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The International Comparative Legal Guide to:

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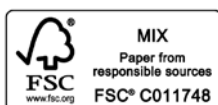
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Remedies for Breach of the Arbitration Agreement – Dealing with Parties That Try to Circumvent Arbitration

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This article discusses the remedies available when a party commences court proceedings notwithstanding the existence of a valid arbitration agreement. It focuses in particular on the United States, the UK and Switzerland. Where proceedings are threatened or brought in a local court that is likely to assert jurisdiction over the matter and refuse to refer the parties to arbitration, one available remedy in common law jurisdictions is to request specific performance from a court in the arbitration forum or arbitrator by means of an anti-suit injunction. The authors also take a closer look at an arbitral tribunal's authority to award damages for breach of an arbitration agreement, and discuss several recent cases of the Swiss Supreme Court allowing for this remedy.

I. Introduction

Despite the strong public policy favouring arbitration, and the widespread adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), parties are often confronted by court proceedings initiated in breach of arbitration agreements.¹ A counterparty may initiate court proceedings with the intent to complicate, delay or even circumvent the arbitration proceedings,² or it may simply be seeking a way to obtain a more favourable decision in its home jurisdiction.³

When suit is brought in a jurisdiction that is a signatory to the New York Convention, and where the arbitration clause is not only valid, but sufficiently broad to cover all disputes arising out of and relating to the underlying contract, the local court in which the parallel proceeding has been brought should decline jurisdiction and refer the parties to arbitration. This is by virtue of Art. II (3) of the New York Convention, which provides that “*the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed*”. As of May 2015, the New York Convention has been adopted by 155 state parties,⁴ although at least some of these jurisdictions cannot credibly be characterised as “arbitration friendly”.

If the system works as it should, parallel court proceedings should not be permitted to proceed when the parties have a valid arbitration agreement governing their dispute:

Scenario 1: A commences arbitration proceedings under the ICC Rules with seat in Vienna. B objects to the jurisdiction of the arbitral tribunal, but then ceases to participate in the proceedings. Instead, defendant B brings claims arising out of the same contract before a local court in Switzerland. Assuming a valid arbitration agreement and arbitrable issues

in dispute, the local court in Switzerland, a state party to the New York Convention, will refuse to hear the case and refer the parties to arbitration.

This is not always the case, however, and parties that desire to obstruct or avoid arbitration altogether often employ creative ways to try to circumvent arbitration. While the default is for courts – at least those in New York Convention jurisdictions – to respect arbitration agreements, and dismiss such actions, there are a number of instances where this might not be the case and where courts may nevertheless assert jurisdiction:

- where the court proceedings are commenced in a state which is not a signatory to the New York Convention, or where, despite its adoption, the local courts are not sophisticated or arbitration savvy;
- where there is an issue as to the validity of the arbitration agreement;
- where the arbitration clause is narrow, contains a carve-out for certain types of disputes, or where the issues in dispute are considered not to be arbitrable in the jurisdiction in which the court proceedings are commenced;⁵ and
- where the party initiating the court proceedings brings statutory, tort or other extra-contractual claims against a parent or affiliate that is not a party to the contract and arbitration agreement in order to circumvent arbitration proceedings.

This article examines potential remedies available to a party where a local court refuses to refer the parties to arbitration and instead asserts jurisdiction over the dispute. What remedies are available to a party that desires to resolve the dispute in arbitration and is faced with potentially costly parallel proceedings and the risk of conflicting decisions? And what of the situation where a party to an arbitration agreement threatens to bring parallel court proceedings in violation of the arbitration agreement, but has not yet actually done so? What remedies are available to parties that find themselves caught in the following scenarios?

Scenario 2: Manufacturer A terminates its distribution agreement with distributor B, which contains a valid arbitration clause providing for LCIA arbitration with seat in London. The distribution agreement and the law governing the contract both exclude the right for compensation upon termination of the distribution agreement. Distributor B therefore believes it will have a better chance to prevail under the laws of its home jurisdiction, country X. Hence, B commences local court proceedings. The local court in X, a country with a patchy record of adherence to its New York Convention obligations, decides to assert jurisdiction over the case notwithstanding the existence of the valid arbitration clause.

Scenario 3: Swiss company A sold part of its business to Norwegian company B. A is a subsidiary of American parent company C. The share purchase agreement contained an arbitration agreement and is governed by Swiss law. After the deal has been concluded, B realises that some goods sold with the business are defective. B sues C before a state court in the United States alleging fraud under U.S. law. Although there is no direct breach of the arbitration agreement, it seems apparent that B is circumventing the obligation to arbitrate in order not to argue its case under Swiss law, under which fraud is more difficult to prove. A, the party to the underlying contract and arbitration agreement, has no direct standing to petition the U.S. court to decline jurisdiction and refer the parties to arbitration pursuant to the New York Convention because it is not a party to the U.S. proceedings, and the claims brought in the proceedings against C are not directly covered by the arbitration agreement between A and B.

Scenario 4: Joint venture partners A and B have a falling out, and B, domiciled in the U.S., threatens to bring a range of contract and tort claims before the U.S. courts notwithstanding the existence of an arbitration agreement in the parties' joint venture agreement, which calls for ICC arbitration in Paris and in which the parties specifically agreed to a heightened confidentiality regime. Concerned about the disclosure of highly sensitive commercial information, A preemptively launches the arbitration, but B refuses to participate, threatening to make their dispute very public. In a situation where the local court has not yet been seized with the dispute, what are the available remedies open to A?

The consequences of court proceedings introduced in breach of the arbitration agreement can be burdensome for the defendant, and can include the need to engage local counsel and devote precious time and resources of its management and in-house counsel. In addition, depending on the jurisdiction, should the court find the defendant liable, the defendant may be faced with an adverse costs award and may have to cover the court fees and legal expenses of the other party. Further, if parallel court proceedings are commenced, there is a risk of conflicting decisions and legal uncertainty.

Confronted with such circumstances, A must first try to enjoin the court proceedings by directly objecting to the court's jurisdiction. If this fails, A could request an anti-suit injunction in appropriate circumstances. Finally, if A has incurred costs with respect to the parallel proceedings – whether the costs were incurred as part of A's successful fight to oppose the proceedings, or if A failed, resulted from the parallel proceedings – A could seek to recover in arbitration the damages it incurred as a result of the breach of the arbitration agreement.

II. Possible Remedies For Breach of the Arbitration Clause

Courts and scholars agree that obligations derive from the arbitration agreement. Depending on the jurisdiction, the obligation deriving from the arbitration agreement may be characterised as a positive obligation, i.e., the parties have an obligation to arbitrate, or as a negative one, namely that the parties should refrain from commencing litigation in the state courts.⁶ Regardless of the characterisation of the obligation, in this article we focus on the remedies available when a party breaches the arbitration agreement by commencing or threatening court proceedings.

A. Blocking Parallel Court Proceedings by Enforcing the Arbitration Agreement

As discussed above, as a starting point, where B has commenced

court proceedings notwithstanding a valid arbitration agreement with A, A should move to enjoin the proceedings directly at the court in which the suit was commenced. We assume that the court proceedings were commenced in a New York Convention jurisdiction. While each jurisdiction has implemented Art. II (3) of the New York Convention slightly differently, this section will focus on the approach taken in the United States.

The U.S. Federal Arbitration Act (“FAA”), which codifies and implements the provisions of the New York Convention, embodies the strong federal policy in favour of arbitration. The U.S. view is that the parties subject to a valid and sufficiently broad arbitration agreement are obliged to bring any claims arising out of, or in connection with, the contract before an arbitral tribunal, the so-called positive obligation to arbitrate deriving from the arbitration agreement.⁷ Section 3 of the FAA (9 USC § 3) provides for a stay of proceedings brought in the courts of the United States where the issue is referable to arbitration pursuant to a valid arbitration agreement.⁸

Further, Section 206 of the FAA provides parties to an arbitration agreement with the right to petition a U.S. court having jurisdiction to compel a party to arbitrate the case in the manner provided for in the arbitration clause (9 USC § 206). Such a motion to compel arbitration could be used, for example, by A to compel B to arbitrate when B refuses to participate in arbitration proceedings, or where B has already commenced court proceedings in another jurisdiction, but where the U.S. courts nevertheless have the requisite jurisdiction to act under Section 206 of the FAA.

In appropriate cases, U.S. courts may even allow a stay of proceedings when the case involves both signatories and non-signatories to the arbitration agreement.⁹ When the party requesting the stay of proceedings is not a signatory to the arbitration agreement, it must demonstrate that the stay is warranted because the claims at issue are inextricably intertwined with, and involve the same operative facts and law as, the arbitration proceedings.¹⁰ In determining whether to grant a stay of claims against the non-signatory, the court must determine “whether proceeding with the litigation will destroy the signatories’ right to a meaningful arbitration”.¹¹ Further, the court must decide whether the outcome of the non-arbitrable claims will depend upon the arbitrator’s decision.¹² Courts, however, may refuse to stay proceedings of non-arbitrable claims when it is feasible to proceed with the litigation.¹³

B. Anti-Suit Injunctions

As discussed above, for a variety of reasons local courts seized with proceedings in violation of an arbitration agreement will not always refuse jurisdiction and enforce the arbitration agreement. In these cases, the defendant may consider obtaining an anti-suit injunction to block the parallel proceeding. An anti-suit injunction may also be an option when party B threatens to bring a case before a local court and party A seeks to head off this initiative at the outset, especially when the local court is located in a non arbitration-friendly jurisdiction.

An anti-suit injunction is an order issued by a court or arbitral tribunal which prevents a party from commencing or continuing proceedings in another jurisdiction or forum. While originally applied in a domestic context, anti-suit injunctions in many jurisdictions are now also issued against foreign court proceedings.¹⁴ Anti-suit injunctions originated in common law jurisdictions. Courts in civil law countries continue to be reluctant to issue them.¹⁵ Assuming the requirements are met, including jurisdiction, anti-suit injunctions may be obtained from English or American courts if the case presents a nexus with the UK or the United States, e.g., if one of the parties is domiciled in, or if the place of the arbitration is in, these countries.¹⁶

Anti-suit injunctions may also be requested from an emergency arbitrator¹⁷ or directly from the arbitral tribunal, if it has already been constituted, based on the arbitrator's authority to issue interim relief. Arbitral anti-suit injunctions present a means to pressure the opposing party. This is only true to a certain extent, however, as one of the primary criticisms of arbitral anti-suit injunctions is that they are not necessarily enforceable in light of arbitrators' lack of authority to order measures of enforcement. As such, the other party may simply decide not to voluntarily comply with such injunction.¹⁸

In Switzerland, Chapter 12 of the Swiss International Private Law ("SPILA") is silent on the arbitral tribunal's jurisdiction to grant arbitral anti-suit injunctions.¹⁹ There have been a very limited number of reported cases in which a Swiss-seated arbitral tribunal granted an anti-suit injunction, but the number of cases in which a tribunal refused to grant such an injunction remains unknown.²⁰ Given the lack of legal basis in Swiss law for anti-suit injunctions, issues concerning their enforcement, and a general distrust among civilian lawyers and scholars towards what has traditionally been a common law remedy, the availability of arbitral anti-suit injunctions in Switzerland remains controversial.²¹

In the European Union, anti-suit injunctions have been particularly controversial since their scope of application was drastically restricted by the 2009 decision of the European Court of Justice ("ECJ") in *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA, Generali Assicurazioni Generali SpA, v. West Tankers Inc.* ("West Tankers").²² In *West Tankers* the ECJ held that courts of an EU Member State are not permitted to issue anti-suit injunctions against a party that initiated court proceedings in another Member State because such measures are incompatible with Regulation No. 44/2001 (Brussels I) regulating the jurisdiction, recognition and enforcement of judgments in civil and commercial matters in the EU.²³ The *West Tankers* decision provoked a heated debate among the European arbitral community,²⁴ sparking fears that the number of court proceedings brought in breach of arbitration agreements would increase.²⁵ Parties to an arbitration agreement were also left with the uncertainty as to whether an *arbitral tribunal* with seat in an EU Member State could issue an anti-suit injunction against a party that commenced court proceedings in another EU Member State.

In the long-awaited 2015 *Gazprom* decision, the ECJ clarified its position, stating that Regulation No. 44/2001 does not apply to arbitration. Arbitral tribunals seated in Europe are therefore not prevented from issuing anti-suit injunctions against a party that commences court proceedings in breach of the arbitration agreement.²⁶

C. Claims for Monetary Relief/Damages

Another possible remedy for breach of the arbitration agreement is to bring, in arbitration, a claim for damages incurred as a result of the unwanted court proceedings. While this option is more akin to a subsidiary remedy, and does not have the same teeth as an anti-suit injunction since it cannot prevent parallel proceedings from commencing or continuing, a claim for damages may nevertheless go some way in compensating parties for the costs incurred in blocking or defending the parallel proceedings. The damages awarded in the arbitration may include not only a party's own "costs" in the parallel proceedings, but also cover the damages and costs awarded against it in such proceedings.

Courts in England and Switzerland have upheld arbitral awards in which a party was granted monetary relief as compensation for breach of the arbitration agreement by the other party.²⁷ Some authors, however, are less than enthusiastic about the possibility of

seeking compensation for breach of the arbitration agreement before an arbitral tribunal.²⁸ They question the arbitral tribunal's power to award these damages and see a risk that by doing so, the arbitral tribunal will interfere with the state court's exclusive jurisdiction to award costs.²⁹ Also, some English courts consider monetary relief inappropriate to enforce the arbitration agreement, especially as the losses may be difficult to calculate.³⁰

Since as early as 1980, however, English courts have determined that a party may seek monetary relief for breach of the arbitration agreement.³¹ In *CMA CGM SA v. Hyundai Mipo Dockyard Co Ltd*, an English court reviewed in 2008 an arbitral award issued by a tribunal with seat in London. The arbitral tribunal awarded damages because it found that one party breached the arbitration agreement by commencing an action in a French state court. The English court concluded that the arbitrators were entitled to ask what would have happened if the contract had not been breached.³² In light of the *West Tankers* decision, in which the ECJ restricted the applicability of anti-suit injunctions within the EU, there was renewed interest in the issue of seeking damages for breach of the arbitration agreement.

While in the United States, case law shows that a court can award damages for breach of a forum selection clause,³³ claims for damages for breach of the arbitration agreement appear to be rare given the various tools which exist to enforce arbitration agreements described above. Prior to the enactment of the Federal Arbitration Act, there was some discussion in U.S. case law concerning a party's right to bring a claim for damages for a violation of the arbitration agreement. However, the discussion appeared to be more theoretical than practical in nature and it is unclear whether such relief would be available today and whether such damages could be sought in court proceedings, in arbitration, or both.³⁴

In Switzerland, where anti-suit injunctions are not well known and may be difficult to obtain or enforce, claims in arbitration for damages for breach of the arbitration agreement are not uncommon. As will be discussed further below, the Swiss Supreme Court recently reviewed two awards in which an arbitral tribunal awarded damages for breach of the arbitration agreement. The court dismissed both jurisdictional appeals, a positive signal that an arbitral tribunal with seat in Switzerland may indeed award damages for breach of the arbitration agreement.

III. Monetary Relief for Breach of the Arbitration Agreement in Switzerland

A. Jurisdiction

While it appears to be increasingly common for arbitral tribunals to award damages for violations of arbitration agreements, one may question the arbitral tribunal's authority to hear such claims in light of the legal nature of the arbitration agreement, which is a separate agreement within the underlying contract.³⁵

In the leading Swiss decision on the subject, issued in February 2010, the Swiss Supreme Court held that there is no violation of public policy when an arbitral tribunal awards damages for a breach of the arbitration agreement.³⁶ In December 2004, a dispute arose between a Swiss pharmaceutical manufacturer and its distributor in Israel. The manufacturer commenced a Swiss Rules arbitration in Switzerland pursuant to the distribution agreement. As in *Scenario 2* described above, the distributor initiated court proceedings in Israel in breach of the arbitration agreement. The manufacturer objected to the Israeli court's jurisdiction, but the court nevertheless rejected the objection. Consequently, in the arbitration, the manufacturer sought declaratory relief for compensation of all costs incurred as a

consequence of the distributor's breach of the arbitration agreement. In return, the distributor challenged the arbitral tribunal's jurisdiction with regard to declaratory relief. The arbitral tribunal first rendered a partial award assuming jurisdiction, and then rendered a second award confirming jurisdiction and granting declaratory relief for breach of the arbitration agreement.

The distributor challenged the second award arguing that: (i) the arbitral tribunal did not have jurisdiction because the manufacturer lacked the requisite interest to obtain declaratory relief; (ii) the claim for declaratory relief violated public policy; and (iii) the distributor was deprived of the right to bring claims before a state court.

The Swiss Supreme Court dismissed the appeal. First, the court held that the distributor lodged the appeal too late, as it had not challenged the first award. In addition, the court decided that by agreeing to arbitrate, the parties validly excluded the jurisdiction of the state courts. Finally, the Swiss Supreme Court held that the manner in which the arbitral tribunal grants declaratory relief is not an issue of public policy.

More recently, the Swiss Supreme Court again touched upon the issue of whether a Swiss-seated arbitral tribunal has jurisdiction to grant monetary relief for violation of the arbitration agreement.³⁷ The facts were similar to the previous case, with a dispute arising between a UK manufacturer and a Greek distributor following termination of the distribution agreement. The Greek distributor commenced court litigation in Greece notwithstanding the existence in the distribution agreement of a valid arbitration clause providing for ICC arbitration with seat in Switzerland. During the arbitration proceedings, the Greek court proceedings were stayed. Relying on the arbitration agreement, the UK manufacturer filed a Request for Arbitration and requested, among other relief, compensation for the breach of the arbitration agreement.

In the unpublished ICC award, which was reviewed by the Swiss Supreme Court (the "ICC case"), the arbitral tribunal noted that the claim for damages for breach of the arbitration agreement constitutes a contractual claim under English law and has thus to be differentiated from the allocation of costs pursuant to Article 31 (1) of the ICC Rules. Further, the arbitral tribunal concluded that it was not seeking to encroach on the Greek court's power to freely allocate costs in the court proceedings, but that it could rule that any amounts incurred by the UK manufacturer as a result of the court proceedings constituted a damage, since the court proceedings were initiated in breach of the arbitration agreement. The arbitral tribunal assumed jurisdiction, granted declaratory relief and ordered the distributor to pay damages for the breach of the arbitration agreement.

The distributor moved to set aside the award before the Swiss Supreme Court, challenging the arbitral tribunal's jurisdiction with regard to the relief sought for breach of the arbitration agreement. The Swiss Supreme Court dismissed the jurisdictional appeal.

Surprisingly, in the two cases described above the appellants did not seek to challenge the arbitral tribunal's jurisdiction on the basis that claims for breach of the arbitration agreement are not governed by that very arbitration agreement.³⁸ Instead, in both cases, the appellants unsuccessfully argued that the arbitral tribunal violated the court's exclusive jurisdiction to allocate costs.

It is the authors' view that claims for breach of the arbitration agreement should fall within the arbitral tribunal's jurisdiction, taking into account the broad scope of the arbitration agreement and the possibility to even extend the arbitration agreement to non-signatories. If the wording is sufficiently broad, the arbitral tribunal should be competent to award damages for breach of the arbitration agreement notwithstanding the separate nature of the arbitration agreement, at least in an arbitration-friendly jurisdiction.³⁹ In the ICC case, the arbitral tribunal concluded that the relevant wording

of the arbitration clause ("Any dispute arising from or in connection with this Agreement") was decisive, and that the term "Agreement" meant the whole of the distribution agreement, including the arbitration agreement. Accepting that arbitral tribunals have the power to hear such claims, thereby avoiding yet further proceedings by other judicial authorities, is also in keeping with the parties' intent when they decided to submit all disputes arising out of or in connection with the contract to arbitration.⁴⁰

B. Applicable Law and Requirements

Chapter 12 SPILA does not specify the law applicable to claims for damages as a result of a violation of the arbitration agreement.⁴¹ In the ICC case, the arbitral tribunal applied English law, the law chosen by the parties to govern the contract.⁴² Since the parties did not object to the applicability of English law, the arbitral tribunal was not required to rule on the applicable law.

It may well be, however, that the substantive law of the seat of the arbitral tribunal would apply. Article 187 (1) SPILA stipulates that the arbitral tribunal applies the law agreed by the parties or the law with which the claim presents the closest connection. This provision should be applied by analogy. In most cases, the parties only agree on the law governing the contract, but not on the law governing the arbitration agreement itself. Therefore, the arbitral tribunal should apply the law which presents the closest connection with the claims for breach of the arbitration agreement.⁴³ This would be the substantive law at the seat of the arbitration. By choosing a seat for the arbitration proceedings, the parties intended to locate the arbitration proceedings in a particular jurisdiction.⁴⁴ Thus, any issues relating to the arbitration, including claims based on a breach of the arbitration agreement, should be governed by the law applicable at the seat of the arbitration. Consequently, under this analysis, the arbitral tribunal in the ICC case should have applied Swiss law in resolving the question whether the manufacturer was entitled to damages as a result of the distributor's breach of the arbitration agreement.

Therefore, in deciding whether the party is entitled to damages for breach of the arbitration agreement, the arbitral tribunal must review whether the requirements provided for by the law applicable at the seat of the arbitration proceedings are met.⁴⁵

C. Scope of Damages

Where a party is confronted with court proceedings initiated in breach of the arbitration agreement, a further issue relates to its scope of damage, and what losses it may claim for the breach.

In the ICC case, the arbitral tribunal took an exceptionally broad approach and granted all relief sought by the UK manufacturer. Addressing the issue under English law, the arbitral tribunal based its decision essentially on two precedents from English courts, including the above-mentioned *CMA CGM SA v. Hyundai Mipo Dockyard Co Ltd*.⁴⁶ Based on this decision, the arbitral tribunal in the ICC case ordered the Greek distributor to pay the UK manufacturer all of the legal fees, costs and expenses incurred by the manufacturer in connection with the arbitration and the Greek proceedings. With respect to the stayed Greek court proceedings and any potential, future litigation which the distributor could commence in violation of the arbitration agreement, the arbitral tribunal granted declaratory relief that the manufacturer was entitled to an indemnity from the distributor in respect of:

- any reasonable legal costs and expenses that the UK manufacturer incurs in such proceedings in defending the same claims that were made in the arbitration (to the extent

to which the UK manufacturer does not recover such costs and expenses from the Greek distributor following any costs orders the relevant court might make in favour of the manufacturer);

- any award of compensation or damages that the relevant court may make against the manufacturer in respect of any of the issues that were the subject of the award; and
- any costs orders that the relevant court may make against the manufacturer if such costs order is in respect of any of the issues that were the subject of the award.

Assuming the legal requirements for granting damages are met, the party entitled to damages must be placed in the situation in which it would have been had the opposing party not commenced state court proceedings in breach of the arbitration agreement.⁴⁷ Therefore, the claimant in the arbitration proceedings may seek recovery of any costs and expenses incurred in participating and defending its position in the state court proceedings net of any recovery that it may obtain from the defendant following any costs orders that the state court may make in claimant's favour. In addition, the claimant could even recover any sums that it was ordered to pay in the state court proceedings. From the total, an arbitral tribunal must deduct any costs the party may have saved in order to avoid double dipping.⁴⁸

In many cases, the court proceedings may still be pending when the arbitral tribunal deliberates on the claim for damages. Moreover, there may also be uncertainty as to whether the opposing party will initiate additional, future court proceedings in breach of the arbitration agreement. To reflect the fact that the final amount of all costs incurred as a consequence of the breach of the arbitration agreement is unknown when the arbitral tribunal renders its decision, the arbitral tribunal may grant declaratory relief.

IV. Concluding Remarks

When faced with the commencement by its counterparty of court proceedings in breach of a valid arbitration agreement, a party has several tools at its disposal. As a first step, the party should move to enjoin the court proceedings according to the local law implementing Art. II (3) of the New York Convention. If the court is located in a jurisdiction that is not a party to the New York Convention, or if the court otherwise refuses to refer the dispute to arbitration, a party may, depending on the remedies available in particular jurisdictions, seek an anti-suit injunction or bring a motion to compel arbitration. Both actions, where effective and enforceable, may block parallel court proceedings at an early stage, avoiding the potential for conflicting decisions and additional costs altogether. They may also be used to put pressure on the opposing party, encouraging a settlement. Even if granted and complied with, however, these actions provide no remedy for the costs already incurred by a party in its attempts to enjoin the parallel proceedings. A claim for monetary relief, if successful, may indemnify the party for all the additional costs it incurred in connection with the parallel court proceedings, including any amounts that could be awarded by the court, and potentially may even cover possible future costs should the counterparty attempt to bring future court actions in breach of the arbitration agreement.

The most appropriate remedy will ultimately depend on the specific circumstances of each case as illustrated by the scenarios described at the beginning of this article.

- In *Scenarios 1* and *2*, the arbitration proceedings and the court proceedings are between the parties to the arbitration agreement, i.e., A and B. In *Scenario 1*, the court proceedings were commenced in an arbitration-friendly jurisdiction. The

Swiss court will therefore most likely dismiss the case and refer the parties to arbitration.⁴⁹ In *Scenario 2*, the seat of the arbitration is London. If the local court in country X indeed asserts jurisdiction over the case despite the obligations set out in the New York Convention, A may opt for an anti-suit injunction from an English court and/or the arbitral tribunal. In both scenarios, A should in any event consider whether to bring a damage claim in arbitration for the losses it incurred as a result of the court proceedings that B commenced notwithstanding the existence of the arbitration agreement.

- In *Scenario 3*, B commenced litigation in the U.S. against C, a non-signatory to the arbitration agreement, circumventing the obligation to arbitrate the case. Since C may not compel B to arbitrate since it is a non-signatory to the arbitration agreement, C should move to obtain a stay of the proceedings in order to pressure B to arbitrate its claims as provided in the contract between A and B. While tempting, it seems unlikely that A could bring, in the arbitration, a claim against B for damages for breach of the arbitration agreement because the party that suffered losses due to the breach was C, A's parent, and not A.
- In *Scenario 4*, B has threatened to commence public court proceedings in the U.S. despite a valid arbitration agreement with A, which provides for a heightened confidentiality regime. Although B has not yet commenced court proceedings, since the U.S. courts would otherwise have jurisdiction over B, which is domiciled in the U.S., A may seek an anti-suit injunction in the United States to prevent B from commencing the parallel litigation. As in the other scenarios, A could arguably bring a damage claim in arbitration for the costs it incurred as a result of B's violation of the arbitration agreement.

In any event, to avoid costly and disruptive parallel proceedings, parties should consider reinforcing the obligation to arbitrate by drafting their arbitration clauses accordingly.⁵⁰ First, parties should opt for broad language, which will ensure that the arbitral tribunal will be competent to rule on all contractual and non-contractual claims arising out of, in connection with and under the contract. Parties should also consider including language specifying that the arbitral tribunal has jurisdiction to award damages as a consequence of the breach of the arbitration agreement.

Endnotes

1. Matthias Scherer, Damages as a Sanction for Commencing Court proceedings in Breach of an Arbitration Agreement on www.kluwerarbitrationblog.com, p. 1.
2. Jean-Pierre Fierens/Bart Volders, Monetary Relief in Lieu of Anti-Suit Injunctions for Breach of Arbitration Agreements in RBA N° 34 – Arb-Jun/2012 – *Doutrina Internacional*, p. 91; Simon Gabriel, Chapter 13, Part XII: Damages for Breach of Arbitration Agreements in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International 2013, pp. 1473 *et seq.*, para. 31; Matthias Scherer, Damages as a Sanction for Commencing Court proceedings in Breach of an Arbitration Agreement on www.kluwerarbitrationblog.com, p. 1 referring also to Horvath/Wilske (ed), *Guerilla Tactics in International Arbitration*, Kluwer 2013.
3. Jean-Pierre Fierens/Bart Volders, Monetary Relief in Lieu of Anti-Suit Injunctions for Breach of Arbitration Agreements, in RBA N° 34 – Arb-Jun/2012 – *Doutrina Internacional*, p. 93.
4. Cf. current list of contracting states at: <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states>.

5. For example, this is sometimes the case involving distribution agreements. Some jurisdictions provide for the distributor's mandatory right to compensation for clientele in case of termination of the distribution agreement (e.g. Art. 418 u of the Swiss Code of Obligations). In some jurisdictions, the local law even provides that local courts have exclusive jurisdiction to hear these cases. (Cf. Decision of the Swiss Supreme Court 4A_444/2009 of 11 February 2010, discussed below).
6. Cf. Basler Kommentar, *Internationales Privatrecht*, 3rd ed., 2013 – Dieter Gränicher ad Art. 178 N 79 *et seq.*; Gary B. Born, *International Commercial Arbitration*, 2nd ed., Kluwer Law International 2014, p. 1253; Fouchard/Gaillard/Goldman on *International Commercial Arbitration*, 1999 Kluwer Law International, para. 627 *et seq.*; Simon Gabriel, Chapter 13, Part XII: Damages for Breach of Arbitration Agreements in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International 2013, pp. 1473 *et seq.*; Marco Stacher, *Die Rechtsnatur der Schiedsvereinbarung, Merkmale und Wesen der verpflichtenden und der gestaltenden Elemente der Schiedsvereinbarung*, St. Galler Studien zum internationalen Recht, Band 36, DIKE 1997, para. 179-180.
7. Gary B. Born, *International Commercial Arbitration*, 2nd ed., Kluwer Law International 2014, p. 1253.
8. This provision, which is part of Chapter 1 of the FAA dealing with domestic arbitration, applies to international commercial arbitration by virtue of Section 208 of the FAA (9 USC. § 208); cf. Daniel Tan, Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court's Remedial Powers in *Virginia Journal of International Law*, Volume 47:3, pp. 545-618, p. 555 *et seq.*
9. Daniel Tan, Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court's Remedial Powers in *Virginia Journal of International Law*, Volume 47:3, pp. 545-618, p. 556.
10. *Hudson Global Resource Management, Inc. v. Beck*, 2006 WL 1722353, at *6 (M.D. Fla. June 20, 2006); cf. also *Gerd Petrik v. Reliant Pharmaceuticals, Inc.*, United States District Court, M.D. Florida, Tampa Division, Case No. 8:07-cv-1462-T-24 TBM. /M.D. Fla. Nov 05, 2007.
11. *Waste Management, Inc. v. Residuos Industriales Multiquim, S.A.*, 372 F.3d 339, 343 (5th Cir. 2004).
12. *Gerd Petrik v. Reliant Pharmaceuticals, Inc.*, United States District Court, M.D. Florida, Tampa Division, Case No. 8:07-cv-1462-T-24 TBM. /M.D. Fla. Nov 05, 2007.
13. *Gerd Petrik v. Reliant Pharmaceuticals, Inc.*, United States District Court, M.D. Florida, Tampa Division, Case No. 8:07-cv-1462-T-24 TBM. /M.D. Fla. Nov 05, 2007.
14. Olga Vishnevskaya, Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil? In *Journal of International Arbitration*, 2015, Volume 32, Issue 2, p. 175.
15. Gary B. Born, *International Commercial Arbitration*, 2nd ed., Kluwer Law International 2014, p. 1296 *et seq.*
16. We note that the requirements to issue an anti-suit injunction, including the question whether the court has jurisdiction, are different in each jurisdiction and U.S. courts appear to be more reluctant than English courts in granting such relief; cf. Gary B. Born, *International Commercial Arbitration*, 2nd ed., Kluwer Law International 2014, p. 1290 *et seq.*; Geoffrey Fisher, Anti-suit Injunctions to Restrain Foreign Proceedings in Breach of an Arbitration Agreement in *Bond Law Review* (2010) Volume 22 Issue 1, p. 4 *et seq.*; John Gaffney, ECJ in West Tanker Shocker: London Anti-suit Injunctions Fall Foul of EC Law on www.kluwerarbitrationblog.com, p. 2; Martin Gusy/Mathew Weldon, Anti-suit Injunctions and Anti-arbitration Injunctions in the US Enjoining Foreign Proceedings, on www.uk.practicallaw.com, p. 1 *et seq.*; Michael James, Commercial Court jurisdiction to grant anti-suit injunction against third party in favour of London arbitration on www.uk.practicallaw.com, p. 1 *et seq.*
17. Most of the modern arbitration rules now provide for the appointment of emergency arbitrators with the power to issue interim measures even before an arbitral tribunal has been constituted; cf. Tanya Landon/Marc Palay, "A Comparative Review of Emergency Arbitrator Provisions: Opportunities and Risks," in *The International Comparative Legal Guide to: International Arbitration 2011*.
18. Cf. also Jean-Pierre Fierens/Bart Volders, Monetary Relief in Lieu of Anti-Suit Injunctions for Breach of Arbitration Agreements in RBA N° 34 – Arb-Jun/2012 – *Doutrina Internacional*, p. 94.
19. Marco Stacher, *Die Rechtsnatur der Schiedsvereinbarung, Merkmale und Wesen der verpflichtenden und der gestaltenden Elemente der Schiedsvereinbarung*, St. Galler Studien zum internationalen Recht, Band 36, DIKE 1997, para. 205.
20. Matthias Scherer/Werner Jahnel, Anti-suit and anti-arbitration injunctions in international arbitration: A Swiss perspective in *International Arbitration Law Review* (2009) Volume 12 Issue 4, pp. 66-73, p. 70 *et seq.*; Georg von Segesser/Christopher Boog, Chapter 6: Interim measures in Elliot Geisinger and Nathalie Voser (eds), *International Arbitration in Switzerland: A Handbook for Practitioners 2nd ed.*, Kluwer Law International 2013, p. 112 *et seq.*
21. Basler Kommentar, *Internationales Privatrecht*, 3rd ed., 2013 – Dieter Gränicher ad Art. 178 N 81; Matthias Scherer, Court proceedings in violation of an arbitration agreement: Arbitral Jurisdiction to issue anti-suit injunction and award damages for breach of the arbitration agreement in *International Arbitration Law Review* (2011) Volume 14 Issue 2, p. 44; Matthias Scherer/Werner Jahnel, Anti-suit and anti-arbitration injunctions in international arbitration: A Swiss perspective in *International Arbitration Law Review* (2009) Volume 12 Issue 4, pp. 66-73; Marco Stacher, *Die Rechtsnatur der Schiedsvereinbarung, Merkmale und Wesen der verpflichtenden und der gestaltenden Elemente der Schiedsvereinbarung*, St. Galler Studien zum internationalen Recht, Band 36, DIKE 1997, para. 205.
22. ECJ, Judgment of the Court of 10 February 2009 in case C-185/07.
23. ECJ, Judgment of the Court of 10 February 2009 in case C-185/07; Jean-Pierre Fierens/Bart Volders, Monetary Relief in Lieu of Anti-Suit Injunctions for Breach of Arbitration Agreements in RBA N° 34 – Arb-Jun/2012 – *Doutrina Internacional*, p. 93.
24. John Gaffney, ECJ in West Tanker Shocker: London Anti-suit Injunctions Fall Foul of EC Law on www.kluwerarbitrationblog.com, p. 2.
25. Jean-Pierre Fierens/Bart Volders, Monetary Relief in Lieu of Anti-Suit Injunctions for Breach of Arbitration Agreements in RBA N° 34 – Arb-Jun/2012 – *Doutrina Internacional*, p. 94.
26. EJC, Judgment of the Court of 13 May 2015 in the case C-536/13.
27. *CMA CGM SA v. Hyundai Mipo Dockyard Co Ltd* (2008) EWHC 2791 and (2009) 1 Lloyd's Rep 213; *West Tankers Inc v. Allianz SpA and another* [2012 EWHC 854 (Comm)]; Decision of the Swiss Supreme Court 4A_444/2009 of 11 February 2010; Decision of the Swiss Supreme Court 4A_232/2013 of 30 September 2013; Gary B. Born, *International Commercial Arbitration*, 2nd ed., Kluwer Law International 2014, p. 1304 *et seq.*; Jean-Pierre Fierens/Bart Volders, Monetary Relief in Lieu of Anti-Suit Injunctions for Breach of Arbitration Agreements in RBA N° 34 – Arb-Jun/2012 – *Doutrina Internacional*, p. 95; Nino Sievi, The

- Availability of Damages in the European Union for Breach of the Arbitration Agreement in *Dispute Resolution Journal* 2011(1), pp. 57-63, p. 58.
28. Sylvain Bollée, L'arbitre peut-il octroyer des dommages-intérêts pour violation de la convention d'arbitrage?, note sous England and Wales High Court of Justice (Comm. Court, 4 avril 2012) in *Revue de l'arbitrage*, Volume 2012, Issue 4, pp. 838-843; Olga Vishnevskaya, Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil? In *Journal of International Arbitration*, 2015, Volume 32, Issue 2, p. 204.
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 30. Gary B. Born, *International Commercial Arbitration*, 2nd ed., Kluwer Law International 2014, p. 1305; Olga Vishnevskaya, Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil? In *Journal of International Arbitration*, 2015, Volume 32, Issue 2, p. 205 referring to *Starlight Shipping Co. v. Tai Ping Ins. Co.*, [2008] 1 Lloyd's Rep. 230, 233.
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 32. *CMA CGM SA v. Hyundai Mipo Dockyard Co Ltd* (2008) EWHC 2791 and (2009) 1 Lloyd's Rep 213.
 33. Gary B. Born, *International Commercial Arbitration*, 2nd ed., Kluwer Law International 2014, p. 1304 referring to *Ball v. Versar, Inc.*, 454 F.Supp.2d 783 (S.D. Ind. 2006); *Indosuez Int'l Fin., BV v. Nacional Reserve Bank*, 758 N.Y.S.2d 308 (N.Y. App. Div. 2003); *Allendale Mut. Ins. Co. v. Excess Ins. Co.*, 992 F.Supp. 278 (S.D.N.Y. 1998).
 34. Jean-Pierre Fierens/Bart Volders, Monetary Relief in Lieu of Anti-Suit Injunctions for Breach of Arbitration Agreements in RBA N° 34 – Arb-Jun/2012 – *Doutrina Internacional*, p. 95; Daniel Tan, Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court's Remedial Powers in *Virginia Journal of International Law*, Volume 47:3, pp. 545-618, p. 597.
 35. Jean-Pierre Fierens/Bart Volders, Monetary Relief in Lieu of Anti-Suit Injunctions for Breach of Arbitration Agreements in RBA N° 34 – Arb-Jun/2012 – *Doutrina Internacional*, p. 96.
 36. Decision of the Swiss Supreme Court 4A_444/2009 of 11 February 2010.
 37. Decision of the Swiss Supreme Court 4A_232/2013 of 30 September 2013.
 38. Decision of the Swiss Supreme Court 4A_444/2009 of 11 February 2010; Decision of the Swiss Supreme Court 4A_232/2013 of 30 September 2013; Matthias Scherer, Court proceedings in violation of an arbitration agreement: Arbitral Jurisdiction to issue anti-suit injunction and award damages for breach of the arbitration agreement in *International Arbitration Law Review* (2011) Volume 14 Issue 2, p. 44.
 39. Marco Stacher, *Die Rechtsnatur der Schiedsvereinbarung, Merkmale und Wesen der verpflichtenden und der gestaltenden Elemente der Schiedsvereinbarung*, St. Galler Studien zum internationalen Recht, Band 36, DIKE 1997, para. 265 *et seq.*
 40. Bernhard Berger/Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed., Stämpfli 2015, para. 536; Basler Kommentar, *Internationales Privatrecht*, 3rd ed., 2013 – Dieter Gränicher ad Art. 178 N 52a; Marco Stacher, *Die Rechtsnatur der Schiedsvereinbarung, Merkmale und Wesen der verpflichtenden und der gestaltenden Elemente der Schiedsvereinbarung*, St. Galler Studien zum internationalen Recht, Band 36, DIKE 1997, para. 266.
 41. Marco Stacher, *Die Rechtsnatur der Schiedsvereinbarung, Merkmale und Wesen der verpflichtenden und der gestaltenden Elemente der Schiedsvereinbarung*, St. Galler Studien zum internationalen Recht, Band 36, DIKE 1997, para. 267.
 42. Decision of the Swiss Supreme Court 4A_232/2013 of 30 September 2013.
 43. Simon Gabriel, Chapter 13, Part XII: Damages for Breach of Arbitration Agreements in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International 2013, pp. 1473 *et seq.*, para. 26; Marco Stacher, *Die Rechtsnatur der Schiedsvereinbarung, Merkmale und Wesen der verpflichtenden und der gestaltenden Elemente der Schiedsvereinbarung*, St. Galler Studien zum internationalen Recht, Band 36, DIKE 1997, para. 267 *et seq.*
 44. Marco Stacher, *Die Rechtsnatur der Schiedsvereinbarung, Merkmale und Wesen der verpflichtenden und der gestaltenden Elemente der Schiedsvereinbarung*, St. Galler Studien zum internationalen Recht, Band 36, DIKE 1997, para. 268.
 45. In Switzerland, a claimant would need to demonstrate that the conditions of Article 97 (1) of the Swiss Code of Obligations are met, i.e., (1) breach of the arbitration agreement, (2) damages, (3) causal connection between the damages and the breach, and (4) fault.
 46. Decision of the Swiss Supreme Court 4A_232/2013 of 30 September 2013.
 47. Nino Sievi, The Availability of Damages in the European Union for Breach of the Arbitration Agreement in *Dispute Resolution Journal* 2011(1), pp. 57-63, p. 58.
 48. Marco Stacher, *Die Rechtsnatur der Schiedsvereinbarung, Merkmale und Wesen der verpflichtenden und der gestaltenden Elemente der Schiedsvereinbarung*, St. Galler Studien zum internationalen Recht, Band 36, DIKE 1997, para. 278 *et seq.* By way of example, if a witness statement was prepared for the local court proceedings and was reused verbatim in the arbitration proceedings, the costs to prepare the statement were incurred only once. If the party was not allocated these costs in the court proceedings, it can, in the arbitration, request them either as costs of the arbitration or as damages for breach of the arbitration agreement, but not both.
 49. A Swiss court would dismiss the case in favour of arbitration pursuant to Art. 7 SPILA, which implements Art. II (3) of the New York Convention.
 50. Jean-Pierre Fierens/Bart Volders, Monetary Relief in Lieu of Anti-Suit Injunctions for Breach of Arbitration Agreements in RBA N° 34 – Arb-Jun/2012 – *Doutrina Internacional*, p. 96, Simon Gabriel, Chapter 13, Part XII: Damages for Breach of Arbitration Agreements in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International 2013, pp. 1473 *et seq.*, para. 45 *et seq.*

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