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**ANTI-SUIT INJUNCTION IN INTERNATIONAL  
ARBITRATION**

**By**

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**ANTI-SUIT INJUNCTION IN INTERNATIONAL ARBITRATION**

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## Declaration

This is to certify that the thesis prepared by Solomon Girma, named *Anti-suit Injunction in International Arbitration* and submitted in partial fulfillment of the requirements for the Degree of Master of Law (LL.M. in Public International Law) complies with the regulations of the University and meets the accepted standards with respect to originality and quality.

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## Acronyms

AACCSA	Arbitration Institute of the Addis Ababa Chamber of Commerce and Sectorial Associations
AAWSA	Addis Ababa Sewerage and Water Authority
BIT	Bilateral Investment Treaty
CCJ	Caribbean Court of Justice
CPR	International Institute for Conflict Prevention and Resolution
EACC	Ethiopian Arbitration and Conciliation Centre
ECJ	European Court of Justice
HKIAC	Hong Kong international Arbitration Centre
ICC	International Chamber of Commerce
ICCA	International Congress and Convention Association
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Dispute
LCIA	London Court of International Arbitration
PCA	Permanent Court of Arbitration
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
UNCTRAL	United Nations Commission on International Trade Law

## Abstract

*The involvement of national courts is essential to the overall effectiveness of arbitration, both in domestic and international level. However, anti-suit injunction as an instrument of terminating or staying arbitral proceeding, the relationship of national courts and arbitral tribunals are vary between forced cohabitation and true partnership. Moreover, a marked increase of anti-suit injunctions issued by both Arbitral Tribunals and National Courts has been seen recently. This thesis, therefore, identifies the power of both national courts and arbitral tribunals towards issuing anti-suit injunction in international arbitration. In addition, compatibility of anti-suit injunction with the general purposes and principles of international arbitration have been critically scrutinized. Furthermore, the legal effect of anti-suit injunction in international arbitration is addressed in detail. Finally, after a profound analysis on the above three areas of controversies in international commercial arbitration, the thesis argues that since anti-suit injunction is a new trend in international arbitration, both National Courts and Arbitral Tribunals should always exercise this power with due care because their effects may be more harmful than the problem they are seeking to resolve it.*

**Key Words:** Anti-suit Injunction, Judicial Intervention, International Arbitration.

# Chapter One

## Introduction

### 1.1. Background of the Study

International arbitration has become the principal method of resolving disputes between states, individuals, and corporations in almost every aspect of international trade, commerce, and investment.<sup>1</sup> In the post-World War II era, the use of international arbitration to resolve foreign investment disputes significantly increased and treaty-based arbitration of foreign investment dispute claims are ranging from millions to billions of dollars.<sup>2</sup> As a result, new arbitration centers have been set up to catch the wave of this new business.<sup>3</sup>

Moreover, many scholars define anti-suit injunction. For example, Neil Dowers defines anti-suit injunction as a court order against a party with the aim “either of preventing a party raising an action in another forum, or forcing that party to discontinue such an action if already started.”<sup>4</sup> Thomas Raphael defines anti-suit injunction as “an order of the court requiring the defendant not to commence, or to cease to pursue, or not to advance particular claims within, or to take steps to terminate or suspend, court or arbitration proceedings in a foreign country.”<sup>5</sup> Margaret Moses also defines anti-suit injunction as “an order by a court to a party over which the court has personal jurisdiction that requires the party either not to file a claim in a foreign jurisdiction or not to proceed with a claim that has already been filed.”<sup>6</sup>

Fernandez Rozas offers the following on the purpose of anti-suit injunction:

*Anti-suit injunction is used to safeguard the possibility of instituting arbitral proceeding to ensure that (arbitrators) properly carried out, while at the same time avoiding the co-*

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<sup>1</sup>Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (Oxford: Oxford University Press, 2009), 1.

<sup>2</sup>Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Hague: Kluwer Law International, 2009), 26.

<sup>3</sup>Blackaby et al., *Redfern and Hunter on International Arbitration*, 1.

<sup>4</sup>Neil Dowers, “The Anti-Suit Injunction and the EU: Legal Tradition and Europeanization in International Private Law,” *Cambridge Journal of International and Comparative Law* 2, no.4 (2013): 960.

<sup>5</sup>Thomas Raphael, *The Anti-Suit Injunction* (Oxford: Oxford University Press, 2008), 3-4.

<sup>6</sup>Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (New York: Cambridge University Press, 2012), 91-92.

*existence of two decisions relating to the same dispute, they are certainly far from being without risk.*<sup>7</sup>

From the phrase “*ensure that arbitrators will be properly carried out,*” it is ascertained that, anti-suit injunction is issued by a body which carries a proper conduct of arbitral proceeding. From the historical point of view, Rosier and Murray defines anti-suit injunction as a mechanism of “safeguarding an arbitration agreement against the threat of parallel proceedings launched in a foreign jurisdiction.”<sup>8</sup>

On the other hand, anti-suit injunction is not only ordered by Court but also by the Arbitral Tribunal, which aimed to prevent or restrain the proceedings in breach of arbitration agreement.<sup>9</sup> As to Emmanuel Gaillard, this power of Arbitral Tribunal emanates “from the well-established principles of international arbitration law” which sanction a party violate the arbitration agreement.<sup>10</sup> Therefore, the terminology of anti-suit injunction used to describe both an injunction issued by National Court and Arbitral Tribunal.

International arbitration, as a dispute settlement mechanism, resolves disputes across the borders that has an autonomous character and exists in a domain of independent character.<sup>11</sup> Unless parties of arbitration or the arbitral tribunal seeks the assistance of local forums, arbitration consigns national courts to a secondary position.<sup>12</sup> The anti-suit injunction is an exceptional instrument available to national courts to intervene in international arbitration.<sup>13</sup> In recent years, a number of anti-suit injunctions have been issued by national courts directed at the parties, or even at the arbitrators, with a view to terminate or to stay arbitral proceeding.<sup>14</sup> Different

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<sup>7</sup>Fernandez Rozas, “Anti-suit Injunctions Issued by National Courts Measures Addressed to the Parties or to the Arbitrators,” in *Anti-Suit Injunctions in International Arbitration*, ed. Emmanuel Gaillard (Berna:Staempfli Verlag AG, 2005),77.

<sup>8</sup>Darren Rosier and Dorothy Murray, “The Latest Word on the Anti-Suit Injunction,” King and Wood Mallesons, January 23, 2014, <http://www.Kwm.Com>(Accessed June 24, 2015).

<sup>9</sup>Laurent Lévy, “Anti-Suit Injunctions Issued by Arbitrators,” *IAI International Arbitration Series* 2 (2003):124.

<sup>10</sup>Emmanuel Gaillard, “Anti-Suit Injunctions Issued by Arbitrators,” in *International Arbitration 2006: Back to Basics*, ed. Albert Jan Van Den Berg (Hague: Kluwer Law International, 2007), 237.

<sup>11</sup>Julian D.M. Lew, “Does National Court Involvement Undermine the International Arbitration Processes,” *American University International Law Review* 24, no. 3(2009):490.

<sup>12</sup>Giulia Carbone, “Interference of the Court of the Seat with International Arbitration,” *Journal of Dispute Resolution*, no.1 (2012):220.

<sup>13</sup>Ibid. 12.

<sup>14</sup>Emmanuel Gaillard, *Legal Theory of International Arbitration* (Boston: Martinus Nijhoff Publishers, 2010), 71.

international arbitration cases show that an anti-suit injunction is not only granted by courts but also by arbitrators. Anti-suit injunctions ordered by national courts are either by court of seat of arbitration or by court of a state other than that of the seat of the arbitration. International Arbitration cases, including but not limited to, Hubco,<sup>15</sup> COPEL<sup>16</sup> and National Grid<sup>17</sup> are showing the trend of anti-suit injunctions ordered by courts of a state other than a court of the seat of arbitration. Cases like Saipem S.p.A. v. Bangladesh,<sup>18</sup> Himpurna v. Indonesia,<sup>19</sup> and Salini Costruttori Spa v. AWSA<sup>20</sup> have remarkably cited to show the trend of anti-suit injunction issued by court of seat of arbitration.

Furthermore, National Courts involvement in international arbitration in general and anti-suit injunction in particular is still debatable specifically in relation to the scale of involvement.<sup>21</sup> Parties in arbitration want a prompt, less expensive and final resolution of the dispute, whereas states want to ensure the arbitral process is just and impartial.<sup>22</sup> Based on this, different theories emerged on judicial intervention in arbitration process.<sup>23</sup> As a result, anti-suit injunction has become one area of controversies. The silence or ambiguities of international arbitration instruments, on the other hand, intensify the anxiety.

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<sup>15</sup>Hubco Corporation v. Water and Power Development Authority of Pakistan (WAPDA), Supreme Court of Pakistan, Civil Appeal Case no 1398 and 1399 (June 14, 2000), *Arbitration International* 16 no.4:439-460 (Herein after called "Hubco case").

<sup>16</sup>Companhia Paranaense De Energia (COPEL) v.UEG Arancaria Ltda, Curitiba Court of First Instance, case no. 001-14668( June 3, 2003), *Journal of International Arbitration* 25, no.1:35 (Herein after called "COPEL case").

<sup>17</sup>National Grid Plc and The Argentine Republic, UNCITRAL Arbitration Decision on Jurisdiction (June 20, 2006), *The American Journal of International Law* 103, no. 4:722 (Herein after called "National Grid case").

<sup>18</sup>Saipem S.p.A. v. The People's Republic of Bangladesh, ICC case no. 7934, unpublished, cited in ICSID Case no.ARB/05/7 (June 30, 2009), *ICSID Review-Foreign Investment Law Journal*:95 (Herein after called "Saipem S.p.A case").

<sup>19</sup>Himpurna California Energy Ltd ("Himpurna") v. Republic of Indonesia, Ad Hoc Arbitration under UNCITRAL rules (May 4, 1999), *Yearbook Commercial Arbitration* 25:11 (Herein after called "Himpurna case").

<sup>20</sup>Salini Costruttori Spa v. Federal Democratic Republic of Ethiopia, Addis Ababa Water & Sewage Authority, ICC Arbitration Case no.10623/AER/ACS (December 7, 2001), *Mizan Law Review* 4, no.2:324 (Herein after called "Salini case").

<sup>21</sup>Angualia Daniel, "The Role of Domestic Courts in International Commercial Arbitration," *Social Science Research Network: SSRN* (2010):9, <http://www.ssm.com/abstract=1674760> (Accessed June 14, 2015)

<sup>22</sup>Okezie Chukwumerije, "Judicial Supervision of Commercial Arbitration: The English Arbitration Act of 1996," *Journal of Arbitration International* 15, no.171 (1999):6.

<sup>23</sup>Loukas Mistelis et al., *Comparative International Commercial Arbitration* (Hague: Kluwer Law International, 2003), 72.

Concerning the power of arbitral tribunals to issue anti-suit injunction, international arbitration rules are silent. For instance, the Convention on the Settlement of Investment Disputes between States and Nationals of other States does not expressly refer to anti-suit injunction.<sup>24</sup>The UNCITRAL Model Law on International Commercial Arbitration (“UNCITRAL”) also has not addressed it.<sup>25</sup>The ICC Rules of Arbitration are also silent on this matter.<sup>26</sup>For some scholars also it is highly doubtful whether an arbitral tribunal has power to issue anti-suit injunction.<sup>27</sup> However, practical cases of Holiday Inns S.A.,<sup>28</sup> Plama Consortium, Tokios Tokelés, Occidental Exploration & Production and Framatome S.A. are affirms the power of arbitral tribunal to issue anti-suit injunction.<sup>29</sup>

In the context of Ethiopia, modern arbitration is as old as the promulgation of 1960 Civil Code and the 1965 Civil Procedure Code.<sup>30</sup>The establishment of EACC and AACCSA are also indicatives of the current trend towards a better utilization of arbitration in commercial disputes.<sup>31</sup> From reading of Article 154 of Civil Procedure Code and the provisions of the Civil Code from 3325 to 3346, temporary injunction may be ordered to restrain a party from doing a particular act or requiring him/her to do such an act. However, arbitration rules of both EACC and AACCSA are silent on the power of arbitrators to issue anti-suit injunction. Therefore, this thesis inquires status of anti-suit injunction in international arbitration.

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<sup>24</sup>Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) of 1965, <http://www.worldbank.org/icsid/basicdoc-archive/9.htm>. (Accessed June 5, 2015).

<sup>25</sup>UNCITRAL Model Law on International Commercial Arbitration (1985) and its amendments (2006),[https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)(Accessed Sep 3, 2015).

<sup>26</sup>Ongur Ergun, "The New Arbitration Rules of International Chamber of Commerce," *Ankara Bar Review* 4,no.2 (2011):83-90.

<sup>27</sup>Pierre Karrer, "Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please," in *International Arbitration and National Courts: The Never Ending Story*, ed. Albert Jan Van De Berg (Boston: Kluwer Law International, 2001), 106-107.

<sup>28</sup>Holiday Inns S.A. and others v. Morocco, ICSID Case no. ARB/72/1 (September 23, 1974), *British Yearbook of International Law*51, no.1:123-134 as cited in Emmanuel Gaillard "Anti-suit Injunctions Issued by Arbitrators," (Hague: Kluwer Law International, 2007), 244. (Herein after called “Holiday case”).

<sup>29</sup>Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24/Procedural Order (September 6, 2005) (Herein after called “Plama Consortium case”), see Framatome S.A. v. Atomic Energy Organization of Iran (ICC Case no. 3896, April 30, 1982), Tokios Tokelés v. Ukraine (ICSID Case no. ARB/02/18/Jurisdiction, April 29, 2004), Occidental Exploration & Production Company v. Republic of Ecuador (LCIA Case no. UN 3467/Non-Justifiability, April 29, 2005), <http://www.italaw.com/cases/857>(Accessed July 10, 2015).

<sup>30</sup>Daniel Alemayehu, "Review of Arbitration in Ethiopian Construction Industry, " (Master’s thesis, Addis Ababa University, 2014):10, <http://etd.aau.edu.et/handle/1234/5054> (Accessed July 19, 2015).

<sup>31</sup> Ibid.

## 1.2. Statement of the Problem

Arbitration is one of the dispute settlement methods that lead by impartial third party in accordance with the arbitration agreement.<sup>32</sup> With acceptance of such party autonomy, “the level of court intervention has been significantly diminished over the years”.<sup>33</sup> However, anti-suit injunction is a recent trend of court involvement in international arbitration.<sup>34</sup> The stage of court involvement through anti-suit injunction is not clear; it gives rise to a number of practical and legal difficulties. In practice, anti-suit injunctions in international arbitration have directed at arbitral proceedings or at court proceedings, which vary in their form and are, requested “either in an attempt to disrupt the arbitral process or, to the contrary, to try to protect it.”<sup>35</sup> According to Emmanuel Gaillard, in recent years, the numbers of anti-suit injunctions issued by national courts are dramatically increased and it has to terminate or to stay arbitral proceeding unlike other areas of court intervention in international arbitration.<sup>36</sup>

Based on four different theories i.e. Jurisdictional, Contractual, Hybrid and Autonomous on the power of courts to issue anti-suit injunctions, debates among scholars are continued. For some of them ‘there will hardly ever be a justification for a national court to grant an anti-suit injunction’<sup>37</sup> but for others, it is an inherent power of national courts. Such differences have also reflected in number of practical cases. The question like, what is the legal effect of anti-suit injunction, on whom anti-suit injunction is issued and at what stage anti-suit injunction is ordered are also unanswered in the existing international arbitration legal frameworks. Due to this legal gap, the issue of anti-suit injunction poses a serious problem. On the other hand, the power of arbitration tribunals to issue anti suit injunction is not universally recognized and main legal sources of international arbitration are either silent or ambiguous. As a result, a debate among scholars continued concerning power of arbitrators to issue anti-suit injunctions and the legal effect of such injunction. Therefore, this research intends to assess and answers the above-enumerated problems, and evaluates international experience.

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<sup>32</sup>Belma Bulut, “The Role of the Place of Arbitration in International Commercial Arbitration Proceeding; Turkey as a Place of Arbitration,” *Ankara Bar Review*1, no 1(2011): 35.

<sup>33</sup>Ibid.

<sup>34</sup>Loukas Mistelis and Julian D.M. Lew, *Pervasive Problems in International Arbitration* (Hague: Kluwer Law International, 2006), 204.

<sup>35</sup>Ibid.

<sup>36</sup>Gaillard, *Legal Theory of International Arbitration*, 71.

<sup>37</sup>Lew, “Does National Court Involvement Undermine the International Arbitration Processes,” 509.

### 1.3. Research Objectives

#### 1.3.1. General Objective

The general objective of this thesis is to examine anti-suit injunction in the international arbitration. In very limited scope also, assess anti-suit injunction in the context of Ethiopia arbitration laws.

#### 1.3.2. Specific Objectives

- To review anti-suit injunction in the arbitration process internationally.
- Identify the legal and practical challenges of anti-suit injunction in international arbitration.
- Propose what should be done to promote and improve international commercial arbitration in relation to anti-suit injunction.

### 1.4. Research Questions

The thesis shall answer the following basic questions

- Do Arbitral Tribunals and National Courts have power to issue anti-suit injunctions in international arbitration or not?
- What is the consequence of anti-suit injunction?
- What lesson should be drawn from the practical challenges of anti-suit injunction?

### 1.5. Significance of the Study

This work on “Anti-Suit Injunction in International Arbitration” adds towards shading light on international arbitration legal frameworks and practices on the concern of anti-suit injunction. The thesis also plays an important role in identifying whether Arbitral Tribunals and National Courts have power to issue anti-suit injunction. It serves to reconsider the issue of anti-suit injunction in the arbitration process and to take remedial action. In addition, it has an immense contribution in examining the legal and practical challenges of anti-suit injunction. Furthermore, it serves as an important input for students and researchers who are interested to make further investigation on the topic.

## 1.6. Scope

The study is exclusively limited to anti-suit injunction in international commercial arbitration. As a result, this thesis is limited to assess the legal and theoretical foundations of anti-suit injunctions and identifies practical challenges of anti-suit injunction in the process of international commercial arbitration. In Ethiopian context also, as best of my assessment, unable to found any international anti-suit injunction case which Ethiopia is party except *Contruttori SPA v. AAWSA*. Therefore, only this case has taken in the Ethiopian context. On the other hand, anti-suit injunctions in restraint of foreign court proceedings have been purposely excluded.

## 1.7. Methodology

The thesis is a Desk research. As qualitative research in line with Article 38 of ICJ, this desk research examining a variety of sources, including laws, cases, publications and other relevant academic literatures based on purposive data selection method.

## 1.8. Presentation

Chapter one introduces the subject matter of the thesis and presents the problems that the study aims to examine. In chapter two, the compatibility of anti-suit injunction is analyzed with general purpose and principles of international arbitration. In chapter three, anti-suit injunction issued by courts has been addressed. In chapter four, anti-suit injunction issue by arbitrators is examined. Finally, the conclusion and recommendation of the thesis are given.

## 1.9. Limitation

In the due course of this study, the researcher faced different challenges. Among others, difficulty of finding cases directly related to the study area. Shortage of time and limited Access of reference materials was also another limitation.

## Chapter Two

### Anti-Suit Injunction in International Arbitration

#### 2.1. Anti-Suit Injunction – Literature Review

With the objective of settling different dispute, nations establish institutions like court and administrative tribunals. However, arbitration is a private method of dispute resolution used to settle disputes between companies or states.<sup>38</sup> Certainly, due to a multi-faceted nature of the process and the way it has evolved over time, there is no single accepted definition of the term ‘arbitration’ despite various attempts to define.<sup>39</sup>

Rene David defines arbitration as “a device whereby the settlement of a question--- entrusted to one or more persons who derive their powers from a private agreement.”<sup>40</sup> Redfern and Hunter also defines the notion of arbitration as a process which “two or more parties faced with a dispute which they cannot resolve themselves; agree that some private individual will resolve it.”<sup>41</sup> Concerning the concept of arbitration however, there does not appear to be a serious divergence but on the limits of scope of arbitration.<sup>42</sup>

According to Nigel Blackaby et al, the term ‘international’ used to mark “the difference between arbitrations which are purely national or domestic and those which in some way transcend national boundaries.”<sup>43</sup> However, there is still a lack of an internationally agreed definition on the term ‘international’ in the context of international commercial arbitration.<sup>44</sup>

As discussed above, anti-suit injunction is a mechanism which staying or terminating arbitration proceeding. However, anti-suit injunctions and anti-arbitration injunctions are words that used to describe staying or terminating arbitration proceedings. For example, Romesh Weeramantry

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<sup>38</sup>Elna Haikola, "Arbitral Tribunals and National Courts-Constant Battle or Efficient Co-Operation?," (2013):1 Finna.FI, <http://www.google.com/search?hl=Elina+national+court>. (Accessed June 2, 2015).

<sup>39</sup>Maxi Scherer, "Award and the Courts, Set-off in International Arbitration," in *Austrian Yearbook on International Arbitration 2015*, ed. Gerold Zeiler (Manz'sche Verlags- und Universitäts buchhandlung, 2015), 476.

<sup>40</sup>Rene David, *Arbitration in International Trade* (Deventer: Kluwer Law and Taxation, 1985), 5.

<sup>41</sup>Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 2004), 5.

<sup>42</sup>Emmanuel Gaillard and John Savage, *International Commercial Arbitration* (Hague: Kluwer Law International, 1999), 10.

<sup>43</sup>Blackaby et al., *Redfern and Hunter on International Arbitration*, 1.

<sup>44</sup>*Ibid.* 1.28.

point out that, anti-suit injunction is “injunction seeks to prevent the initiation or continuation of arbitration proceedings whereas anti-arbitration injunction is injunction seeks to prevent the initiation or continuation of court proceedings.”<sup>45</sup> On the contrary, Gusy and Weldon, claimed that both terms are different which anti-suit injunction used to “prevent a party from proceeding with litigation commenced in a foreign in violation arbitration agreement” whereas anti-arbitration injunction is used to “prevent a party from proceeding with arbitration due to lack of a valid arbitration agreement between the parties.”<sup>46</sup> Julian D M Lew point out that, both terms have not used interchangeably which anti-arbitration injunction is injunctions that “seek to undermine or block arbitration proceedings,” whereas anti-suit injunction is injunctions that “encourage and enforce arbitration proceedings.”<sup>47</sup>

According to Emmanuel Gaillard, however, both terms used to refer an order “issued either during the arbitral process in order to prevent an arbitral tribunal from hearing the claim or, at the end of the arbitral process, to obstruct the enforcement of the arbitral award.”<sup>48</sup> Similarly, Nicholas Poon used both anti-suit injunction and anti-arbitration injunction as a “mechanism to restrain arbitration from commencing or continuing.”<sup>49</sup>

## 2.2. Anti-Suit Injunction and Purpose of International Arbitration

The question ‘why parties choose international arbitration?’ is important to assess anti-suit injunction within the purpose of international arbitration. To draw the link between anti-suit injunction and purposes of international arbitration, at least for the purpose of consensus, anti-suit injunctions issued by courts for the purpose of facilitating and supporting of arbitration process, and to avoid parallel proceedings or to supervise a minimum standards of due process of law and fairness of the arbitral proceedings are directly allied with the purpose of international arbitration.<sup>50</sup>

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<sup>45</sup>Romesh Weeramantry, “*Anti-Arbitration Injunctions: Core Concepts*,” (2014) [Http://Cil.Nus.edu.Anti-Arbitration-Injunctions.Pdf](http://Cil.Nus.edu.Anti-Arbitration-Injunctions.Pdf). (Accessed August 2, 2015).

<sup>46</sup>Martin Gusy and Matthew Weldon, “*Anti-suit Injunctions and Anti-arbitration Injunctions in the US Enjoining Foreign Proceedings*,” (2014):1-3. [Http://Us.Practicallaw.Com/3-560-2848](http://Us.Practicallaw.Com/3-560-2848) (Accessed March 4, 2014).

<sup>47</sup>Lew, “Does National Court Involvement Undermine the International Arbitration Processes,” 499.

<sup>48</sup>Mistelis and Lew, *Pervasive Problems in International Arbitration*, 204.

<sup>49</sup>Nicholas Poon, “The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore,” *Singapore Academy Law Journal* 25, no. 1 (2013):246.

<sup>50</sup>Moses, *The Principles and Practice of International Commercial Arbitration*, 92.

Furthermore, anti-suit injunction issued by arbitral tribunals that aimed to avoid the aggravation of the dispute or to ensure the effectiveness of award is relate with the purposes of international arbitration.<sup>51</sup>

### 3.2.1. Flexibility

The apparent advantage of institutional arbitration is availability of pre-established rules and procedures.<sup>52</sup> In arbitration, the parties have the flexibility to adapt the procedure that suit with the situation.<sup>53</sup> Flexibility of arbitration is hopefully a manifestation of party autonomy and helps parties to save time and costs.<sup>54</sup> On the other hand, the purpose of anti-suit injunction is to take remedy against “parallel proceedings when one of the parties (typically the party with the weaker right or no right at all) to escape the arbitration agreement by commencing court proceedings.”<sup>55</sup> In this regard, the attempt of such recalcitrant party to disrupt the arbitral process is against flexibility purpose of arbitration.

### 2.3.2. Neutrality

Neutrality in international arbitration is an opportunity of parties to choose a neutral place for the resolution of their dispute and to choose a ‘neutral’ tribunal.<sup>56</sup> Choosing of a neutral forum has a vital role over the arbitral proceeding and has “effects over the legal issues, such as the determination of the arbitrators, enforcement of the awards, and it also has an impact over the practical issues such as accommodation, visa issues” and other.<sup>57</sup> Essentially, it is up to the parties to determine the place of arbitration by taking into account both legal and practical factors. Because, seat of arbitration is the most important variable in an arbitration agreement and choose a good seat will likely get an effective arbitration.<sup>58</sup> Therefore, the seat of arbitration

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<sup>51</sup>Gaillard, "Anti-Suit Injunctions Issued by Arbitrators," 237.

<sup>52</sup>John Arthur, "An Introduction to International Commercial Arbitration,"(2013):25, [www.gordanandjackson.com.au](http://www.gordanandjackson.com.au). (Accessed June 28, 2015).

<sup>53</sup>Article 17(1) of UNCITRAL Rule and Article 16 (1) of SIAC Arbitration Rule.

<sup>54</sup>Arthur, "An Introduction to International Commercial Arbitration," 12.

<sup>55</sup>Duarte Ricardo, "Anti-Suit Injunctions in the Context of International Commercial Arbitration," *Antitrust & Unfair Competition Law Journal* 48, no.3(2010): 1.

<sup>56</sup>Blackaby et al., *Redfern and Hunter on International Arbitration*, 1.89.

<sup>57</sup>Bulut, "The Role of the Place of Arbitration in International Commercial Arbitration Proceeding; Turkey as a Place of Arbitration," 34.

<sup>58</sup>Elodie Dulac, Introduction to International Arbitration, Lecture, March 26, 2014.

determines the courts that supervise and support the arbitration that relate with neutrality purpose of international arbitration.<sup>59</sup>

### 2.3.3. Confidentiality

Confidentiality in arbitration is hearing parties in private and not to disclose secrets of the arbitration to anyone not involved in the arbitration process.<sup>60</sup> In fact, there is no hard and fast legal rule regarding the confidentiality of arbitration proceedings.<sup>61</sup> However, to preserve confidentiality, parties may stipulate “the required degree of confidentiality in their arbitration agreement.”<sup>62</sup> For the case at hand, confidentiality purpose of arbitration, has no direct link with the issue of anti-suit injunction, but indirectly an act of parties to escape the arbitration agreement by commencing court litigation is amount the leak of information and it is an act of revelation.

### 2.3.4. Cost and Time

Nigel Blackaby et al wrote:

*Arbitration was a speedy and relatively inexpensive method of dispute resolution. This is no longer so, at least where international arbitration is concerned. There are many reasons for this. First, the fees and expenses of the arbitrators (unlike the salary of a judge) must be paid by the parties; and in international arbitrations of any significance, these charges may be substantial. Secondly, it may be necessary to pay the*

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<sup>59</sup>Jan Paulsson, "Arbitration Unbound: Award Detached from the Law of Its Country of Origin," *International and Comparative Law Quarterly* 30, no. 2 (1981):358.

<sup>60</sup>Jim McCartney, "Are Arbitrations Private and Confidential?," *ADR Institute of Canada* (2014):1 [http://www.adrcanada.ca/resources/documents/mccartney\\_jim\\_are\\_arbitrations\\_private\\_and\\_confidential\\_000.pdf](http://www.adrcanada.ca/resources/documents/mccartney_jim_are_arbitrations_private_and_confidential_000.pdf). (Accessed August 4, 2015).

<sup>61</sup>For instance, the Arbitration Rules of the Arbitration SCC use clear word that the Institute and the Arbitral Tribunal “shall maintain confidentiality of the arbitration. Article 52(5) of the 1976 UNCITRAL Arbitration Rules also stipulates that ‘the award may be made public only with the consent of both parties.’ However, both the 1985 and 2006 UNCITRAL Model Law on International Commercial Arbitration is silent on the issue of confidentiality. Article 30(1) of ICC Arbitration Rule also indicates that arbitral tribunals should take measures in addition to for protect trade secrets and confidential information. However, unlike most institutional rules, ICC Arbitration Rules are silent on the matter of confidentiality of the award.

<sup>62</sup>Doug Jones, "Guide To International Arbitration," (2014):4. <https://www.lw.com/.../Guide-To-International-Arbitration-2014>. (Accessed July 4, 2015).

*administrative fees and expenses of an arbitral institution, and these too can be substantial.*<sup>63</sup>

However, to determine whether a particular arbitration process is expensive or cheap as compared to litigation, factors such as the rules that govern arbitration, the weight of the case involved, the cost of initiating the arbitration, and the type of hearing requested by the parties should be considered.<sup>64</sup> Additionally, arbitral proceedings can commence and dispute resolved, faster than litigation, if an appropriate procedure is used.<sup>65</sup>

In relation to anti-suit injunction, an act of suing of parties before an “incompetent arbitral tribunal instead of a competent court or vice versa may lead to the claim being rejected or the decision of the incompetent arbitral tribunal being set aside.”<sup>66</sup> As a result, parties incur additional cost and time.<sup>67</sup> Therefore, issuing anti-suit injunction for the purpose of avoiding wastage of the costs, and shortening the time of arbitral proceeding is justified as compatible to the purpose of arbitration.

## 2.4. Anti-Suit Injunctions and International Arbitration Principles

### 2.4.1. Principle of Arbitrability

According to Giuditta Cordero, “Arbitrability rule is meant to preserve the jurisdiction of the courts in certain areas where the public interest is deemed to prevail against the freedom of the parties to regulate their own interests.”<sup>68</sup> In international commercial arbitration, “the law governing the Arbitrability of a dispute may depend on place, and stage of arbitral proceeding.”<sup>69</sup> Bernard Hanotiau points out that:

*In its usual meaning, Arbitrability can challenge in to different ways (a) due to the quality of one of the parties. One may refer this case to subjective Arbitrability--- and (b) due to the*

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<sup>63</sup>Blackaby et al., *Redfern and Hunter on International Arbitration*, 1.100.

<sup>64</sup>Michael Buhler, “Awarding Costs in International Commercial Arbitration: an Overview,” *ASA Bulletin-Kluwer Law* 22, no.2 (2004): 249.

<sup>65</sup>Colin Edelman et al., *The Law of Reinsurance* (Oxford: Oxford University Press, 2005), 6.13.

<sup>66</sup>Irene Welsler, “Pitfalls of Competence,” (2007):18, <https://www.google.search?hlpitfalls+welsler> (Accessed July 12, 2015).

<sup>67</sup>Gerold Zeiler et al., *Austrian Arbitration Yearbook 2007* (Manz’sche Verlags- und Universitätsbuchhandlung, 2007), 4.

<sup>68</sup>Giuditta Cordero, “National Rules on Arbitrability and the Validity of an International Arbitral Award: The Example of Disputes Regarding Petroleum Investment in Russia,” (2010):1. <http://lexarbitri.pe/wp-content/uploads/2014/02/National-rules-on-Arbitrability-and-international-arbitral-award.pdf>.

<sup>69</sup>Katarína Chovancová, “Arbitrability,” (2014):2, <http://www.paneurouni.com/files/sk/fp/ulohy-version.pdf>. (Accessed July 25, 2015).

*subject matter of the dispute which has been removed from the domain of Arbitrability matters by the applicable national law. This is objective Arbitrability.*<sup>70</sup>

The issue of subjective Arbitrability arises in particular when a State or a public entity that has signed an arbitration agreement subsequently avails itself to avoid the arbitration.<sup>71</sup> However, state enterprise or a state entity, “may not invoke its incapacity to enter into an arbitration agreement to refuse to participate in an arbitration to which it has previously consented.”<sup>72</sup> Concerning restrictions relating to the parties based on the subject matter of the dispute, as indicated in New York Convention, enforcing court look to its own law to determine whether the dispute is arbitrable or not.<sup>73</sup>

Therefore, national laws determines which types of disputes are the exclusive domain of national courts, and which disputes can be decided through arbitration.<sup>74</sup> For instance, the Ethiopia Civil Procedure Code under Article 315(2) prescribes ‘no arbitration may take place in relation to administrative contracts as defined in Article 3132 of the Civil Code.

#### 2.4.2. Separability of the Arbitration Agreement

In principle of separability, the arbitration agreement is an autonomous agreement that survives the invalidity or termination of the main underlying contract.<sup>75</sup> This principle is intended to give primary responsibility to the tribunal,<sup>76</sup> with respect to determining whether it has jurisdiction irrespective of whether the arbitration contract is null or void.<sup>77</sup> An arbitral tribunal can make a decision regarding its own jurisdiction, including objections regarding the existence or validity of the arbitration agreement.<sup>78</sup> According to the separability principle, an arbitration clause included in

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<sup>70</sup> Bernard Hanotiau, "The Law Applicable to Arbitrability," *Singapore Academy of Law Journal* 26, (2014): 875.

<sup>71</sup> *Ibid.*, 876.

<sup>72</sup> Zheng S. Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Paris: Taylor & Francis Ltd, 2014), 33.

<sup>73</sup> Article 5 of the New York Convention.

<sup>74</sup> Chovancová, "Arbitrability," 4.

<sup>75</sup> Amokura Kawharu, "Arbitral Jurisdiction," *New Zealand Universities Law Review* 23, no.2 (2008): 240.

<sup>76</sup> Altan Gülerci, "Separability of the Arbitration Agreement in International Arbitration," *Ankara Bar Review* 1 (2008): 109.

<sup>77</sup> See Judgment of Supreme Court of Judicature Court of Appeal (Civil Division), London Case No. [2007] EWCA CIV 20 (January 2007) and Judgment of House of Lords of Appeal, London Case No. [2007] UKHL 40. (October 2007).

<sup>78</sup> Joachim Delaney and Katharina Lewis, "The Presumptive Approach to The Construction of Arbitration Agreements and The Principle of Separability- English Law Post *Fiona Trust* and Australian Law Contrasted," *UNSW Law Journal* 31, no.1 (2008): 358.

arbitration agreement has evaluated separately from the other conditions of the agreement.<sup>79</sup> Therefore, arbitral tribunal, not the court, has jurisdiction to determine questions regarding the validity of a contract containing an arbitration agreement once the dispute submitted to arbitral tribunal.<sup>80</sup> Furthermore, any act of parties to stop or terminate the arbitration proceeding through requesting anti-suit injunction from court based on voidness of contract is against the principle of separability until the tribunal assessed the validity of arbitration agreement in its jurisdiction.<sup>81</sup>

The law governing arbitration law in Ethiopia that found in the 1960 Civil Code and the 1965 Civil Procedure Code say nothing about the principle of separability.<sup>82</sup> As provided under sub-article (3) of Article 3330 of the Civil Code also, *the arbitrator may in no case be required to decide whether the arbitral submission is or is not valid*. This provision ousts arbitrators from jurisdiction regarding matters relating to the validity of arbitration agreement.<sup>83</sup>

#### 2.4.3. Limits on Party Autonomy

The principle of party autonomy is not only freedom of parties to choose laws but also to choose the conduct of the arbitration process.<sup>84</sup> The principle of party autonomy is not however unlimited autonomy of parties but subject to some restrictions.<sup>85</sup> Public policy reasons, unequal treatment of parties, mandatory rules, and no third parties subject to obligation are exceptional restriction to party autonomy.<sup>86</sup> Therefore, actions to preserve and protect public policy, or unequal treatment of parties by arbitral tribunals, or clear violations of mandatory provisions, and to protect interest of third parties are legitimate grounds to take an anti-suit injunction.

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<sup>79</sup>Gülerci, "Seperability of the Arbitration Agreement in International Arbitration," 109.

<sup>80</sup>Andrew Dougall and Leon Loannou, "Separability Saved: Us Supreme Court Eliminates Threat to International," *Journal of International Arbitration* 21, no. 3 (2006):14.

<sup>81</sup>See Article 6(4) of ICC Arbitration Rule, Article 8(1) of CPR Arbitration Rule, Article 23 of both LCIA and UNCITRAL Arbitration Rules.

<sup>82</sup>See Article 3325 to 3346 of the Ethiopian Civil Code and Article 315 to 319, 416 and 350 to 357 of Ethiopian Civil Procedure Code.

<sup>83</sup>Hailegabriel G. Feyissa, "The Role of Ethiopian Courts in Commercial Arbitration," *Mizan Law Review* 4, no. 2 (2010):310.

<sup>84</sup>See Article 17 (1) of ICC Arbitration Rule, Article 28 of ICDR Arbitration Rule, Article 22(3) of LCIA Arbitration Rule, and Article 35 of UNCITRAL Arbitration Rule.

<sup>85</sup>Andrew Barraclough and Jeff Waincymer, "Mandatory Rules of Law in International Commercial Arbitration," *Melbourne Journal of International Law* 6, no. 2 (2005):2.

<sup>86</sup>Blackaby et al., Redfern and Hunter on International Arbitration, 6.14.

#### 2.4.4. Principle of “Competence-Competence”

The “competence-competence” (Kompetenz-Kompetenz) is a principle, which empowers an arbitration tribunal to rule on its jurisdiction.<sup>87</sup> As indicated in *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs of Pakistan* case, principle of competence-competence does not mean a complete ignorance of national courts.<sup>88</sup> The principle of “competence-competence” provides an arbitral tribunal with the power of ruling its own jurisdiction, thus avoiding any need to wait for a court determination of the issue.<sup>89</sup> Meanwhile, the principle of competence-competence is a core principle in the determination of the power to issue anti-suit injunction. In Ethiopian, Article 3330(2) Civil Code recognizes contractual freedom of parties and authorizes arbitrators to decide disputes relating to jurisdiction with the limitation of *contractual provisions relating to the jurisdiction of the arbitrator shall be interpreted restrictively*.

#### 2.4.5. Principle of Good Faith and Abuse of Rights

Good faith principle is a “basic principle of international commercial arbitration that the parties have the duty to cooperate in the performance of arbitration agreement as well as the arbitral proceedings.”<sup>90</sup> Once parties have consented to settle their dispute through arbitration, they have a duty to negotiate, constitute the tribunal, cooperate with the tribunal and accept the arbitral award.<sup>91</sup> Nowadays, duty to cooperate in good faith in dispute settlement is not only a matter of conventional law but also a force of necessity.<sup>92</sup> The obligation of the parties to arbitrate in good faith has reflected in different international arbitration legal documents and case laws.<sup>93</sup> Anti-suit

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<sup>87</sup>See Article 23(1) of LCIA Arbitration Rule and Article 8(1) of CPR Arbitration Rule.

<sup>88</sup>See *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* (2010).

<sup>89</sup>Jack Graves and Davydan Yelena, “Competence-Competence and Separability-American Style,” in *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, ed. Loukas Mistelis et al (Hague: Kluwer Law International, 2011), 157.

<sup>90</sup>V.V. Veeder, “The Lawyer’s Duty to Arbitrate in Good Faith,” *Arbitration International* 18, no.4 (2002):439.

<sup>91</sup>Abba Kolo, “Witness Intimidation, Tempering and Other Related Abused of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal,” *Arbitration International* 26, no.1 (2010):53-54.

<sup>92</sup>Anne Peters, “International Dispute Settlement: A Network of Cooperation Duties.” *European Journal of International Law* 14, no.1 (2003):9.

<sup>93</sup>Martha Belete, “Good Faith (Lack of) in Investment Arbitration and the Conduct of the Ethiopian Government in the Salini Case: Exercise of Legitimate Right or “Exhibit A” for Guerrilla Tactics?” (2012):5-6. <http://www.google.com.et/search?q=martha+goodfaith> (Accessed July 10, 2015).

injunction claimed by parties contrary to the principle of good faith and in abuse of rights is, therefore, unacceptable and it breaches not only the arbitration agreement but also the obligation to cooperate with the tribunal in resolving dispute. Article 3344(1) of Ethiopian Civil Code also lays down the legal consequence of bringing a dispute covered by arbitration agreement to Court contrary to principle of Good faith.

## Chapter Three

### Anti-Suit Injunction Issued by National Courts

#### 3.1. National Courts Involvement in International Arbitration

According to Correll and Szecepanik, “courts were not intended to play a meaningful role in arbitration is inaccurate.”<sup>94</sup>David Williams noted that, “Until late in the twentieth century, the courts in many countries were empowered by statute to exercise a general supervisory jurisdiction over arbitration.”<sup>95</sup>In this seam, once arbitration agreement concluded between parties, it express that disputes between them referred to and settled by arbitration.<sup>96</sup>Julian D M Lew stated, “National court involvement in international arbitration is a fact of life as prevalent as the weather.”<sup>97</sup>

##### 3.1.1. Theoretical Justifications of National Courts Involvements in International Arbitration

###### A. *The Jurisdictional Theory*

In Jurisdictional theory, an arbitration agreement is valid and arbitral award enforceable, only if laws of place of arbitration and place of enforcement is recognized right of parties to refer the dispute to arbitration.<sup>98</sup>In other words, courts have a power to determine and regulate all aspect of arbitration including the validity of arbitration agreements and the enforceability of arbitral awards based on the law of the forum.<sup>99</sup>However, this theory may contradict with the principle of party autonomy being national court determines, control and regulate all aspect of arbitration.

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<sup>94</sup>Charles Correll and Ryan Szecepanik, “No Arbitration is an Island: The Role of Courts in Aid of International Arbitration,” *World Arbitration and Mediation Review*6, no.3 (2012):565.

<sup>95</sup>David Williams, “Defining the Role of the Court in Modern International Commercial Arbitration,”*Asian International Arbitration Journal*10,no. 2(2014):2.

<sup>96</sup>Mistelis et al., *Comparative International Commercial Arbitration*, 355.

<sup>97</sup>Lew, “Does National Court Involvement Undermine the International Arbitration Processes,” 490.

<sup>98</sup>Daniel, “The Role of Domestic Courts in International Commercial Arbitration,” 8-14.

<sup>99</sup>Barracrough and Waincymer , “Mandatory Rules of Law in International Commercial Arbitration,”6.

### B. *The Contractual Theory*

The basis for Contractual theory is the contractual nature of arbitration agreement.<sup>100</sup> In this regard, Barraclough and Waincymer discoursed, “the entire arbitral process is seen as a product of the parties’ agreement.”<sup>101</sup> This implies, arbitration is an illustration of freedom of contract.<sup>102</sup> Under this theory, mandatory rules should only be relevant if it form part of the *lex contractus*, or prove the invalidity or illegality of the parties’ contract.<sup>103</sup>

### C. *The Mixed or Hybrid Theory*

In hybrid theory, arbitration could be beyond every legal system but there is a circumstance where national laws could determine the validity arbitration and the enforceability of the award.<sup>104</sup> The Mixed theory combines the above two theories, and it avows that, if the court has exclusive jurisdiction over the subject matter, or if the arbitrators conduct the proceedings in defiance of basic principles of equity, or if the award conflicts with the public policy of the forum, the court in which arbitration held and/or enforce the award have a power to take immediate remedial action and even refuse to recognize or enforce such arbitral award.<sup>105</sup>

### D. *The Autonomous Theory*

Unlike Jurisdictional, Contractual and Mixed theories stated above, autonomous theory denotes arbitration as complete independent system.<sup>106</sup> According to Angualia Daniel, national courts should “refrain from interfering with the exercise of the powers entrusted to arbitrators by the parties and assisting the arbitral process only when the need arises.”<sup>107</sup>

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<sup>100</sup>Alexander Belohlavek, “The Legal Nature of International Commercial Arbitration and the Effects of Conflicts between Legal Cultures,” *Legal Journal of Law of Ukraine*, no.2(2011):18.

<sup>101</sup>Barraclough and Waincymer, “Mandatory Rules of Law in International Commercial Arbitration,” 5.

<sup>102</sup>Daniel, “The Role of Domestic Courts in International Commercial Arbitration,” 83.

<sup>103</sup>Barraclough and Waincymer, “Mandatory Rules of Law in International Commercial Arbitration,” 5.

<sup>104</sup>Mistelis et al., *Comparative International Commercial Arbitration*, 78.

<sup>105</sup>Han Jian, *Theory and Practice on Modern International Commercial Law* (Beijing: Law Press, 2000),36.

<sup>106</sup>Daniel, “The Role of Domestic Courts in International Commercial Arbitration,” 12.

<sup>107</sup>Ibid.,14.

### E. *The Territorialism Theory*

William Park point out that, the origins of the territorialism theory comes from the “traditional view that the *lex loci arbitri* governs the validity of arbitration.”<sup>108</sup>In this theory, “arbitrators derive their powers from the law of the place where they perform their duties, as do judges serving in local courts” and seat courts have power to “review awards which were rendered in their country.”<sup>109</sup>.

### F. *The Delocalization Theory*

Contrary to territorialism theory, delocalization theory elaborates, “international arbitral tribunals are detached from controls imposed by the law of the seat of arbitration” and parties frequently choose to place the arbitration in a country where the parties' business interests are located, simply because it is convenient for them.<sup>110</sup>In this theory, arbitrators have not only allowed disregarding the *lex fori*, but also award annulled by seat court may enforce in any other state jurisdiction.<sup>111</sup>

As has already been discussed, anti-suit injunction is a mechanism of court involvement in arbitration process.<sup>112</sup>Therefore, in Jurisdictional theory, since courts have a power to determine and regulate all aspect of arbitration, this power may include the power issue to anti-suit injunction. In Contractual theory, issuing of anti-suit injunction is only possible in case where such power is part of the *lex contractus*. In Mixed theory however, since there are certain circumstance where national laws bind arbitration like validity of submission to arbitration and the enforceability of the award, anti-suit injunction may ordered by court in such case. In Autonomous theory, the subject of anti-suit injunction issued by court is irrelevant due to complete independent of arbitration from national courts.

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<sup>108</sup>William Park, *Arbitration in International Business Disputes* (Oxford: Oxford University Press, 2012), 50

<sup>109</sup>Carbone, “Interference of the Court of the Seat with International Arbitration,” 220.

<sup>110</sup>Ibid.

<sup>111</sup> Hong Lin-Yu, “Defective Awards Must be Challenged in the Courts of the Seat of Arbitration-A Step Further Than Localization?” *The Int'l J. of Arbitration, Mediation & Dispute Management* 65, no.3(1999):196.

<sup>112</sup>Rozas, “Anti-suit Injunctions Issued by National Courts Measures Addressed to the Parties or to the Arbitrators,” 79.

According to Delocalization theory, since international arbitration cannot be restricted to the sole application of the procedural laws of the seat, anti-suit injunction is not possible. Nevertheless, in Territoriality theory, since it emphasizes international arbitration is subject to national court of seat of arbitration, there is a possibility to issue anti-suit injunction by the seat court.

Before finalizing the theoretical debate on national court involvement in international arbitration, it is important to look at the following case. In *British Caribbean Bank Ltd ('BCB') and Government of Belize (GOB)* case, the source of dispute was the measure taken by the GOB that nationalizes country's telecommunications industry in 2009.<sup>113</sup> In 5 May 2010, British Caribbean Bank Ltd commenced arbitration in UNCITRAL based in Hague by alleging a violation of the U.K.-Belize Bilateral Investment Treaty (the BIT).<sup>114</sup> On December 2010, Government of Belize obtained an injunction which restraining BCB from proceeding with the UNCITRAL arbitration from High Court.<sup>115</sup> Belize Court of Appeal also justified the injunction.<sup>116</sup> Three years after proceedings suspended because of a Belizean courts injunction, UNCITRAL panel in Hague has resumed the hearing based on CCJ<sup>117</sup> decision against an action of government of Belize.<sup>118</sup>

Among lessons drawn from the decision of ICC in relation to anti-suit injunctions,<sup>119</sup> the first one is, although some theories would like to see anti-suit injunction is prohibited entirely, the decision affirms the power of courts to enjoin an arbitral proceeding in appropriate circumstances.<sup>120</sup> Secondly, it affirmed the source of Court authority to issue anti-suit injunction

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<sup>113</sup>British Caribbean Bank Limited and Attorney General of Belize, Caribbean Court of Justice Appellate Jurisdiction, CCJ Appeal No CV 001 (Judgment, 25 June 2013), *Journal of World Investment Law and Trade* 15(2014):324-352. (Herein after called "Caribbean Bank Limited case").

<sup>114</sup>Ibid., See Agreement between United Kingdom of Great Britain and Northern Ireland and Belize for the Promotion and Protection of Investments., signed at Belmopan, 30 April 1982, (No. 21315), *United Nations Treaty Series* 1294 (1982):199 -205. In this BIT, an investor-state dispute is subject to UNCITRAL Arbitration Rule.

<sup>115</sup>Caribbean Bank Limited case, Award, para. 11.

<sup>116</sup>See *British Caribbean Bank Limited v. Attorney General of Belize* (Court of Appeal of Belize, A.D. 2012 .Civil Appeal No. 6 of 2011, 3 August 2012). In this appeal, the majority in the Court of Appeal upheld the grant of the interim injunction but arrived at their decision by another route that is the right to arbitrate needed to ripen by the completion of the proceedings in the domestic court.

<sup>117</sup>For more information, see [http://www.law.yale.edu/documents/pdf/CDO\\_Public](http://www.law.yale.edu/documents/pdf/CDO_Public). (Accessed June 10, 2015).

<sup>118</sup>Caribbean Bank Limited case, Award, para. 11 and 13. CCJ court affirmed an act of Belize government was inconsistent with the doctrine of kompetenz- kompetenz and anti-arbitration injunction is vacate, and the BIT arbitration resumed. Currently case is pending and even on march 7, 2015 the tribunal decides on the Respondent Motion pursuant to Articles 36 and 37 of UNCITRAL Arbitration Rules.

<sup>119</sup>S.I. Strong, "Anti-Arbitration Injunctions in Cases Involving Investor-State Arbitration: *British Caribbean Bank Ltd. v. The Government of Belize*," *The Journal of World Investment & Trade* 15 (2014):324-332.

<sup>120</sup>Caribbean Bank Limited case, Award, para. 14.

is primarily from the national laws.<sup>121</sup> Thirdly, in restraining international arbitration proceedings, the national court must re-double the caution while restraining arbitral proceedings.<sup>122</sup> Fourthly, CCJ recognizes the broad powers of the arbitral tribunal to rule its own jurisdiction under the doctrine of Kompetenz-Kompetenz, and decide whether to stay arbitral proceedings pending because of domestic actions like anti-suit injunction.<sup>123</sup>

### 3.2. The Power of National Courts to Grant an Anti-Suit Injunction

#### 3.2.1. UNCITRA Model Rule

The latest international arbitration rule, UNCITRA model,<sup>124</sup> foresees courts involvement in international arbitration in very limited circumstances. According to Article 5 of this model law, no court shall intervene in the arbitration process except where so provided in the model.<sup>125</sup> These limited circumstances includes the appointment of arbitrators, challenge on the jurisdiction of the arbitral tribunal, recognition and enforcement of both interim measures and arbitral awards including setting aside of such award. In the model, among others, courts have a power to terminate a mandate of arbitrators as consequence of arbitrators de jure or de facto inefficient to perform their functions or fail to act without undue delay.<sup>126</sup> This mandate is exercise through issuing anti-suit injunction.

Even in this model, once the arbitral tribunal rules its competence-competence, a party may challenge such competence before national courts.<sup>127</sup> Therefore, unlike autonomous theory, which favor a complete independence of arbitral tribunal from national courts, and jurisdictional theory of complete control of national courts over arbitral proceeding, this model filled the gap on the stage of court involvement. As a result, it is easy to conclude from this model that, court have jurisdiction to issue anti-suit injunction on appeal after arbitral tribunal ruled over its jurisdiction.

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<sup>121</sup> Caribbean Bank Limited case, Award, para. 30.

<sup>122</sup> Caribbean Bank Limited case, Award, para.40 and 32.

<sup>123</sup> Caribbean Bank Limited case, Award, para. 2.

<sup>124</sup> Article 5 of the 2006 UNCITRAL Model Law.

<sup>125</sup> See Article 5, Article 11, Article 14, Article 16, and Article 36 of UNCITRAL Model Law.

<sup>126</sup> Article 5 of the UNCITRAL Model Law.

<sup>127</sup> See Article 5, Article 11, Article 14, Article 16, and Article 36 of UNCITRAL Model Law.

### 3.2.2. Jurisprudential Justifications

International arbitration allows flexibility over a wide range of matters even though subject to national rules and policies restriction.<sup>128</sup> This restriction bases itself on principle of state sovereignty. In principle of state sovereignty, if states believe that their interests are protected in arbitration by mandatory rules, they may enact mandatory rules.<sup>129</sup> However, state legal expansionism by enacting mandatory rule should not exaggerate.<sup>130</sup> Supplementary, like arbitral tribunals competence-competence, state courts shall have also a jurisdiction to rule its own jurisdiction. In this regard, arbitrators cannot rule over a jurisdiction other than their own.<sup>131</sup> As a result, arbitrators may “neither decides on the jurisdiction of a court nor, a fortiori, on the cogency of the case brought before such court.”<sup>132</sup> The court may exercise this power “either during an arbitration proceedings or later when a party seeks recognition and enforcement of arbitral award.”<sup>133</sup>

### 3.2.3. Recognition and Enforcement of Arbitral Award

The New York convention requires states to give effect to arbitration agreements and enforce arbitral awards through summary proceedings made in other states subject to limited exceptions.<sup>134</sup> Article V of the Convention indicates circumstances that recognition and enforcement of the award may refused.<sup>135</sup> The reading of Articles II, III and V of the New York Convention also divulges, “Court of the seat of arbitration or the enforcement will only involve

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<sup>128</sup> A.F.M. Maniruzzaman, "International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview," *Journal of International Arbitration* 7, no.3 (1990): 54.

<sup>129</sup> Barraclough and Waincymmer, "Mandatory Rules of Law in International Commercial Arbitration," 8.

<sup>130</sup> *Ibid.*, 6.

<sup>131</sup> Lévy, "Anti-suit injunctions issued by arbitrators," 120.

<sup>132</sup> *Ibid.*

<sup>133</sup> Julian D.M. Lew, *Contemporary Problems in International Arbitration* (London: Springer Publisher, 1987), 65.

<sup>134</sup> The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June (1958). It also known as the "New York Arbitration Convention" or the "New York Convention" is one of the key instruments in international arbitration. The New York Convention applies to the recognition and enforcement of foreign arbitral awards. The Convention come into force in 1958 and has more than 145 signatories. See more [www.newyorkconvention.org](http://www.newyorkconvention.org) (Accessed July 10, 2015).

<sup>135</sup> *Ibid.* In the New York Convention, there are limited circumstances for non-recognition of arbitral awards i.e. arbitration agreement is null and void, or lack of proper notice to the parties, or an award has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

in support of the arbitral process.”<sup>136</sup> Therefore, only the court of seat of arbitration or the place of enforcement has a power to issue anti-suit injunction.<sup>137</sup>

#### 3.2.4. Principle of Comity

In the principle of judicial comity, courts and tribunals should respect decision of their counterparts.<sup>138</sup> Principle of Comity encourages courts and tribunals to consider “staying of their proceedings in the face of alternative set of proceeding relating to the same issues.”<sup>139</sup> Accordingly, the awards of arbitration tribunals be given in due deference and be enforced unless exceptional circumstances occurred.<sup>140</sup> As a result, arbitral tribunals should respect the decision of courts on the limited circumstances that demand the staying of arbitral proceedings.<sup>141</sup>

#### 3.2.5. Parallel Litigation

Emmanuel Gaillard offered the following on parallel litigations:

*The question arises in situations where one party considers that there is a valid arbitration agreement covering the matter in dispute and brings the dispute before an arbitral tribunal while the other party, considers the arbitration agreement to be either void or not applicable, brings the same dispute before a national court.*<sup>142</sup>

In this scenario, even if the source power for arbitral tribunal is parties’ agreement, this does not mean that arbitration agreement is independent of any legal order.<sup>143</sup> However, no presumption

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<sup>136</sup>Lew, "Does National Court Involvement Undermine the International Arbitration Processes," 494.

<sup>137</sup>Claudia Alfons., *Recognition and Enforcement of Annulled Foreign Arbitral Awards: An Analysis of the Legal Framework and Its Interpretation in Case Law and Literature* (Berlin:Peter Lang Publisher, 2010),93-95.

<sup>138</sup>Arthur W. Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Boston: Martinus Nijhoff Publishers, 2008), 137.

<sup>139</sup>Ibid. 138.

<sup>140</sup>Shaun Lee and SC Hwang, "Survey of South East Asian Nations on the Application of the New York Convention," *Journal of International Arbitration* 25, no. 6 (2008):888.

<sup>141</sup>Ibid.

<sup>142</sup>Gaillard, *Legal Theory of International Arbitration*,86.

<sup>143</sup>Salini Case Award, par. 127-129.

that the pursuit of ‘multiple proceedings is troublesome or unjust or an abuse of arbitration process in itself.’<sup>144</sup>

### 3.3. Types of Anti –suit injunction Issued by National Courts

International arbitration, there are two types of anti-suit injunctions: anti-suit injunctions to favor arbitration, and anti-suit injunctions to prevent arbitration.<sup>145</sup>

#### 3.3.1. Anti-suit injunctions to Favor Arbitration

Anti-suit injunction issued by national courts to favor arbitration is an injunction issued for the purpose of specific performance of arbitration agreements.<sup>146</sup>

Duarte Ricardo points out that:

*As far as anti-suit injunctions are concerned, court cooperation with arbitration can manifest at two stages: (i) during the arbitration proceedings, when the recalcitrant party seeks an action at another court to disrupt the ongoing arbitration proceeding and to avoid that an award is made; (ii) after the award is made, the losing party tries to institute court proceedings to avoid enforcement of the arbitral award.*<sup>147</sup>

In arbitral process, courts directly compel parties to undertake what they have already agreed in their arbitration agreement.<sup>148</sup> Because proceedings in breach of arbitration agreement could frustrate the ongoing arbitration both in terms of cost and time, being re-litigated the same issue that has already covered by arbitration clause.<sup>149</sup> However, most national laws and the New York Convention does not expressly allow that courts shall order parties to participate in arbitration proceedings rather courts only have a duty to “refer” a party to arbitration.<sup>150</sup>

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<sup>144</sup>Caribbean Bank Limited case, Award, para. 40.

<sup>145</sup>Ricardo, "Anti-Suit Injunctions in the Context of International Commercial Arbitration," 18.

<sup>146</sup>Lew, "Does National Court Involvement Undermine the International Arbitration Processes," 526.

<sup>147</sup>Ricardo, "Anti-Suit Injunctions in the Context of International Commercial Arbitration," 19

<sup>148</sup>Lew, "Does National Court Involvement Undermine the International Arbitration Processes," 526.

<sup>149</sup>Mistelis et al., *Comparative International Commercial Arbitration*, 364.

<sup>150</sup>Lew, "Does National Court Involvement Undermine the International Arbitration Processes," 528.

### 3.3.2. Anti-suit Injunctions to Prevent Arbitration

Anti-suit injunction issued to prevent arbitration is a commonly used to restrain the arbitral proceedings or to prevent actions for the enforcement of arbitral awards.<sup>151</sup>In this regard, an injunction restraining the further conduct of arbitration proceedings is only granted where arbitration proceedings wrongly brought.<sup>152</sup>An anti-suit injunction can also prohibit one of the parties from continuing arbitration proceedings that it deems to initiated in the absence of a valid arbitration agreement.<sup>153</sup>Therefore, in case of wrongly brought arbitral proceeding or arbitral proceeding because of invalid arbitration agreement, courts have a power to issue anti-suit injunction for preventing the arbitration.

### 3.4. Anti-Suit Injunctions: Stages, Grounds and Parties

In most legal systems, state courts are intervening in the arbitration process at all stages of the arbitral proceedings.<sup>154</sup>Conversely, court involvement by the name of anti-suit injunctions is common “either during the arbitral process or, at the end of the arbitral process.”<sup>155</sup>Based on the reading of the New York Convention and the UNCITRAL Model Law, however, there are four stages when courts are most likely to become involved in the arbitration process.<sup>156</sup>

#### 3.4.1. Prior to the Establishment of a Arbitral Tribunal

There are three possible grounds where courts involve in arbitration process prior to the establishment of arbitral tribunal in relation to anti-suit injunctions.<sup>157</sup>The first ground is to challenge the validity of arbitration agreement.<sup>158</sup> Taking into account the differences on the extent of power to review the validity of arbitration agreement, “the majorities of arbitration rules as well as the international arbitration statutes allow courts at least a power to review of the prima facie existence of an arbitration agreement or even a complete review.”<sup>159</sup> Thus, at this

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<sup>151</sup>Ricardo, “Anti-Suit Injunctions in the Context of International Commercial Arbitration,” 19.

<sup>152</sup>Mistelis et al., *Comparative International Commercial Arbitration*, 363.

<sup>153</sup>Ricardo, “Anti-Suit Injunctions in the Context of International Commercial Arbitration,” 8.

<sup>154</sup>Rozas, “Anti-suit Injunctions Issued by National Courts Measures Addressed to the Parties or to the Arbitrators,” 74.

<sup>155</sup>Mistelis and Lew, *Pervasive Problems in International Arbitration*, 202.

<sup>156</sup>Lew, “Does National Court Involvement Undermine the International Arbitration Processes,” 496.

<sup>157</sup>*Ibid.*, 497.

<sup>158</sup>Lew, “Does National Court Involvement Undermine the International Arbitration Processes,” 496.

<sup>159</sup>Mistelis et al., *Comparative International Commercial Arbitration*, 364.

stage, the court has a power to examine the validity of arbitration agreement.<sup>160</sup> The second ground for court involvement prior to the establishment tribunal is “where one party institutes court proceedings despite, and perhaps with the intention of avoiding the agreement to arbitrate.”<sup>161</sup>The third ground is to protect urgent interests of parties until the appointment of the arbitral tribunal.<sup>162</sup>At this stage, “national court intervention is not disruptive, and may be beneficial to the arbitration proceedings.”<sup>163</sup>

In Ethiopian context, the involvement of Courts before the establishment of arbitral tribunal has related to the enforcement of the arbitration agreement.<sup>164</sup>As has already been discussed, it is the power of courts to enforce the arbitration agreement as per Article 3344 (1) of the Civil Code. Hailegabriel G. Feyissa wrote :

*Where a party insists on arbitration, Ethiopian courts have practically declined to assume jurisdiction on the merits and, accordingly, referred disputes to arbitration. This judicial practice has a long history dating at least as far back as the early 1960s. Numerous cases related to the enforcement of arbitration agreements are also involve government agencies. This is particularly because government agencies – the most notable Ethiopian participants in international commercial arbitrations – often try to take advantage of the unsettled Ethiopian law on Arbitrability of administrative contracts.*<sup>165</sup>

As have been discussed, sub-article 2 of Article 315 of Ethiopian Civil Procedure Code prohibits the submission of disputes pertaining to administrative contracts by arbitration. In this regard, Bezzawork Shimelash wrote:

*Even if one holds the contrary view that disputes arising from administrative contracts are not capable of settlement by arbitration by virtual of Article 315(2) of the Civil*

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<sup>160</sup>Article 2 of the New York Convention.

<sup>161</sup>Lew, "Does National Court Involvement Undermine the International Arbitration Processes," 496.

<sup>162</sup>Ibid., 497.

<sup>163</sup>Ibid.

<sup>164</sup>Hailegabriel G. Feyissa, "The Role of Ethiopian Courts in Commercial Arbitration," 313,

<sup>165</sup>Ibid., 314.

*Procedure Code, in practical terms it is of minimal effect. Thus, administrative contracts or disputes that arise from them are capable of settlement by arbitration.*<sup>166</sup>

Zekarias Kene'aa also after having treated the issue of Arbitrability and conclude the following:

*Could it be said that the subject to [in arbitrability] provisions of articles 3325-3346 of the Civil Code any matter that is not specifically prohibited and that arises from valid contracts or other specific legal relationships seems to be arbitrable in Ethiopia?*<sup>167</sup>

Therefore, Article 3325-3346 of the Civil Code is “silent as to whether disputes involving administrative contracts are arbitrable or not and this silence has been taken by some as indicative of Arbitrability, as opposed to non-Arbitrability, of administrative contracts.”<sup>168</sup>

#### 3.4.2. At the Opening of the Arbitration

Julian D.M Lew claims that, “court intervention at the commencement of arbitration generally involves assisting with the appointment of and challenges to arbitrators.”<sup>169</sup>In international arbitration practice however, “challenges to the appointment of an arbitrator are often motivated by delay tactics, rather than by a real concern regarding the arbitrator's independence.”<sup>170</sup>To tackle this challenge, different arbitral institutions incorporate internal mechanism.<sup>171</sup> However, the mere existence of internal mechanism does not preclude national court from considering the above stated challenge in case where controversy is remaining.<sup>172</sup>

As is provided clearly under sub-article (1) of Article 3344(1) of the Ethiopia Civil Code, a party to arbitration agreement may demand judicial enforcement of the arbitration agreement if the other party refuses to perform the acts required for setting the arbitration in motion. Appointing arbitrators is a good example in this regard. Therefore, pursuant to Article 3332(3) *cum* 3334(1), parties have the discretion to appoint an arbitrator in accordance with the arbitral submission and

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<sup>166</sup>Bezzawork Shimelash, “The Formation, Content and Effect of An Arbitral Submission Under Ethiopian Law,” *Journal of Ethiopian Law* 17(1994):85.

<sup>167</sup>Zekarias Keneaa, “Arbitrability in Ethiopia: Posing the Problem,” *Journal of Ethiopian Law* 17(1994):136.

<sup>168</sup>Hailegabriel G. Feyissa, “The Role of Ethiopian Courts in Commercial Arbitration,” 315. See *Water Resource Ministry v Siyoum & Ambaye General Contractors*, Federal Supreme Court Civil Appeal Case No.19659/1997, and *Zemzem PLC v Illubabor Zone Education Department*, Federal Supreme Court Cassation File No.16896/ 1998.

<sup>169</sup>Lew, “Does National Court Involvement Undermine the International Arbitration Processes,” 497.

<sup>170</sup>Carbone, “Interference of the Court of the Seat with International Arbitration,” 225.

<sup>171</sup>Carbone, “Interference of the Court of the Seat with International Arbitration,” 225.

<sup>172</sup>Article 14(1) of UNICITRAL Arbitration Rule.

if they fail to appoint within the time limit given, courts will be in charge of appointing members of the arbitral tribunal. Sub-article (3) of Article 3342 of the Civil Code also empowered Ethiopian Courts to decide over preliminary challenges to arbitration and an unsuccessful challenge for disqualification of an arbitrator is appealable to the court within ten days. The grounds for arbitrator disqualification stated under Article 3340 of Civil Code are *inter alia*, impartiality and independence, criminal conviction, age, unsound mind and illness.

### 3.4.3. During the Arbitration Process

Once an arbitral tribunal constituted, arbitration shall be conducted without court intervention.<sup>173</sup> However, there may be a circumstance where the involvement of a national court is necessary to ensure the proper conduct of the arbitration.<sup>174</sup> Court involvement during the arbitration process is principally either to protect and/or taking evidence, or preserve the integrity of the arbitration.<sup>175</sup> This type of interventions are out of anti-suit injunction scope and generally unobjectionable.<sup>176</sup>

Furthermore, pursuant to Article 317(3) Civil Procedure Code *cum* Article 3344(2) of the Ethiopia Civil Code, parties to arbitration may apply for court assistance whenever appropriate and such applications has considered neither a breach of agreement to arbitrate nor a waiver of the agreement to arbitrate.<sup>177</sup>

### 3.4.4. At the Enforcement Stage

After an award has been rendered, courts at the place of arbitration, i.e., when a party challenges and seeks to set aside the award, or lodges an appeal against the award under the applicable arbitral law or regime; or at the place of enforcement, where the successful party seeks the

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<sup>173</sup>Blackaby et al., *Redfern and Hunter on International Arbitration*,1.13.

<sup>174</sup>*Ibid*.

<sup>175</sup>Lew, "Does National Court Involvement Undermine the International Arbitration Processes,"498. Concerning preserving the integrity of the arbitration, the arbitral tribunal itself has the power to issue interim measures. However, there are four situations where the tribunal's powers may be insufficient and favor recourse to a national court. First, when arbitral tribunals have no power to take interim measures as per state legislation. Second, since arbitral tribunal interim measures may only limited to the parties involved in the arbitration itself, assistance of a national court may be necessary to address third parties. Thirdly, interim measures unlike a final arbitral award that enforced under the New York Convention, in case where a need for international enforcement of the interim measure. Fourthly, in case where *ex parte* relief is important to reduce the risk of dissipation of assets or risk on the loss of evidence.

<sup>176</sup>Lew, "Does National Court Involvement Undermine the International Arbitration Processes," 489.

<sup>177</sup>Hailegabriel G. Feyissa,"The Role of Ethiopian Courts in Commercial Arbitration,"323.

recognition and enforcement of the award are the two scenarios of court involvement.<sup>178</sup> Before challenge an award in court of law, however, all available local remedies should exhaust. Once such remedies shall exhaust, it is possible to challenge the validity or effect of an award on the court of the seat of the arbitration.<sup>179</sup> As per sub-article (1)(e) of Article V of the New York Convention, State may refuse to enforce award when that award is “set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”<sup>180</sup>

In Ethiopia during this stage, the court undertakes entertain challenges on arbitral awards as per Article 351 of Civil Procedure Code. The grounds stated under Article 351 of Civil Procedure Code are *inter alia*, ambiguous award, or if the arbitrator omitted to decide matters referred to him, or if irregularities in the proceedings. or if the arbitrator has been guilty of misconduct, and applications for enforcement of award as per Article 461 of Civil Procedure Code.<sup>181</sup>

Before final the discussion on court involving in arbitration through anti-suit injunction, it would be useful to address the question on whom anti-suit injunctions is issued. In case of anti-suit injunction aimed to prevent arbitration, if the court has a personal jurisdiction on the subject matter, an injunction is issued against both arbitrators and parties whereas, all other cases, anti-suit injunction are direct on parties.<sup>182</sup> However, for those anti-suit injunction issued for favoring the arbitration, it is always issued against recalcitrant party who seeks an action at another court to disrupt the ongoing arbitration proceeding and to avoid an award.<sup>183</sup>

### 3.6. Challenges of Anti-suit Injunctions Issued by National Courts

The following practical challenges of anti-suit injunction issued by national courts have identified. The first challenge is relate to seat of arbitration. As if partiality of the courts is much concern when the state is a party to the dispute, the same might said about arbitrating against the state in an arbitration organization located in that state. More recently, anti-suit injunction is issued due to change of venue. As a result, arbitral proceeding are end up with contempt of court,

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<sup>178</sup> Ibid.

<sup>179</sup> Blackaby et al., *Redfern and Hunter on International Arbitration*, 10.21.

<sup>180</sup> Art 5 (1) (e) of the New York Convention.

<sup>181</sup> See Article 351 and 461 of Ethiopia Civil Procedure Code.

<sup>182</sup> Mistelis et al., *Comparative International Commercial Arbitration*, 363.

<sup>183</sup> Ibid.

an award rendered in opposition from local courts are set aside, and become unenforced.<sup>184</sup>In *Vikram Bakshi v. McDonald's* case for instance, High Court of Delhi (India) granted anti-suit injunction in response to an arbitration initiation of McDonald pursuant to arbitration agreement that provide LCIA arbitration in London.<sup>185</sup>

The court upheld its decision on the ground that London, agreed seat of arbitral, was a forum non-convenience.<sup>186</sup>As has been discussed, seat of the arbitration has determined by parties and exceptionally by arbitral tribunal if parties have not agreed. In this regard, the decision of Indian court is a clear violation of arbitration agreement and party autonomy principle. On the other hand, such injunction postponed tribunal speedy proceeding on the merit of the case, or the court effectively has to pre-empt the decision of the tribunal. Furthermore, even seat of arbitration was London then England courts are only supervisory jurisdiction over the arbitration. Therefore, the above decision is against the principle of international arbitration and the injunction to restrain arbitral proceeding has no any legal consequence in the eyes of international arbitration.

The other area of challenge is related with degree and extent of seat court involvement in the arbitration process. It generally agreed international arbitration principle that, court of the seat of arbitration must not involve in the arbitration up to the extent of unjustifiable interference.<sup>187</sup> Practically this unjustifiable interference commonly linked with an assessment of the scope and validity of arbitration clause, which relate with the jurisdiction over the subject matter.<sup>188</sup>This challenge is also more aggravated when no 'lex arbitri' exists or in case where the lex arbitri is not designed in 'arbitration-friendly' manner or in case where the lex arbitri' leaves room for court intervention.<sup>189</sup>

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<sup>184</sup>Carbone,"Interference of the Court of the Seat with International Arbitration," 225.

<sup>185</sup>*Vikram Bakshi v. McDonald's India Pvt. Ltd.*, High Court of Delhi, Case no.6207 and No.962/2014(December 22, 2014), *India Business Law Journal* (2015):1-22.(Herein after called "Vikram Bakshi case").

<sup>186</sup>*Ibid.*

<sup>187</sup>Carbone,"Interference of the Court of the Seat with International Arbitration," 233

<sup>188</sup>See Rule 8(1) of CPR Arbitration Rule, Article 6(4) of ICC Arbitration Rule and Article 15(1) of ICDR Arbitration Rule.

<sup>189</sup>Matthias Scherer, "The Place or 'Seat' of Arbitration (Possibility And/or Sometimes Necessity of Its Transfer?) - Some Remarks on the Award in ICC Arbitration No. 10'623," *Swiss Arbitration Association Bulletin*,no. 1(2003):113.

For instance, in *Saipem S.p.A v. Petrobangla* case, parties had agreed to build a natural gas pipeline in Bangladesh.<sup>190</sup> The arbitration clauses of the agreement indicate any dispute between parties has submitted to ICC in Dhaka (Bangladesh) as the place of arbitration.<sup>191</sup> In pending arbitration, Petrobangla requested the arbitration tribunal to order Saipem S.p.A to produce certain documents but the tribunal denied the request.<sup>192</sup> Because of such tribunal denial, First Instance Court in Dhaka cancel the pending arbitration by considering as misconduct of arbitrators, and Supreme Court of Bangladesh issued anti-suit injunction.<sup>193</sup> However, the arbitral tribunal preceded the arbitration notwithstanding the injunction and finally rendered an award in favor of Saipem S.P.A.<sup>194</sup> After the Supreme Court of Bangladesh considered the ICC award as non-existent, based on Italy-Bangladesh bilateral investment treaty Saipem S.p.A brought a case against Bangladesh in ICSID arbitration.<sup>195</sup> The ICSID tribunal then found that Bangladesh Court abused their supervisory jurisdiction over the ICC arbitration and had expropriated Saipem's S.P.A. investment in Bangladesh in breach of the BIT.<sup>196</sup>

The following lessons are drawn from *Saipem S.p.A v. Petrobangla* case. The first lesson related with the change of the agreed place of arbitration. Parties' choice of specify place as the seat of the arbitration, had accepted a reasonable risk of interference by the local courts. Because by choosing the seat of the arbitration, parties submit to the jurisdiction of the courts at the seat for aid and control of the arbitration process.<sup>197</sup> Change of seat of arbitration allowed to preserve the

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<sup>190</sup>Saipem S.p.A case, Award, par.7. See the Agreement between the Government of the Republic of Italy and the Government of the People's Republic of Bangladesh on the Promotion and Protection of Investments (March 20 1990).

<sup>191</sup>Ibid. See the Agreement between Bangladesh Oil Gas and Mineral Corporation and Saipem S.p.A for construction of North-South Pipeline (14 February 1990): Clause 1.1.38.

<sup>192</sup>Saipem S.p.A case, Award, par.7-10.

<sup>193</sup>Saipem S.p.A case, Award, par. 45 and 48.

<sup>194</sup>Ibid. As per the procedural order given on 30 April 2001, the ICC Arbitral Tribunal decided to resume the proceedings "on the ground that the challenge or replacement of the arbitrators in an ICC arbitration falls within the exclusive jurisdiction of the ICC Court and not of the courts of Bangladesh" and "the revocation of the authority of the ICC Arbitral Tribunal by the Bangladeshi courts was [thus] contrary to the general principles governing international arbitration." On 9 May 2003, the ICC Arbitral Tribunal rendered an award holding that Petrobangla had breached its contractual obligations to compensate Saipem S.p.A for the time extension and additional works and ordered Petrobangla to pay to Saipem the total amount of USD 6,148,770.80 plus EUR 110,995.92 (which included the Retention Money which remained unpaid) plus interest at 3.375% from 7 June 1993.

<sup>195</sup>Ibid.

<sup>196</sup>Saipem S.p.A case, Award, par. 187.

<sup>197</sup> Ibid.

integrity of the arbitral proceedings and to render effective agreement to arbitrate. ICSID Tribunal also did not find the slightest trace of error or wrongdoing by ICC in this regard.

The second lesson related with courts' misconduct amount a denial of justice.<sup>198</sup> This case is the first ICSID award that holds a state responsible for the act of expropriation based on the illegal interference by its judiciary in international arbitration proceedings.<sup>199</sup> ICSID affirms refusal of State to arbitrate pursuant to an arbitration clause is constitutes a denial of justice.<sup>200</sup> Thirdly, the ICSID Tribunal envisaged that a decision to revoke an arbitral tribunal's authority by court of seat of arbitration might amount a breach of the New York Convention depending upon de facto and de jure circumstance of the case.<sup>201</sup>

The other finding is relates with time of court involvement in international commercial arbitration. International arbitration practice shows the time of court involvement varies depending upon national laws of place of arbitration. For instance in Ethiopia, from the reading of Article 355 *cum* Article 356 of Civil Procedure Code with Article 3342(3) of Civil Code, Court may involve in arbitration in case where application for disqualification of arbitrators are dismissed by competent arbitration organ. French Code de Procedure Civile stands in favor of appeal after final award of arbitrators.<sup>202</sup> Unlike this, United State of America favored the court can intervene at any moment including to determine scope and validity of arbitration agreement

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<sup>198</sup>Felipe Roa, "Comments on the ICSID Award Saipem v. Bangladesh: Would its rationale be applicable in future cases?" *International Institute for Conflict Prevention and Resolution* (2014). <http://www.cpradr.org/About/NewsandArticles/ses-2011-Writing-Contest-Winner.aspx>. (Accessed July 15, 2015).

Although the ICSID Tribunal determined that an acts of the Bangladeshi courts amounted to an expropriation, even Saipem acknowledged during the ICSID Arbitration that facts of the case most likely constituted denial of justice rather than expropriation. Therefore, this ICSID decision is criticized because Article 9.1 of the BIT did not confer jurisdiction to the ICSID Tribunal over a claim based on denial of justice that broaden the scope of the BIT beyond what was agreed upon the States.

<sup>199</sup>Sameer Sattar, "National Courts and International Arbitration: A Double-edged Sword?" *Journal of International Arbitration* 27, no. 1(2010):72.

<sup>200</sup>Stephen M. Schwebe, *International Arbitration: Three Salient Problems*(Cambridge Grotius Publication, 1987),944.

<sup>201</sup>Saipem S.p.A case, Award, par.11 and 167. As per Article II (3) of the New York Convention, Court of a Contracting State, when seized a matter subject to arbitration shall refer the parties to arbitration except the said arbitration agreement is null and void, inoperative or incapability etc. As to the finding of ICSID tribunal, an act of Bangladesh did not target the arbitration or the arbitration agreement in itself but revoked the authority of the arbitrators that is tolerable as per above Convention in technical terms. However, as to the de facto consideration of the act, it has aimed to prevent, frustrate or immobilizes the arbitration the arbitration agreement as a result violate Article II (3) of the New York Convention.

<sup>202</sup>Article 1458 of the French Code de Procedure Civile.

even before a final award is given.<sup>203</sup> England rules of arbitration however, incorporate the hybrid position that in principle does not accept appeal on the ruling of arbitral tribunal before rendering award but there is an exceptional circumstance where the court empowered to involve before final award has rendered.<sup>204</sup>

Another finding relate to the removal of arbitrators. In this regard, the majority of national regulations on arbitration contain provisions concerning involvement of National Courts in arbitration for assuring the minimum standards of due process of law and fair proceeding of the arbitration process.<sup>205</sup> However, some nations allow the court to intervene in the arbitration process based on misconduct of arbitrators even before final award rendered.<sup>206</sup> The case between Salini Contruttori SPA v. AAWSA is a good example in this regard. In this case, Salini Contruttori SPA was agreed with Addis Ababa Sewerage and Water Authority (AAWSA) for construction of Dire water transmission line project for Addis Ababa city. The contract contained general provisions that, disputes had to be submitted to ICC arbitration and seat of arbitration would be in Addis Ababa.<sup>207</sup> Certain dispute arose between parties of the agreement in relation to the contract and ICC tribunal holds its meeting in Paris without prejudice to Addis Ababa remaining the place of arbitration.<sup>208</sup>

AAWSA strongly objected to moving the venue of the hearing away from Addis Ababa, the place of arbitration, on the basis that moving the hearing to Paris would cause it great inconvenience and constituting an improper exercise of arbitrators' discretion.<sup>209</sup> AAWSA, thus, challenged all three arbitrators before the ICC Court of Arbitration pursuant to Article 11 of the ICC Rules.<sup>210</sup> However, the ICC Court rejected AAWSA's challenge. AAWSA appealed the ICC Court's decision to the Federal Supreme Court of Ethiopia as per Article 3342 of the Ethiopian Civil Code and the Supreme Court issued an injunction ordering the suspension of the arbitration

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<sup>203</sup> Section 3 of United states Federal Arbitration Act,

<sup>204</sup> Section 32 of English Arbitration Act 1996,

<sup>205</sup> Carbone, "Interference of the Court of the Seat with International Arbitration," 225.

<sup>206</sup> Article 3340 and 3342(3) of Ethiopia Civil Code.

<sup>207</sup> Salini Case, Award, par.3-5.

<sup>208</sup> Ibid. On February 23, 2001, ASWA apply on the procedural order no.2 given January 25, 2001 to ICC. However, ICC Court at its plenary session of March 30, 2001 rejects the claim.

<sup>209</sup> Reza Mohtashami, "In Defense of Injunctions Issued by the Courts of the Place of Arbitration: A Brief Reply to Professor Bachand's Commentary On Salini Costruttori S.p.A. v. Ethiopia," *Mealey's International Arbitration Report* 20, no.5(2005).

<sup>210</sup> Ibid.

pending its decision.<sup>211</sup> On the other hand, AAWSA had commenced a separate action before the Federal First Instance Court for obtaining a judgment that the Tribunal lacks jurisdiction for pending arbitration.<sup>212</sup> As AAWSA informed the Tribunal, in a letter, that the Federal First Instance Court had issued an order enjoining the Claimant from proceeding with the arbitration pending its decision on the Tribunal's jurisdiction.<sup>213</sup> On December 7, 2001 however, the Tribunal rendered a Partial Award on which enjoy jurisdiction and not bound to suspend the proceedings because of the order of the Supreme Court.<sup>214</sup>

As indicated in Article 11(3) and 7(4) of the 1998 ICC arbitration rule, any challenge on the arbitrator that decided by ICC court is final. It does not mean any appeal before national courts.<sup>215</sup> In other word, once parties choose the applicable law, their right to submit before national court is waive except in limited circumstances like mandatory provisions seat of arbitration.<sup>216</sup> In case at hand, the assessment of the Ethiopian Civil Code in general and Article 3342(1) in particular on disqualification of arbitrators shows that, it is the tribunal itself decides the matter and in case where such application rejected, the party may appeal to the court within ten days. However, Article 3342(1) of Ethiopia Civil Code is not a mandatory provision.<sup>217</sup> Therefore, AAWSA's act of challenging arbitrators is a waived right due to non-mandatory provision by choosing ICC Rules in behalf.<sup>218</sup>

Sub-article (2) of Article 3330 of Ethiopian Civil Code also recognized the power of arbitrators to decide on disputes relating to their jurisdiction. However, the mandatory provision of Article 3330(3) clearly stipulates that 'the arbitrator may in no case be required to decide whether the arbitral submission is or is not valid.'<sup>219</sup> Among other, AAWSA objected that there was no

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<sup>211</sup>Salini Case, Award, para.78.

<sup>212</sup>Salini Case, Award, para. 77.

<sup>213</sup>Ibid., 78.

<sup>214</sup>Salini Case, Award, para 263 and 265, see Mohtashami, "In Defense of Injunctions Issued by the Courts of the Place of Arbitration: A Brief Reply to Professor Bachand's Commentary On Salini Costruttori S.p.A. v. Ethiopia," 3.

<sup>215</sup>Yves Derains and Eric A. Schwartz, *A Guide to the New ICC Rules of Arbitration* (Hague, Kluwer Law International, 1998), 126.

<sup>216</sup>Martha Belete, "Good Faith (Lack of) in Investment Arbitration and the Conduct of the Ethiopian Government in the Salini Case: Exercise of Legitimate Right or "Exhibit A" for Guerrilla Tactics?" 25.

<sup>217</sup>Ibid., 21.

<sup>218</sup>Ibid.

<sup>219</sup>See Article 3330(3) *cum* 3330 (2) of the Ethiopian Civil Code.

relevant agreement between parties to arbitrate under ICC rule rather to ad hoc arbitration as per Article 3325 of Ethiopia Civil Code.<sup>220</sup>

Martha Belete wrote:

*The Arbitral Tribunal in the Salini case, should have declined to entertain the jurisdictional challenge posed against itself as doing so was contrary to the choice of the parties as well as the mandatory provisions of the place of arbitration, Ethiopia, and such action is one of the grounds for setting aside of an arbitral award under Article 356(a) of the Civil Procedure Code of Ethiopia, possible place for enforcement of the award.*<sup>221</sup>

However, such violation by the tribunal does not automatically empower the court to issue anti-suit injunction because the stage where such injunction issued should be examined. On the other hand, an action of ICC tribunal which continues hearing notwithstanding the Federal Supreme Court injunction is unacceptable due to the decision itself violating the arbitration agreement since the parties agreed to the rules governing their issue under Ethiopian law and that specific law also among the mandatory rules stated under article 155(1) and 317(1) Civil Procedure Code.<sup>222</sup> Therefore, an order of the Federal Supreme Court should be respected.

The challenge of anti-suit injunction issued by courts of the state other than that of the seat of arbitration is related to an allegation of corruption, invalidity of the arbitration agreement, misconduct of arbitrators and public policy concerns.<sup>223</sup> For instance, in the Hubco case,<sup>224</sup> the government of Pakistan challenged the arbitration agreement as being obtained illegally through fraud and corruption. Because of this, the Supreme Court of Pakistan issued an anti-suit injunction. Due to public policy reasons, the State Court of Brazil issued an anti-suit injunction in the COPEL case.<sup>225</sup> In the National Grid case also, after unsuccessfully challenging the removal of the president of the arbitral tribunal at ICC, the Argentine Federal Administrative Appellate Court

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<sup>220</sup>Salini Case, Award, para.16.

<sup>221</sup>Martha Belete, "Good Faith (Lack of) in Investment Arbitration and the Conduct of the Ethiopian Government in the Salini Case: Exercise of Legitimate Right or "Exhibit A" for Guerrilla Tactics?"<sup>22</sup>.

<sup>222</sup> Ibid. 26.

<sup>223</sup>Raul Fleury, "Do Arbitrators Have an Ex Officio Duty/Right To Self-Investigate Corruption?" 2015 <http://kluwerarbitrationblog.com/2015/11/25/do-arbitrators-have-an-ex-officio-duty-right-to-self-investigate-corruption/> (Accessed July 11, 2015).

<sup>224</sup>Hubco Corporation v. Water and Power Development Authority of Pakistan (WAPDA), 439.

<sup>225</sup>Companhia Paranaense De Energia (COPEL) v.UEG Arancaria Ltda, 5.

issued anti-suit injunction against National Grid Plc to refrain from arbitration proceeding due to partiality reason.<sup>226</sup> On the final finding, states are also hide behind their own law to avoid the arbitration once the state or state owned entities has freely consented to an arbitration agreement through issuing anti-suit injunctions. In response also, arbitral tribunals are completely ignored or not likely to reason the claim raised by state parties which essentially needs the analysis of national laws.

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<sup>226</sup>National Grid Plc and The Argentine Republic,8.

## Chapter Four

### Anti-suit Injunctions Issued by Arbitrators

#### 4.1. The Power of Arbitral Tribunals to Issue Anti-suit Injunctions

As explained below, there are two arguments on the power of arbitrators to issue anti-suit injunction. The arguments lies on arbitrators' power to issue anti-suit injunctions is originates from the well-established principles of international arbitration law<sup>227</sup> whereas the arbitral tribunal should not allowed telling another tribunal or a state court what to do.<sup>228</sup>To this end, arguments of both sides discussed as follows.

##### 4.1.1. Argument in *Favor* of Arbitral Tribunal Power to Issue Anti-suit Injunctions

Arbitration, as a consensual method of dispute settlement, parties may determine in the arbitration agreement or in their terms of reference, whether arbitrators have a jurisdiction to issue anti-suit injunction.<sup>229</sup>For Emmanuel Gaillard, the power of arbitrators to issue anti suit injunction is incontestable and this power even extends to decide all questions related to the merits of the dispute brought before arbitrators.<sup>230</sup>The same author wrote that, “Principle of competence- competence gives inherent power to the tribunals to sanction parties if they violate the arbitration agreement.”<sup>231</sup>Consequently, arbitral tribunals have power to examine any challenge including anti-suit injunction.

The other justifying ground is related the principle of conduct that demand parties to refrain from “any conduct which aggravate the dispute and arbitrators obligation to take appropriate measure in order to prohibit a conduct that aggravate a dispute.”<sup>232</sup> In principle of conduct, arbitral tribunals should protect effectiveness of arbitral proceedings.<sup>233</sup>Because of this, arbitrator tribunals have a power to take all necessary measures including anti-suit injunctions both to

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<sup>227</sup>Gaillard, "Anti-Suit Injunctions Issued by Arbitrators,"237.

<sup>228</sup>Karrer, "Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please,"241.

<sup>229</sup>Ricardo,"Anti-Suit Injunctions in the Context of International Commercial Arbitration,"10.

<sup>230</sup>Gaillard, "Anti-Suit Injunctions Issued by Arbitrators,"237..

<sup>231</sup>Ibid.

<sup>232</sup>Federico Campolieti, "The Rule of Non-Aggravation of the Dispute in ICSID Arbitration Practice," *ICSID Review*30, no. 1 (2015):217–222.

<sup>233</sup> See Article 35 of ICC Arbitration Rule and Article 32(2) of LCIA Arbitration Rule.

protect the international effectiveness award and to stop conducts of parties aggravate the dispute.

Thirdly, proponents raise the issue of interim or provisional measures as ground of justify a power of arbitral tribunals to issue anti-suit injunction. For instance, Article 26 of the UNCITRAL arbitration rule empowered the arbitral tribunal to take measure for the purpose of maintaining or restoring the status quo of pending arbitration. Similarly, Article 47 of ICSID arbitration rule clearly provided that except as the parties otherwise agree, the tribunal may, if it considers the circumstances so require, take any provisional measures to preserve the respective rights of either party. Since, arbitral tribunal's power to order interim measures becoming less debated<sup>234</sup> and anti-suit injunction is included in the domain of interim measure.<sup>235</sup>

#### 4.1.2. Argument Repudiating Arbitral Tribunal's Power to Issue Anti-suit Injunctions

On anti-suit injunction, Philippe Fouchard wrote:

*Anti-suit injunction inevitably aggravate the dispute, undermine procedures of arbitration, the scattered the claim in different fora, or the retaliatory measures that may be taken in the form of anti-anti- suit injunctions by national courts in response to anti-suit injunctions issued by arbitral tribunals.*<sup>236</sup>

However, Fouchard does not consider disruptive tactics of parties by bringing the dispute before domestic courts in the presence of an arbitration agreement. According to Pierre Karrer also, party autonomy “should not exclude the right to seek relief before national courts and granting a power to the tribunal to issue anti-suit injunction is against parties' fundamental right of seeking relief before courts.”<sup>237</sup> Laurent Levy claims that:

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<sup>234</sup>Lévy, "Anti-Suit Injunctions Issued by Arbitrators," 121.

<sup>235</sup>Ricardo, "Anti-Suit Injunctions in the Context of International Commercial Arbitration," 11.

<sup>236</sup>Philippe Fouchard, "Anti-Suit Injunctions in International Arbitration: What Remedies? Anti-Suit Injunctions in International Arbitration. " *IAI Series on International Arbitration*, no. 2(2005):8.

<sup>237</sup>Karrer, "Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please," 241.

*Parties do not waive their right to resort to courts for interim measures as courts retain jurisdiction in this respect' and arbitrators must ensure that these 'measures do not violate a party's fundamental right of seeking relief before national courts.'*<sup>238</sup>

However, Laurent Levy does not say arbitral tribunals have no power to issue anti-suit injunction. The other ground of argument that opposes arbitrators power of issuing anti-suit injunction is relates with the principle of competence -competence.<sup>239</sup> Because, while exercising principle of competence –competence, “arbitrators are neither decides on the jurisdiction of a court nor, the intensity of the case brought before such court.”<sup>240</sup>

To evaluate the validity of both side arguments, it is essential to consider arbitration principles and arbitration agreements. For instance, in party autonomy principle, parties may stipulate in their arbitration agreement concerning the power of tribunal to issue anti-suit injunctions.<sup>241</sup> Nevertheless, this is uncommon in the existing international arbitration practices, and international arbitration institution rules<sup>242</sup> are silent in this regard. On the other hand, since the purpose of interim measure and anti-suit injunction are the same, international arbitration instruments are indirectly recognized anti sui-injunction issued by arbitrators through recognizing interim measure taken by arbitrators. Indeed interim relief is “designed either to minimize loss during proceedings, or facilitate the enforcement of final awards.”<sup>243</sup> Whereas, anti-suit injunctions is aimed to directing a party from initiating (court or arbitral) proceedings, or ordering a party to withdraw another lawsuit.<sup>244</sup> Thus, anti-suit injunction is a subsection of interim measure.<sup>245</sup>

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<sup>238</sup>Lévy, "Anti-Suit Injunctions Issued by Arbitrators," 123.

<sup>239</sup>Ibid., 129.

<sup>240</sup>Ibid .

<sup>241</sup>Ricardo, "Anti-Suit Injunctions in the Context of International Commercial Arbitration," 10.

<sup>242</sup> See ICC, LCIA and SIAC arbitration rules as example.

<sup>243</sup>Renee D. Bucy, "How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration under the Amended UNCITRAL Model Law," *American University International Law Review* 25, no.3 (2010):258.

<sup>244</sup>Lévy, "Anti-Suit Injunctions Issued by Arbitrators," 124.

<sup>245</sup>See ICC case no 14581(June 2007) and 18563(December 2012).Both cases are ICC Procedural Decisions. <http://store.iccwbo.org/content/uploaded/pdf/Summary-Cases-Procedural-Decisions-in-ICC-Arbitration.pdf>. (Accessed July 12, 2015).

Considerably, most of the provisional measures granted in the nature of orders for preserving the status quo than orders to defend the tribunal's jurisdiction.<sup>246</sup> Therefore, these measures do not violate a party's fundamental right of seeking relief before national courts.<sup>247</sup>

In *Holiday Inns* case, ICSID arbitration tribunal issued anti-suit injunction by accepting arbitral tribunals' jurisdiction of granting or recommending interim measure.<sup>248</sup> *Plama Consortium* case also affirmed the power of ICSID tribunals to issuing anti-suit injunctions.<sup>249</sup> *ICC Case of Award on Jurisdiction between Framatome S.A. v. Atomic Energy Organization of Iran* clearly address the rule prohibiting states from relying on their national law to renege on arbitration agreement by accepting the power of Arbitral Tribunals to issue anti-suit injunction.<sup>250</sup> The case of *Tokios Tokelés v. Ukraine, Republic of Ecuador v. Occidental Exploration & Production* also shows that in one or another way arbitrators power to issue anti-suit injunctions.<sup>251</sup>

Before closing this section, since arbitral anti-suit injunctions being a measures designed to protect the integrity of the arbitral process, arbitrators anti-suit injunction is issued at any stage of the arbitral proceeding.<sup>252</sup>

#### 4.2. Types of Anti-suit Injunction Issued by Arbitrators

About types of anti-suit injunctions issued by arbitrators, Lauren Levy has identified three common types of anti-suit measures issued by arbitrators. These three types of measures are, a measure enjoining a party from initiating (court or the other arbitral) proceeding, a measure ordering a party to seek specific relief, and a measure ordering a party to withdraw another lawsuit.<sup>253</sup> According to Emmanuel Gaillard, the submitting arbitrable matters that covered by an arbitration agreement to the domestic courts may "aggravate the dispute between the parties and undermine the effectiveness of the award to be rendered by the arbitrators."<sup>254</sup>

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<sup>246</sup>Michael Goldhaber. "The Rise of Arbitral Power over Domestic Courts," *Stanford Journal of Complex Litigation* 1, no. 2 (2013):379.

<sup>247</sup>Lévy, "Anti-Suit Injunctions Issued by Arbitrators," 121.

<sup>248</sup>*Holiday Inns S.A. and others v. Morocco*, 244.

<sup>249</sup>*Plama Consortium Limited v. Republic of Bulgaria*, 21.

<sup>250</sup>*Ibid.*

<sup>251</sup>*Ibid.*

<sup>252</sup>Gaillard, "Anti-Suit Injunctions Issued by Arbitrators," 265.

<sup>253</sup>Lévy, "Anti-Suit Injunctions Issued by Arbitrators," 124.

<sup>254</sup>Gaillard, "Anti-Suit Injunctions Issued by Arbitrators," 239-240.

Lauren Levy, however, rejects Emmanuel Gaillard's argument on the bases that the mere existence of parallel proceedings does not empower arbitrators to issue anti-suit because "declaring jurisdiction of a given tribunal enables the arbitrator to rule on the merits of the dispute before them but it does not comprise the power to exclude the jurisdiction of others".<sup>255</sup> As to the writer view, if arbitrators face up with impending parallel proceedings with a similar subject matter, may only rule its own jurisdiction.

#### 4.3. The Legal Effect of Non-Compliance of Anti-Suit Injunction

Arbitrators while ordering anti suit injunction, make sure that the requested measures are "urgent which aimed to prevent irreparable harm or necessary to facilitate the enforcement of the upcoming award."<sup>256</sup> Arbitral tribunals also use anti-suit injunction in limited situations which a party has committed a fraud or otherwise engaged in abusive behavior in order to revoke the arbitration agreement.<sup>257</sup> Therefore, anti-suit injunction is an exceptional remedy, which "used sparingly" and granted only "with care and great restraint."<sup>258</sup>

As noted below, the legal effect of anti-suit injunction issued by arbitrators may vary based on case-by-case bases. In some circumstances, however, anti-suit injunctions are not effective due to recalcitrant party seeking relief before the domestic courts, to the extent that the arbitrators' order is not, in and of itself, enforceable before those courts.<sup>259</sup> In this case, such injunctions are nothing more than an order given to the party acting in breach of the arbitration agreement to comply with its contractual undertaking to arbitrate.<sup>260</sup>

As has already been discussed the principle of good faith, parties are obligated to submit disputes to the Arbitration Tribunal rather than State Courts as far as valid arbitration agreement exist. There are also a significant body of case law has developed in different national legal systems which submitting disputes that are covered by an arbitration agreement to the domestic courts, or refusing to perform the undertaking to arbitrate that amounts to breach of the arbitration

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<sup>255</sup>Lévy, "Anti-Suit Injunctions Issued by Arbitrators,"120.

<sup>256</sup>Ibid., 125.

<sup>257</sup>Gaillard, "Anti-Suit Injunctions Issued by Arbitrators,"261.

<sup>258</sup>Ricardo,"Anti-Suit Injunctions in the Context of International Commercial Arbitration,"16.

<sup>259</sup>Gaillard, "Anti-Suit Injunctions Issued by Arbitrators,"264

<sup>260</sup>Ibid.

agreement.<sup>261</sup> In this instance, courts of such state are expected to award damages for the breach by taking into account the costs incurred by the other party in domestic proceedings notwithstanding the arbitration agreement.<sup>262</sup> Alerting a recalcitrant party to comply the obligations under the arbitration agreement is also another mechanism.<sup>263</sup>

The case between OAO Gazprom v. Ministry of Energy of the Republic of Lithuania is good example to show the legal effect of anti-suit injunction issued by arbitrators. OAO Gazprom agreed to supply gas to Lithuania via a Lithuanian company, Lietuvosdujos AB.<sup>264</sup> The agreement contained an arbitration clause (SCC arbitration, Stockholm seat). The dispute arose when Lithuanian Ministry of Energy filed an application for investigation proceedings before the Vilnius Regional Court in Lithuania, pursuant to Article 2.124 of the Lithuanian Civil Code against Lietuvosdujos AB, Lietuvosdujos AB managing director and two board members Lietuvosdujos AB appointed by Gazprom.<sup>265</sup> While the case was pending in Vilnius Regional Court, OAO Gazprom commenced arbitration in Stockholm to look for Lithuanian Ministry of Energy to withdraw the court proceedings.<sup>266</sup> However, Vilnius Regional Court granted the Lithuanian Ministry of Energy request for an investigation.<sup>267</sup> The Tribunal at Stockholm declares

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<sup>261</sup> Ibid., 238.

<sup>262</sup> Ibid., 264.

<sup>263</sup> Ibid.

<sup>264</sup> Gazprom v. Ministry of Energy of the Republic of Lithuania, SCC case no.V.125/2011 (July 31, 2012), *Arbitration Institute of The Stockholm Chamber of Commerce* (2011):41-44.

<sup>265</sup> Gazprom Case, Award, para. 41.

<sup>266</sup> Gazprom Case, Award, para 200. Based on the dispute, SCC framed the issue ‘whether the MoE breached the arbitration agreement contained in the shareholders’ agreement by applying for the investigation proceedings before the Lithuanian Court’, then, if the answer is affirmative, the Arbitral Tribunal has to find whether the actual applications filed by Respondent before the Lithuanian Court are such disputes falling within the scope of shareholders agreement and, if so, whether Claimant is entitled to specific performance of the arbitration clause and/or damages. Arbitral Tribunal then is satisfied that an application before the Lithuanian courts for investigation pursuant to article 2.124 constitutes a breach thereof. Consequently, the Arbitral Tribunal decides whether such was the case for the actual applications filed by Respondent. In this regard also, the Tribunal finds that Respondent’s requests under the Revised Claim to the Lithuanian Court are in breach of the arbitration clause of the SHA. Concerning the power of tribunal in ordering forced performance, the tribunal finds that it has jurisdiction to order the Ministry as far as it finds that Respondent has breached the arbitration clause in the SHA. Since it is not possible to quantify the amount of costs incurred by Claimant and no evidence that part of the damages incurred by Lietuvos Dujos because of the Lithuanian proceedings was and/or will be ultimately borne by Gazprom, the tribunal was rejected request for damage.

<sup>267</sup> See Ministry of Energy of the Republic of Lithuania v. AB Lietuvos Dujos, Vilnius Regional Court, civil case No. 2-5031-302/1(2011).

that, the initiation and prosecution was in breach of the arbitration agreement and orders anti-suit injunction on the respondent to withdraw its request.<sup>268</sup>

After this decision, OAO Gazprom sought recognition of the SCC award before the Lithuanian Court of Appeal but appellate court rejected the application.<sup>269</sup> This decision then appealed to the Lithuanian Supreme Court but Supreme Court referred to the European Court of Justice (ECJ).<sup>270</sup> On 13 May of 2015, ECJ acknowledged that an anti-suit injunction comes from an arbitral tribunal does not conflict with the jurisdictions between courts of the ECJ Member States.<sup>271</sup>

Three important lessons are drawn from this case. The first concerns the jurisdiction of arbitral tribunal to issue anti-suit injunction. SCC Arbitration Tribunal has been ruled its own competence-competence and investigates the breach of arbitration clause. Then, because of parties' breach of arbitration agreement, the tribunal issued anti-suit injunction, which has an effect to withdraw court litigation.

Secondly, parties after having consented to arbitration, they have an obligation to submit disputes to arbitration include the duty not to submit such disputes to State Courts in any case. In OAO Gazprom case, however, the tribunal extends to analyzed reasons raised by parties based on national laws like non-Arbitrability of the case, Lithuanian Ministry of Energy power to conclude arbitration agreements in behalf of Lithuanian government. This decision is one-step forward because it does not entirely ignore national laws that one of the parties challenge validity of arbitration based on their respective national laws. The third concerns the legal effect of breach of arbitration agreement. Arbitrators consider specific performance and compensation as a remedy for none complies of anti-suit injunction.

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<sup>268</sup> Gazprom Case, Award, para. 292.

<sup>269</sup> See *Gazprom v. The Republic of Lithuania*, Court of Appeal of Lithuania (December 17, 2012), *YB Commercial Arbitration* 37(2013):417–423.

<sup>270</sup> See *Gazprom v. The Republic of Lithuania*, Supreme Court of Lithuania, Civil Case No. 3K-7-326/2013 (October 10, 2013).

<sup>271</sup> See *Gazprom v. The Republic of Lithuania*, ECJ Case C-536/13 (May 13, 2015).

## Chapter Five

### Conclusion and Recommendation

#### 5.1. Conclusion

An anti-suit injunction in international arbitration is a recent trend that staying or terminating the proceedings surrounding international arbitration. It may vary in their form, and requested either in an attempt to disrupt the arbitral process or, to the contrary, to protect it. This trend compatibility with general purposes of arbitration i.e. flexibility, neutrality, confidentiality, less cost and speedy litigation are also varies based on specific grounds at which the given anti-suit injunction has been issued. When anti-suit injunction issued *inter alia*, preserving the jurisdiction of the arbitral tribunal, safeguard the effectiveness of the award, and prevent the activities of parties those escape the arbitration agreement is unquestionably compatible with flexibility purpose of arbitration.

Since neutrality, purpose of arbitration is related with choosing a neutral place for the resolution of the dispute and to choose a “neutral” tribunal, a change of the agreed place of arbitration should not done in subjective manner. While selecting place of arbitration always reminds that, choose a good seat will likely get an effective arbitration but arbitration in a bad seat is difficult to salvage, even with good institution and rules. On the other hand, even if confidentiality purpose of arbitration has no direct link with the issue of anti-suit injunction but indirectly disclosing information to other body other than tribunal for attaining anti-suit order is against the core principle of confidentiality. Therefore, issuing anti-suit injunction to avoid wastage of cost and time are the sound rationalization to accept compatibility of anti-suit injunction with general of purpose of arbitration.

The assessment of anti-suit injunctions in the domain of international arbitration principles show that, arbitration tribunal can make a decision regarding its own jurisdiction. This includes objections regarding the existence or validity of the arbitration agreement, and any act of parties to stop or terminate the arbitration proceeding through requesting anti-suit injunction based on the contract is void or null is against the principle of separability.

Furthermore, the principle of party autonomy is limited autonomy of parties that subject to some restrictions. Thus, anti-suit injunctions issued to preserve and protect public policy, equality of parties, enforce mandatory provisions, and protect interest of third parties are legitimate space to limit principle of party autonomy.

Principle of Competence-competence also gives a power to the arbitral tribunals to determine the existence of the arbitration clause, its validity and scope, without the need to invoke the jurisdiction of a national court. However, this does not mean that a complete ignorance of national courts. Party's choice of seat of arbitration is also a wider ramification than merely the supervisory powers of the seat courts. Therefore, depending upon specific circumstances of the case, issuing anti-suit injunction not entirely prohibited by international arbitration principles but it is an exceptional remedy.

The power of the court to assist, intervene, supervise, control, and recognize and enforce the award have been always controversial in the legal regime of international commercial arbitration especially in relation to anti-suit injunction. International arbitration institution rule, statutes and model rules failed to address the issue of anti-suit injunction in separate and clear manner. The legal response of arbitral tribunals towards anti-suit injunction is not having straightforward answer. Even those four independent legal theories of international arbitration i.e. Jurisdictional, Contractual, Mixed or hybrid and Autonomous, which described the relationship between international arbitration and states justice system, have not yet attained a universal support. However, the practice in international arbitration also shows courts retained some level of control over arbitration to meets at least minimum standards of fairness-so that arbitration is not a system that is fraudulent, corrupt, or lacking in essential due process.

The power of national courts to issue anti-suit injunction is legally justified by deep scrutinizing international arbitration laws, principles and purposes of international arbitrations. Concerning the power of tribunals to issue anti-suit injunction, since anti suit injunction included in the power of arbitrators to take interim measure and the power to take this measure is less controversial, arbitrators are unequivocally empowered to issue anti-suit injunction. However, this does not mean arbitrators should order a judge or other arbitrators how to behave.

Whether the arbitrators should comply with a local court's order aimed at suspending or interrupting the running of arbitral proceedings, and what type of remedies should a party receive when courts unjustly interfere with their right to arbitrate are the two basic questions that have been addressed in this research. As a result, neither of these questions has a straightforward answer because of differences on states approach and factual circumstances of cases. However, the intervention of local courts is justifiable only if it is not in violation of the arbitration agreement. The arbitrators could reasonably disregard the anti-suit injunction order only when grounded on the abusive intent of one of the parties to frustrate or disrupt the arbitration agreement and arbitration process. Finally, the stage of court involvement and grounds thereof varies based on the types of anti-suit injunction issued either in favor or to prevent arbitration.

## 5.2. Recommendation

Due to increasing a number of anti-suit injunction issued by both national courts and arbitration tribunals which directed to the parties and even on arbitrators for the purpose of terminating or staying international arbitration proceeding should be handled at the first place by recognizing the issue as one area of controversies in international arbitration. Then, adjusting the silent or ambiguous international arbitration status and rules are foreseeable solution.

The challenge relating to interference of national courts in international arbitration is often an effect of a wrong choice of the seat of arbitration. Therefore, parties should avoid sitting of arbitration in a country that is not arbitration-friendly. Furthermore, change of the agreed place of arbitration practically seen as distractive of international arbitration and shifted the relationship of arbitral tribunal and national courts from cooperation to constant battle. As a result, arbitration tribunals should duly considered and analyzed the circumstances before allowing change of arbitration venue apart from the mere existence of power to do so in their respective arbitration rules. Arbitration tribunals also should consult all disputing parties before changing place of arbitration by considering the general purpose of international arbitration.

The other main area of dispute is relating to the degree and extent of seat court involvement. To solve this problem, arbitration agreement should clearly address the extent party autonomy in one hand, and National laws, Arbitration institution rules and international arbitration instruments including the New York Convention should be amended to show clearly the stage, degree and extent of seat court involvement of anti-suit injunction in international arbitration.

Arbitrators and parties misconduct in international arbitration shall improve by strengthen internal rules of international arbitration institutions. Institutions should respond the misconduct claim in immediate and genuine manner. National courts also should take their part of responsible in maintain due process of law, equality of parties and correcting misconduct of arbitrators but at least wait until such internal mechanism exhausted. However, where court unjustifiably interfere and disturb the smooth functioning of international arbitral process, the arbitral tribunal should disregard the orders and continuing with the arbitral proceedings as far as immediate and genuine response is given by the arbitral tribunal. Nevertheless, if tribunal internal mechanism is failed to solve in immediate and genuine manner, seat court should react immediately even before final award.

On the other hand, national courts other than seat of arbitration are tempting for a state, or a state-owned entity, to renege on an arbitration agreement to which it freely consented by restoring to its own courts to have the other contracting party enjoined from initiating an arbitration against it, or, if arbitral proceedings have already been initiated, from pursuing them. Therefore underlining clearly that national courts other than seat of arbitration shall have no power to interfere in international arbitration once consented to solve a dispute in international arbitration.

Problem related with arbitration tribunals power shall cracked by solving arbitration agreement problems. Because arbitral tribunal's competence intrinsically tied with the validity of the arbitration agreement, and any defects (whether of formal or substantive nature), of the arbitration agreement directly impair or even abrogate the arbitral tribunal's competence. Concerning arbitration tribunal's competence-competence, judicial self-restraint is the most appropriate solution in light of the arbitral tribunal's jurisdiction to rule on its own competence. Problem related with the power of tribunal to grant anti-suit injunction also shall be solved by clearly indicating such power of arbitrators either in arbitration agreement or in arbitration legal instruments.

Finally, the place of arbitration has a vital role in international arbitration proceedings. If the parties want to apply arbitration proceeding, they should determine the place of arbitration by taking into account both legal and practical issues. Therefore, in order to become an attractive place for international arbitration, Ethiopia has adopted standard international arbitration law that incorporates the issue of anti-suit injunction. With developments of such arbitration law, Ethiopia will become arbitration center for Africa in the near future due to geographical and diplomatic seat advantage.

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