of an arbitration agreement cannot prevent the exercise of the power of the courts to grant interim relief"*. Such approach is equally applicable to international arbitration as the courts are the only authorities capable of taking urgent measures that are immediately enforceable, regardless of whether or not the arbitral tribunal is constituted.

From the foregoing considerations, it can be discerned that international arbitration plays an important role and had gained enormous support in resolving commercial disputes. It had also been acknowledged to simplify matters concerning company or corporate disputes usually in construction, trade and shipping disputes where intricate issues requiring special knowledge and expertise are required. As gleaned from these variants, arbitration proceedings can be conducted in English, a language known to almost all contending parties, if not all, and the rules of arbitration provide a more leveled playing field than the technical court procedures and that if a party believes that the arbitral award is wrong, there are typically very limited possibilities to have it set aside. The process is also found to be more flexible than the traditional court processes, and for some known reasons, became a by-word in the international community, namely a swift resolution of the commercial dispute, a less expensive course of action, less technicalities and procedural requirements involved, parties have a free hand in the choice of arbitrators to handle each party's claims, confidentiality of the outcome of the arbitration including awards, and compliant with the agreement or contract executed by the parties as regard to resort to arbitration. Moreover, arbitration agreements can be convenient as to form, as they can be made in writing or even orally in the language chosen by the parties. The main advantages of commercial arbitration proceedings are summed up to their increased level of legal certainty, speed, confidentiality, and the level of technical knowledge, expertise and neutrality of the arbitrators. The driving factor is usually the difference in time between concluding legal and arbitration proceedings. It was further made easier by the engagement of arbitrators with required expertise on the field subject of arbitration. While confidentiality is not at times provided in some arbitration agreements and has not been agreed upon by the parties, it can be ordered by the arbitral tribunal or if it is reasonably necessary for the resolution of the dispute and in the higher interest of justice.

The UNCITRAL Model Law's Take on Anti Suit Injunctions Item IV p.111.

Corollarily, anti-suit injunctions[7] in international commercial arbitration are sought not only to give meaning and effect to the arbitration agreement of the parties but most importantly to avoid two separate proceedings for a single dispute that could possibly result in two conflicting decisions/awards. However, it cannot be discounted that such injunction can play a role if it is evident that a party would renege on its obligations under the arbitration agreement to the extent of running away from the arbitral award by pursuing the dispute in another jurisdiction.

It is also said that anti-suit injunctions have significant implications for the principle of international comity that encourages courts to respect and to refrain from interfering with the laws and decisions of other jurisdictions. Some standards had been set like the so-called conservative standard where courts least grant anti-suit injunctions as comity dictates that foreign anti-suit injunctions be issued sparingly and in the rarest of cases. There is also the so-called liberal standard that is broader and more flexible since it places greater emphasis on equitable considerations such as whether the foreign action is vexatious and oppressive, whether it leads to duplicative efforts, inconvenience, delay, expense and harassment, and whether it might lead to inconsistent results or a race to judgment. However, most of all is to protect a valid arbitration clause.

The court may issue anti-suit injunction when its jurisdiction is threatened but there are two known threshold requirements for the issuance of an anti-foreign suit injunction that need to be met such as similarity of parties in both disputes and that the resolution of the case before the enjoining court must be dispositive of the action to be enjoined. The court's power to intervene is designed to support rather than displace the arbitral process. While there is no concrete evidence that intervention of courts frustrates the arbitration process, it is evident that delays may result considering the rules governing trial of commercial disputes.

Over time, the use of anti-suit injunction in international commercial arbitration was extended to several countries. *Singapore* emerged as one of the world's leading centers for international commercial arbitration, and number one preferred seat for arbitration in Asia and top five globally.[8] Countries like *South Korea, Bulgaria, Cayman Islands, China,* Hungary, India, Indonesia, Malaysia, Italy, Switzerland, United Arab Emirates, Austria, Jamaica, Japan, and U.S.A. find arbitration to be advantageous as the parties have a great deal of flexibility to choose the procedures they wish to follow and there are very few limits on these choices unlike court litigation

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7 Emmanuel Gaillard & John Savage. Fouchard Gaillard Goldman on International Commercial Arbitration: International, Provisional & Conservatory Measures., pp. 721-723. (Kluwer Law International, 1999)

8 Tat Lim. Singapore International Arbitration Center.

procedures that are much more rigid and that enforcing a foreign arbitral award is much easier than enforcing a foreign court judgment given the rules in the New York Convention. The *Hongkong* International Arbitration Center was ranked as the 3rd best arbitral institution worldwide, the most preferred arbitral institution outside of Europe, the most improved arbitral institution over the past five years, and the third most preferred seat worldwide following *London* and *Paris*. It continues to be an active arbitral market. Its latest innovation is arbitration of intellectual property rights.[9] It is only in *Netherlands* and *Russia* where litigation is cheaper and faster than arbitration.[10]

It is worthy to mention that most of the countries involved in international commercial arbitration adopted the UNCITRAL Model Law and the New York Convention. However, *England* and *Wales* have not adopted this Model Law although the drafting of its Arbitration Act was, in some respect, influenced by the said Model Law. It adheres to the principle of *kompetenz-kompetenz*.[11] Also, in *Ukraine*, dispute resolution between commercial parties has not become a preferred method such that foreign parties often view the Ukrainian court system with suspicion and politically tainted.[12]

Moreover, some countries under the federal system of government also lack modern arbitration statutes like *Argentina*. It did not adopt the UNCITRAL Model Law just like *England* and *Wales* due to the federal system of government delineated in its constitution, albeit it adheres to the principle of *kompetenz-kompetenz*. In view of this, its commercial courts tend to respect the will of the parties to go to arbitration.[13]

As stated earlier, anti-suit injunctions started in the English courts where it has been applied for the first time in *Bushby v. Munday*[14] where an English court, through Sir John Leach, had applied for the first time a new tool, known later as the anti-suit injunction, to preclude one party from litigating in the courts of another country such as Scotland. This ruling of the English court resulted in the rapid increase in the utilization of anti-suit injunctions in different countries. Companies

9 Peter Murphy, Fergus Saurin, Edward Beeley and Sian Knight, Holman Fenwick Willan. Arbitration Procedures & Practice in Hongkong; Overview. https://content.next.westlaw.com/Document/I46606fe11c9011e38578f7ccc38dcbee/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1, 2017.

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14 (1814-23) All E.R. Rep. 304

around the globe, especially the huge and financially viable corporations made it a point to include in their commercial agreements/contracts provisions that allow for international commercial arbitration to protect their businesses and include whatever law they desire to govern disputes, if any would eventually come out, and necessarily, the venue of arbitration.

Case law has also played a significant role in the development of this tool. The following cases are enlightening:

1. *Cohen v. Rothfield* [1919] 1 K.B. 410 at 418, the English Court of Appeals, through Scrutton L.J., considered that oppressive and vexatious litigation before a foreign authority was a suitable ground to grant an injunction to stop the proceedings, although he emphasized that *"this power should be exercised with great caution to avoid even the appearance of undue interference with another court."*

2. *Ellerman Lines, Ltd. v Read* [1928] 2 KB 144, where the English court through Atkin LJ stated that *"if the English court finds that a person subject to its jurisdiction has committed a breach of covenant, or has acted in breach of some fiduciary duty or has in any way violated the principle of equity and conscience, and that it would be inequitable on his part to seek to enforce a judgment obtained in breach of such obligations, it will restrain him, not by issuing an edict to the foreign court, but by saying that he is in conscience bound not to enforce that judgment"*. This seeks to reconcile the court's power to grant an anti-enforcement injunction with the doctrine of comity – the mutual recognition and enforcement of judgments by courts in different jurisdictions. Anti-enforcement injunctions do not represent an incursion by the English courts into the jurisdiction of a foreign court. They are directed to the party who has obtained the foreign judgment and not to the foreign court or tribunal that gave the judgment. Nevertheless, the English courts have acknowledged that granting an anti-enforcement injunction is *"a very serious matter"*, indicating that the applicant will likely have to meet a high threshold before a court will exercise its discretion to grant an injunction.

3. *Societe Nationale Industrielle Aerospatiale v. Lee Kui Jak,* [1987] A.C. 871 at 893 where Lord Goff established the basic principles that govern the granting of anti-suit injunctions, saying: *"The law relating to anti-suit injunctions restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction has a long history, stretching back at least as far as the early nineteenth century. From an early stage, certain basic principles emerged which are*

now beyond dispute: 1) the jurisdiction is to be exercised when the "ends of justice" requires it ; 2) the court's order is not directed against the foreign court but it is against one of the parties; 3) an injunction may only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction would be an effective remedy, and 4) since such an order indirectly affects the foreign court, the jurisdiction is one which has to be exercised with caution."

4. *Aggeliki Charis Compania Maritima SA v. Pagnan Spa* {1995} *1 Lloyd's Rep 87* - where Lord Justice Millet declared that *"In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign Court has much to commend it where the injunction is sought on the ground of forum non conveniens or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. In the former case, great care may be needed to avoid casting doubt on the fairness or adequacy of the procedures of the foreign Court. In the later case, the question whether proceedings are vexatious or oppressive is primarily a matter for the Court before which they are pending. But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to being them. I cannot accept the proposition that any Court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline. In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in Continental Bank NA v Aeakos Compania Naviera SA, [1994] 1WLR 588. The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case."*

5. *Forum Insurance Co., Inc. v Bristol Myers Squibb. Co. 929 S.W. 2d114 (1996).* It was held that anti-suit injunction is appropriate in four instances: 1) to address a threat to the court's jurisdiction; 2) to prevent the evasion

of important public policy; 3) to prevent multiplicity of suits; and 4) to protect a party from vexatious or harassing litigation.

6. *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603; [2002] SGHC 104, where Lee Seiu Kin J. C. in the Singapore High Court said: *"Once this court is satisfied that there is an arbitration agreement, it has a duty to uphold that agreement and prevent any breach of it. Accordingly, I am of the opinion that the anti-suit injunction should be continued until further order."*

7. *John Reginald Stott Kirkham and Others v Trane US Inc and Others [2009] SGCA 32* where the Court of Appeals clarified on when an anti-suit injunction should be granted. It laid down the following factors in granting an anti-suit injunction:

   a) whether the defendants are amenable to the jurisdiction of the Singapore court;

   b) the natural forum for resolution of the dispute between the parties;

   c) the alleged vexation or oppression to the plaintiffs if the foreign proceedings are to continue;

   d) the alleged injustice to the defendants as an injunction would deprive the defendants of the advantages sought in the foreign proceedings; and

   e) whether the institution of the foreign proceedings is in breach of any agreement between the parties.

8. *Ever Judger Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi (2015) 3 HKC 246* was the first Hongkong anti-suit injunction in support of arbitration to restrain foreign proceedings wherein the Hongkong court granted an anti-suit injunction in support of a Hongkong arbitration agreement. The court established the principle that as a matter of Hongkong law, the court should ordinarily grant an injunction to restrain foreign proceedings in breach of an arbitration agreement as long as the measure was filed promptly and the foreign proceeding was not yet too fair unless the other party has strong reasons to oppose the same.

9. *Sea Powerful II Special Maritime Enterprises v Bank of China Ltd [2016] HKEC 90* – the Hong Kong Court of Appeal (**CA**) has highlighted the need for parties to act promptly when applying for an injunction to restrain foreign court proceedings in favor of arbitration. "Deliberate, inordinate and culpable" delay in seeking the injunction, coupled with considerations of comity, had entitled the Court of First Instance (CFI) to refuse the injunction, even where there was a valid arbitration clause. In particular, the CA condemned the plaintiff for deliberately delaying its anti-suit application until the relevant limitation period had expired in order to deprive the other party of its contractual right to arbitrate. The Hong Kong court considered that injunctive relief should be refused on the ground of delay alone. Interestingly, in considering the issue of delay, the court also took into account the limitation period in the arbitration clause, observing that: *"An application for an anti-suit injunction is to enforce a party's right to arbitration in his chosen forum when that right has been infringed. It stands to reason that if the arbitration has to be brought within a stipulated period of time, the applicant for the injunction should conduct himself in accordance with that time frame. It would be against the notion of justice for the applicant to wait until the 11th hour or later to make the application so that there would be no arbitration because of time bar."*

10. *BC Andaman v Xie Ning [2017] SGHC 64* where the Court granted an anti-suit injunction to protect the substantive contractual rights of the plaintiffs who were parties to the arbitration agreement but who were not respondents in the arbitration, as the dispute involved in the Thai proceedings was covered by the arbitration agreement and should have been submitted for arbitration. For the plaintiffs who were parties to both the arbitration and the arbitration agreement, the court granted the anti-suit injunction on the basis that the defendants' conduct was vexatious and oppressive conduct as it was clearly a re-litigation of the dispute it had initiated in the Singapore arbitration but refused to pursue. Although the arbitration proceedings had formally concluded, this was due to the defendants' discontinuation of their claims at a very early stage of the arbitration, and the issues could not be said to have been properly heard or resolved in the arbitration.

11. *Arjowiggins HKK2 Ltd v Shandong Chenming Paper Holdings Ltd [2018] HKCFI 93 highlights the pro-arbitration attitude of the Hong Kong Courts. The anti-suit injunction sought by the claimant to restrain the respondent from pursuing the proceedings in China was therefore granted as this would have amounted to a breach of an arbitration clause in the contract between the parties. The deliberate disregard of the arbitral process and arbitral award cannot be countenanced.*

12. *Chen Hongqing v Persons whose names are set out in the second column of the Schedule Hereto, HCA 2648/2017 (unrep. 29 May 2018)* - in finding for the plaintiff's application for injunction, the Court held that (a) Hong Kong was clearly and distinctly the appropriate forum for the trial of this action, (b) the Jinan Proceedings were vexatious, oppressive and unconscionable, and (c) there was a real risk that steps had been taken to manipulate the Jinan Proceedings to the detriment of the Plaintiff and to deprive him of a fair trial.

13. *Hilton International Manage (Maldives) Pvt Ltd v. Sun Travel & Tours Pvt Ltd [2018] SGHC 56/ Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd [2019] SGCA 10* follows the ruling in BC Andaman. The decision raised the novel issue as to whether there would be a breach of an arbitration agreement to commence court proceedings after the arbitration has concluded, and the arbitral award has been issued or whether such a breach of the arbitration agreement, if any, should be characterized and considered differently. The Court concluded that for the plaintiffs who were not parties to the agreement but who were not respondents in the arbitration, the anti-suit injunction was granted to protect the contractual rights of the plaintiffs who were parties to the arbitration agreement but who were not respondents in the arbitration as the dispute involved in the Thai proceedings was covered by the arbitration agreement and should have been submitted for arbitration. For the plaintiffs who were parties to both the arbitration and the arbitration agreement, the court granted the anti-suit injunction on the basis that the defendants' conduct was vexatious and oppressive for the re-litigation of the dispute in the Singapore Arbitration but refused to pursue. Although the arbitration proceedings had formally concluded, this was due to the defendants' discontinuation of their claims at a very early stage of the arbitration and the issues could not be said to have been properly heard or resolved in the arbitration. The Court also noted that applications for anti-suit injunctions should be made promptly and before foreign proceedings are too far advanced, not only to avoid prejudice to the defendants but also for consideration of comity.

Evidently from the foregoing landmark cases, it can be discerned that most countries observe a pro-arbitration policy in disputes involving international commercial arbitration.

In the Philippines, Congress, in conjunction with the Supreme Court and Department of Justice, has integrated the arbitration process in the judicial system. During arbitral proceedings, the application for interim measures should be filed with the arbitral tribunal and only when the latter has no power to act on it can resort to the court be had. Section 28 and the succeeding provisions of R.A. No. 9285 provide for the grant of interim measure of protection. Before the constitution of the arbitral tribunal, a party may request from the court an interim measure of protection. After constitution of the arbitral tribunal and during arbitral proceedings, a request for an interim measure of protection or modification may be made with the arbitral tribunal or to the extent that the arbitral tribunal has no power to act or is unable to act effectively.

R.A. No. 9285 likewise provides that (a) any party may request that provisional relief be granted against the adverse party; (b) such relief may be granted to prevent irreparable loss or injury, provide security for the performance of any obligation, to produce or preserve any evidence, or to compel any other appropriate act or omission. The order granting provisional relief may be conditioned upon the provision of security or any act or omission specified in the order and shall be binding upon the parties. Either party may apply with the court for assistance in the implementation or enforcement of the interim measure. A party that does not comply with the order shall be liable for all damages resulting from non-compliance, including all expenses, and reasonable attorney's fees, paid in obtaining the order's judicial enforcement. The interim or provisional relief is requested by written application transmitted by reasonable means to the Court or arbitral tribunal as the case may be and the party against whom the relief is sought, describing in appropriate detail the precise relief, the party against whom the relief is requested, the grounds for the relief, and evidence supporting the request.

Furthermore, with respect to foreign arbitral awards, the New York Convention shall govern the recognition and enforcement of arbitral awards covered by said Convention. The recognition and enforcement of such arbitral awards shall be filed with regional trial courts in accordance with Special Rules of Court on Alternative Dispute Resolution promulgated by the Supreme Court. This procedural rule provides that the party relying on the award or applying for its enforcement shall file with the court the original or authenticated copy of the award and the arbitration agreement. If the award or agreement is not made in any of the official languages, the party shall supply a duly certified translation into any of such languages. The applicant shall establish that the country in which foreign arbitration award was made is a party to the New York Convention. If the application for rejection or suspension of enforcement of an award has been made, the regional trial court may, if it considers it proper, vacate its decision and may also on the application of the party claiming recognition

or enforcement of the award, order the party to provide appropriate security. The recognition and enforcement of foreign arbitral awards not covered by the New York Convention shall be done in accordance with procedural rules to be promulgated by the Supreme Court. The Court may, on grounds of comity and reciprocity, recognize and enforce a non-convention award as a convention award. Moreover, a foreign arbitral award when confirmed by a court of a foreign country, shall be recognized and enforced as a foreign arbitral award and not a judgment of a foreign court while that of a foreign arbitral award, when confirmed by the Regional Trial Court, shall be enforced as a foreign arbitral award and not as a judgment of a foreign court in the same manner as final and executory decisions of courts of law of the Philippines. A party to a foreign arbitration proceeding may oppose an application for recognition and enforcement of the arbitral award in accordance with the procedural rules to be promulgated by the Supreme Court only on those grounds enumerated under Article V of the New York Convention. Any other ground raised shall be disregarded by the Regional Trial Court. The decision of the Regional Trial Court confirming, vacating, setting aside, modifying, or correcting an arbitral award may be appealed to the Court of Appeals in accordance with the rules of procedure to be promulgated by the Supreme Court. The losing party who appeals from the judgment of the court confirming an arbitral award shall be required by the appellate court to post counter bond executed in favor of the prevailing party equal to the amount of the award in accordance with the rules to be promulgated by the Supreme Court.

Thus, proceedings for recognition and enforcement of an arbitration agreement or for vacation, setting aside, correction or modification of an arbitral award, and any application with a court for arbitration assistance and supervision shall be deemed as special proceedings and shall be filled with the Regional Trial Court (a) where arbitration proceedings are conducted; (b) where the asset to be attached or levied upon, or the act to be enjoined is located; (c) where any of the parties to the dispute resides or has his place of business or (d) in the National Capital Judicial Region, at the option of the applicant. In a special proceeding for recognition and enforcement of an arbitral award, the Court shall send notice to the parties at their address of record in the arbitration or if any party cannot be served notice in the party's last known address. The notice shall be sent at least fifteen (15) days before the date set for the initial hearing of the application.

During arbitral proceedings, the application for interim measures should be filed with the arbitral tribunal and only when the latter has no power to act on it can resort to the court be had. Similarly, the ICC practices the same. A case in point is the *Republic of the Philippines suing Westinghouse Electric Corporation*.[15] This is an action brought by the Republic of the Philippines and the National Power Corporation,

[15] U.S. District Court for the District of New Jersey - 714 F. Supp. 1362 (D.N.J. 1989) May 18, 1989.

the Philippine government agency responsible for electric power generation, against Westinghouse Electric Corporation, a Pennsylvania corporation, Westinghouse International Projects Company, the latter's wholly-owned subsidiary, and Burns and Roe Enterprises, Inc., a New Jersey corporation. The District Court held that the claims are covered by the arbitration clause and the court proceeding must therefore be stayed pending the outcome of that arbitration, as a claim for breach of contract is clearly within the ambit of arbitration.

In a more recent case of *Tuna Processing, Inc. v. Philippine Kingford, Inc.,*[16] petitioner submitted the dispute for arbitration before the International Centre for Dispute Resolution (ICDR) in the State of California, United States and won the case against the respondent. To enforce the award, petitioner filed on 10 October 2007 a *Petition for Confirmation, Recognition, and Enforcement of Foreign Arbitral Award* before the Regional Trial Court of Makati City. Respondent filed a Motion to Dismiss but the same was denied for lack of merit. The respondent sought for the inhibition of the Judge and moved for the reconsideration of his order. The Judge inhibited himself and the Judge to which the case was re-raffled granted respondent's Motion for Reconsideration and dismissed the petition on the ground that the petitioner lacked legal capacity to be sued in the Philippines. Petitioner sought the nullification of said decision on the ground that it is entitled to seek recognition and enforcement of the foreign arbitral award in accordance with *R.A. 9285 (Alternative Dispute Resolution Act of 2004)*, the New York Convention and the UNCITRAL Model Law, as none of these specifically requires that the party seeking for the enforcement should have legal capacity to sue.

The Supreme Court held that not one of the exclusive grounds to refuse recognition and enforcement enumerated under Article V of the New York Convention touched on the capacity to sue the party seeking the recognition and enforcement of the award. The grounds are limited to the following: 1) the parties to the agreement are under some incapacity or the subject agreement is not valid under the law to which the parties have subjected it or failing any indication thereon, under the law of the country where the award was made; 2) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; 3) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; 4) the composition of the arbitral authority or the arbitral procedure was

16 *Tuna Processing, Inc. v. Philippine Kingford, Inc.*, G.R. No. 185582, February 29, 2012.

not in accordance with the agreement of the parties or failing such agreement was not in accordance with the law of the country where the arbitration took place; and 5) 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 or 6) the subject matter of the difference is not capable of settlement by arbitration under the law of that country and the recognition or enforcement of the award would be contrary to the public policy of that country. Furthermore, Rule 13.1 of the *Special Rules of Court on Alternative Dispute Resolution*,[17] promulgated by the Supreme Court on this regard, likewise supports the Court's decision. The Rule provides that *"any party to a foreign arbitration may petition the court to recognize and enforce a foreign arbitral award"*. The contents of such petition are enumerated in Rule 13.5. Capacity to sue is not also included. Oppositely, in the Rule on local arbitral awards or arbitrations in instances where the place of arbitration is in the Philippines, it is specifically required that a petition to determine any question concerning the existence, validity, and enforceability of such arbitration agreement available to the parties before the commencement of arbitration and/or a petition for judicial relief from the ruling of the arbitral tribunal on a preliminary question upholding or declining its jurisdiction after arbitration has already commenced should state the facts showing that the persons named as petitioner or respondent have legal capacity to sue or to be sued.

The Supreme Court further elucidated that it is in the best interest of justice that in the enforcement of a foreign arbitral award, it denies availment by the losing party of the rule that bars foreign corporations not licensed to do business in the Philippines from maintaining a suit in our courts. When a party enters into a contract containing a foreign arbitration clause and as in this case, in fact submits itself to arbitration, it becomes bound by the contract, by the arbitration and by the result of arbitration, conceding thereby the capacity of the other party to enter into the contract, participate in the arbitration and cause the implementation of the result. Also worthy to consider is the wisdom of then Associate Justice Flerida Ruth P. Romero in her Dissenting Opinion in *Asset Privatization Trust v. Court of Appeals, to wit: "xxx Arbitration, as an alternative mode of settlement, is gaining adherents in legal and judicial circles here and abroad. If its tested mechanism can simply be ignored by an aggrieved party, one who, it must be stressed, voluntarily and actively participated in the arbitration proceedings from the very beginning, it will destroy the very essence of mutuality inherent in consensual contracts."*[18] Moreover, the Supreme Court added that the novelty and the paramount importance of the issue raised in the case should be seriously considered. Surely, there is a need to take cognizance of the case not only to guide the bench and the bar, but if only to strengthen arbitration as a means of dispute resolution and uphold the policy of the

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[17] A.M. No. 07-11-08-SC

[18] Asset Privatization Trust v. Court of Appeals, G.R. No. 121171, December 29, 1998

State embodied in R.A. 9285 to actively promote and encourage the use of Alternative Dispute Resolution as an important means to achieve speedy and impartial justice and declog court dockets.

At the moment, there appears no specific legal regime that will guide Philippine judges on how to deal with an application for or an opposition to the recognition and enforcement of interim measures in general issued by a foreign tribunal in the course of foreign arbitration such as arbitration seated outside of Philippine jurisdiction. While the Special Rules of Court on ADR, being based on the 2004 Philippine ADR Act, adopted the 1958 New York Convention on the recognition and enforcement of final arbitral awards, interim measures are not covered thereby. Accordingly, there is no Philippine black letter law on the matter; necessarily, there are also no rules with respect to the treatment by a Philippine court of an application for the issuance of a writ of anti-suit injunction by a party involved in international commercial arbitration seated in a foreign jurisdiction.

So far, the Philippines is trending towards taking steps in furtherance of the State policy and in being receptive and welcoming of current developments and prevailing practices in international commercial arbitration conducted not only in the Philippines but, more so, in foreign jurisdictions where international commercial arbitration has already reached stages of relative maturity and stability in terms of practice, legal framework, as well as traditions. Nevertheless, the Writer recommends that the provisions of the 2006 Amendments to the UNCITRAL Model Law on the manner of interim measures of protection be adopted into the Philippine legal system by amending the existing Philippine ADR Act of 2004. The amendment will render the Philippine legal system on arbitration harmonized with the prevailing practices in various jurisdictions in the manner of recognition and enforcement of interim measures issued in connection with an international commercial arbitration seated or conducted in foreign jurisdictions. Specific amendments are suggested to involve the manner of recognition and enforcement of interim measures issued either by the arbitral tribunal or by the court in connection with an international commercial arbitration seated or conducted in foreign jurisdictions. The amendment to the current Philippine ADR Act would in effect make an interim measure of protection issued by a foreign arbitral tribunal or by a foreign court in connection with a foreign arbitration proceeding recognized and enforced in the Philippines by Philippine courts, without regard to and independent of the New York Convention, which applies only to recognition and enforcement of final arbitral awards.