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Injunctions: International Arbitration

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A. Introduction

1 Injunctive relief, also referred to as interim relief (Vishnevskaya, 2015, 175), is an important tool in international arbitration. Parties may sometimes find themselves served with foreign court proceedings, in contravention of an agreement to arbitrate. It is also possible that, given the time period between the initiation of arbitration proceedings and the substantive hearing, the subject-matter or necessary evidence disappears before the award is rendered. Further, one party may frustrate the rights of the other party and make enforcement impossible by dissipating or placing assets beyond reach of the award creditor.

2 In these scenarios, one party may wish to seek to preserve its right or property by requesting injunctive relief in the form of interim measures of protection (→ *Interim (Provisional) Measures of Protection*). These measures are a common feature in international arbitration (Donovan, 2003, 83) and are granted only in limited circumstances as they can be determinative of the dispute and may cause harm that is hard or even impossible to repair. They can also be abused by a party to exert pressure on the other side. Interim measures can be used for tactical reasons such as distracting the opponent, increasing publicity around the case, delaying the matter, increasing the costs, or hindering other business activity.

3 Parties may seek injunctive relief through either the arbitral tribunal or national courts (Lew, 2005, 27; Geisinger, 2005, 375). Various types of injunctive relief are available to a party before and during the arbitral proceedings, including measures that prevent a party from using a trade mark, patent, and confidential know-how, that safeguard the subject-matter of the dispute (eg cargo, oil, properties), that prevent a party from dissipating assets pending the arbitration, and that restrain a party from commencing or continuing proceedings before a foreign court (for the different types of injunctive relief see Seriki, 2014).

4 This entry provides an analysis of the rules and practices governing the seeking and granting of interim relief in → *international investment arbitration* and commercial international arbitration (→ *Commercial Arbitration, International*). To that end, this entry will first explore the legal framework of injunctive relief, followed by an examination of three types of relief that are used in practice and which have resulted in recent decisions, namely anti-suit injunctions (→ *Anti-suit injunctions: International Adjudication*), anti-arbitration injunctions, and freezing injunctions.

B. Legal Framework

5 The point of departure should be an examination of the legal framework governing injunctive or interim relief. The legal basis for seeking and granting interim relief emanates from the governing procedural law of the seat of the arbitration (ie *lex arbitri*) and, when applicable, the institutional rules chosen by the parties. In investor-State arbitration proceedings before the → *International Centre for Settlement of Investment Disputes (ICSID)*, a party wishing to request interim relief should refer to the provisions of the International Convention on the Settlement of Investment Disputes (1965) ('ICSID Convention') and its Arbitration Rules (2022) ('ICSID Arbitration Rules').

6 When examining the legal framework of interim relief, it is first necessary to enquire who the competent authority to grant such relief is. Depending on the applicable arbitration legislation and institutional rules, it might be open to a party to seek relief from the courts or an arbitral tribunal. Arbitration laws have taken different approaches to this issue, with some jurisdictions being very expansive in the type of powers granted to the arbitrators

while other are more restrictive (Lévy, 2005, 121). That said, most arbitration laws acknowledge the power of arbitrators to order interim measures.

7 Article 17 (1) Model Law on International Commercial Arbitration (2006) ('UNCITRAL Model Law') (Model Law on International Commercial Arbitration: United Nations Commission on International Trade Law (UNCITRAL)) provides that '[u]nless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures'. Similarly, Article 183 (1) Swiss Federal Act on Private International Law (1987) states that 'unless the parties have otherwise agreed, the arbitral tribunal may, on motion of one party, order provisional or conservatory measures'. The United States Federal Arbitration Act (1925) also grants arbitrators the power to issue interim relief, unless parties agree otherwise (*McCreary Tire & Rubber Co v CEAT SpA*, 1974, 1037–38).

8 In England, section 39 (1) Arbitration Act (1996) provides that '[t]he parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award'. This provision can be read as allowing tribunals to grant interim measures only if the parties expressly agree (Lévy, 2005, 221). This agreement can, for instance, materialize through the choice of an arbitral institution to administer the proceedings.

9 Modern sets of institutional rules grant arbitral tribunals (once appointed) the power to order interim relief. Article 28 (1) Arbitration Rules of the International Chamber of Commerce ('ICC') (→ *Arbitration Rules (2021): International Chamber of Commerce*) allows the tribunal to 'order any interim or conservatory measure it deems appropriate'. In a similar vein, Article 25 (1) Arbitration Rules of the → *London Court of International Arbitration (LCIA)* (2021) ('LCIA Arbitration Rules') stipulates that '[t]he Arbitral Tribunal shall have the power [to grant "Interim and Conservatory Measures"]'. Article 26 (1) UNCITRAL Arbitration Rules (2013) (→ *Arbitration Rules: United Nations Commission on International Trade Law (UNCITRAL)*), which typically apply in *ad hoc* arbitrations, also provides that '[t]he arbitral tribunal may, at the request of a party, grant interim measures'.

10 The ICSID Convention takes a similar approach in Article 47: '[e]xcept as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party'. As Brown explains:

> Art 47 is subject to exclusion or variation by the parties. The parties may agree to exclude the possibility of provisional measures altogether or to limit the tribunal's power with respect to the circumstances under which they are to be recommended or with respect to the types of measures which will be permissible. Conversely, the parties may extend the tribunal's power by providing that provisional measures or certain categories of provisional measures will be binding (Brown, 2022, 10577).

11 Some investment treaties also contain a specific provision dealing with interim measures. This is the case of the recently amended → *North American Free Trade Agreement (1992)* ('NAFTA'), Article 1134 of which provides that:

> A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction.

12 Though most arbitration laws and institutional rules give arbitrators broad powers to grant interim relief, this does not necessarily mean that the parties may prefer, or need, to seek this relief from national courts. Parties can in fact generally apply either to a court or to arbitrators for interim relief. As one author observes, parties should consider resorting to national courts generally when '[t]he arbitral tribunal has not yet been constituted … [t]he party seeking interim relief needs judicial compulsion' and '[t]he matter is urgent and the arbitrator does not act timely or does not provide an adequate remedy' (Practical Law, 2017, 3–4).

13 On the other hand, parties should consider applying to the arbitral tribunal for interim relief generally when the applicable arbitral rules 'empower the arbitral tribunal to grant broader interim relief than would be available in court … [t]he applicant is satisfied that the other party will respect orders issued by the tribunal' and the '[c]ourts at the place of arbitration are reluctant to grant provisional remedies in aid of arbitration' (Practical Law, 2017, 4).

14 When examining the legal framework of interim relief, it also is necessary to enquire what type of interim measures may be ordered in a specific case and the conditions under which relief can be granted. As Besson notes, '[s]tatutes and institutional rules do not usually prescribe under what conditions interim measures may be ordered in arbitration', nor do they provide the type of interim relief that may be requested by the parties (Besson, 2015, 77). An exception can be found in Article 17 UNCITRAL Model Law, which defines interim relief as:

> any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
>
> a. Maintain or restore the status quo pending determination of the dispute;
>
> b. Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
>
> c. Provide a means of preserving assets out of which a subsequent award may be satisfied; or
>
> d. Preserve evidence that may be relevant and material to the resolution of the dispute.

15 For its part, Article 17 (A) provides that a party requesting an interim measure under Article 17 (2) (a), (b), and (c) shall satisfy the arbitral tribunal that:

> (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
>
> (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

16 Some institutional rules specify the type of relief that can be granted by arbitrators. For instance, Article 25 (1) LCIA Arbitration Rules provides that an arbitral tribunal shall have the power to grant interim and conservatory measures in the following circumstances:

> C. to order any respondent party to a claim, counterclaim or cross-claim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner;
>
> (ii) to order the preservation, storage, sale or other disposal of any monies, documents, goods, samples, property, site or thing under the control of any party and relating to the subject- matter of the arbitration; and
>
> (iii) to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties.

17 The ICSID Arbitration Rules, complemented with the aforementioned Article 47 of the ICSID Convention, provides that '[a] party may at any time request that the Tribunal recommend provisional measures to preserve that party's rights provisional measures for the preservation of its rights be recommended by the Tribunal' (Rule 47 (1) ICSID Arbitration Rules). Rule 47 (1) adds that a party may request provisional measures to '(a) prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process; (b) maintain or restore the *status quo* pending determination of the dispute; or (c) preserve evidence that may be relevant to the resolution of the dispute'.

18 With respect to the conditions for granting interim relief, 'tribunals will typically consider whether the provisional measures are necessary, urgent and required to avoid irreparable harm'. Requests for provisional measures include those aimed at 'obtaining or preserving evidence, securing financial guarantees, staying parallel domestic or arbitral proceedings, staying the execution of administrative decisions, or preventing prejudicial interference by one party' (ICSID's Services, Provisional Measures – ICSID Convention Arbitration).

19 The following sections will examine the position adopted by arbitral tribunals and courts when considering interim relief sought by parties in international commercial and investment arbitration proceedings. The focus will be on three types of interim relief, namely anti-suit injunctions ('ASIs'), anti-arbitration injunctions ('AAIs'), and freezing injunctions.

D. Anti-suit Injunctions (ASIs)

20 ASIs are a form of interim remedy that originated in common law jurisdictions (Lew, 2005, 25) and has been defined as:

> a device, originally found in common law countries, whereby a court - which retains its jurisdiction or anticipates to do so and which seeks to protect that jurisdiction or, more generally, the jurisdiction of the forum it deems to be the most appropriate - orders a party to refrain from bringing a claim before the courts of another State or before an arbitral tribunal or, if the party has already brought such a claim, orders

that party to withdraw from, or the arbitrators to suspend, the proceedings (Gaillard, 2005, 1).

21 ASIs are generally categorized as interim measures, ie provisional relief (Vishnevskaya, 2015, 175). They are an important tool to give full effect to an arbitration agreement in circumstances where a party, in breach of such agreement, commences litigation proceedings. ASIs operate *in personam*, that is, 'they are directed at the party and not at the foreign court whose proceedings are impugned' (Besson, 2015, 71). As the United Kingdom's House of Lords held in *Turner*, an ASI 'is in substance directed at unconscionable conduct of the defendant, as distinct from jurisdictional error by the foreign courts' (*Turner v Grovit*, 2001, 35).

22 ASIs are not limited to national courts. Parties can also ask the arbitral tribunal—once constituted—to order the counterparty to withdraw the court proceedings, or to stay them pending the outcome of the arbitration. ASIs can be issued by an arbitral tribunal only if the law of the seat or the applicable institutional rules allow it to do so. As we have seen, most arbitration laws and key institutional rules give tribunals wide powers to grant interim measures, including ASIs. The UNCITRAL Model Law even includes ASIs in its definition of interim measures, allowing tribunals to issue orders that 'would prevent … prejudice to the arbitral process itself' (Art 17 (2) (b) UNCITRAL Model Law).

23 It is thus safe to say that, as Besson notes, ASIs 'are now being regarded as part of the panoply of interim measures at the disposal of arbitrators. Accordingly, an arbitral tribunal's power to grant anti-suit injunctions is a corollary of its power to grant interim measures' (Besson, 2015, 75; see also Geisinger, 2005, 391; Wirth, 2000, 31–32).

24 When deciding whether to resort to an arbitral tribunal or a court for the issuance of an ASI, parties should consider that courts are better placed to enforce their own orders. As such, irrespective of whether the tribunal is constituted, 'many parties prefer to seek anti-suit relief from a body that can fine, or even imprison, non-compliers. Arbitral tribunals are limited to drawing adverse inferences or penalizing the offender in costs, and many are reluctant to impose cost consequences until the end of the case'; however, it might at times be preferable to apply to the arbitral tribunal when, for instance, the parties 'desire to preserve confidentiality, or to avoid the time and expense of instructing local lawyers to file a court application' (Herbert Smith, Legal Briefing, 2021, 2).

25 Courts and tribunals have dealt with ASIs in both commercial and investment arbitration cases. Some of these cases are discussed below.

1. Commercial Arbitration

26 With respect to national courts, recent cases in England, Hong Kong, and Singapore confirm that the courts are generally willing to grant ASI in support of arbitration agreements.

27 Senior courts in England have 'general power' to grant ASIs in support of arbitration. Until the United Kingdom ('UK') exited the European Union ('EU') in January 2021, this power could not be exercised with respect to foreign proceedings initiated in EU Member States, in line with the well-known *West Tankers* decision by the Court of Justice of the EU ('CJEU') discussed below.

28 English courts have issued ASIs in a number of cases. To mention some examples, in *JSC v AES* (2013), the UK Supreme Court confirmed that courts are competent to injunct the continuation or commencement of foreign proceedings brought in breach of an arbitration agreement, even in the absence of an actual, proposed or intended arbitration. AES Ust-Kamenogorsk Hydropower Plant LLP ('AES UK') leased a concession to operate a hydroelectric plant in Kazakhstan. Ust-Kamenogorsk Hydropower Plant JSC ('JSC') was the owner of the concession. The concession agreement was governed by Kazakh law and contained an ICC arbitration clause with a London seat.

29 After the relationship between the parties deteriorated, JSC commenced court proceedings against AES UK in Kazakhstan. Upon a request from AES UK, the English courts issued an interim ASI against the Kazakh court proceedings and JSC unsuccessfully appealed the decision to the Court of Appeal. JSC then appealed to the Supreme Court.

30 The Supreme Court was asked to consider the inter-relationship between the power of courts to issue an ASI under the English Arbitration Act (1996) and under the Senior Courts Act (1981). In particular, the relationship between section 44 Arbitration Act and section 37 Senior Courts Act. Section 44 (1) Arbitration Act provides that: 'Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings'. Section 37 Senior Courts Act provides that the 'the High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so'. The former sets out the powers available to the court to support arbitral proceedings, including the power to grant an interim injunction provided arbitral proceedings are proposed or underway.

31 The Supreme Court held that the general power under section 37 Senior Courts Act must be exercised cautiously and 'sensitively' in the arbitration context 'with due regard for the scheme and terms' of the English Arbitration Act 1996 (at 60). In this respect, the Supreme Court considered that it was within the lower court's discretion to grant an injunction under the Senior Courts Act to protect the right of AES UK to enforce the negative aspect of its arbitration agreement with JSC, even where no arbitration was commenced or proposed.

32 More recently, in *Enka v Chubb* (2020), the UK Supreme Court reaffirmed the power of English courts to grant an ASI. Enka was a subcontractor for the construction of a power plant in Russia. The contract between Enka and the plant owner contained an arbitration agreement which provided for ICC arbitration with its seat in London. In 2016, following a fire at the power plant, the plant owner's insurer, Chubb, paid an insurance claim made by the owner and was subrogated to the owner's rights under the contract. Chubb then commenced a claim against Enka in Russia. In response, Enka sought an ASI from the English Commercial Court to restrain Chubb from continuing proceedings in Russia. The English Commercial Court declined to grant the ASI on → *forum non conveniens* grounds. On appeal by Enka, the Court of Appeal decided to restrain Chubb from pursuing foreign proceedings, holding *inter alia* that, since English law was the curial law and the law applicable to the arbitration agreement, the court had the power to grant an ASI in support of the arbitration and to restrain Chubb from seeking relief in Russia. It further found that issues of *forum non conveniens* did not arise in the context of the English court's powers over an arbitration where English law was the curial law. The matter went to the Supreme Court, which held that where English law is the law of the seat, English courts generally

have jurisdiction to grant an ASI to restrain breaches of the arbitration agreement, even where that agreement is not itself governed by English law (*Enka v Chubb*, 2020, para 293).

33 These decisions have been followed in more recent cases (see eg *Specialised Vessel Services v Mop Marine Nigeria*, 2021 and *UAU v HVB*, 2021). In short, if there is a valid arbitration clause providing for London as the seat, the parties to that clause have a contractual right to have any claims arising out of or relating to the contract determined in arbitration. Should that contract be breached by the initiation of foreign proceedings, an ASI is an available remedy.

34 Other jurisdictions have also shown willingness to grant ASIs in support of arbitration agreements. For example, in *GM1 and GM2 v KC*, the Hong Kong Court of First Instance held that ASIs may be granted even against a third party if the arbitration agreement covers claims against the non-contracting affiliates or associates of the contracting party (2019, at para 29, relying on *Giorgio Armani v Elan Clothes*, 2019; other cases following a similar approach include *Dickson Valora Group v Fan Ji Qian*, 2019 and *AIG v McCullough*, 2019).

35 Arbitral tribunals have also dealt with ASIs in commercial arbitration proceedings. As Gaillard has noted, however:

> The principle of confidentiality, which covers most arbitral awards and procedural orders in international commercial arbitration, makes it difficult to determine how often arbitrators have actually issued anti-suit injunctions in purely commercial matters (Gaillard, 2007, 251).

36 Despite this, case law shows that the issuance of ASIs by arbitral tribunals is not uncommon in practice (for a survey of cases in which tribunals have granted ASI relief see Gaillard, 2007, 251–59; Besson, 2015, 82–87). To mention some examples, in *ICC Case No 8307*, the sole arbitrator issued an award ordering a party to refrain from pursuing domestic court proceedings against the other party (2001, at 308). The arbitrator found that the filing of a claim before domestic courts breached the arbitration agreement concluded between the parties, which granted exclusive jurisdiction to the arbitrator (at 303). The arbitrator then stated that:

> the power to order the parties to comply with their contractual commitments. The agreement to arbitrate being one of them, its violation must be dealt with in the same manner when it is patent that the action initiated in a state court is outside the jurisdiction of such court and is therefore abusive. This is also a guarantee of the efficiency and credibility of international arbitration (*ICC Case No 8307*, 308).

37 In *ICC Case No 10681*, the tribunal ordered one of the respondents ‘to immediately cease and desist from continuing the litigation before the courts of the Dominican Republic against [the claimant] until a final award is issued in the arbitration’ (2012, at para 15). The tribunal issued such order in accordance with its power to grant interim measures under Article 23 ICC Arbitration Rules (1998), holding that ‘[t]he issuance of an injunction is a delicate measure which tribunals, including arbitral tribunals, must take seriously and approach with the utmost caution (at para 11).

2. Investment Arbitration

38 ASI requests addressed to arbitral tribunals are also seen in investment arbitration, particularly in ICSID proceedings (for a survey of cases see Gaillard, 2007, 244–50). The first case where this relief was requested is *Holiday Inns v Morocco* (1972), where the tribunal dealt with a request to refrain the respondent from initiating or continuing court proceedings before the Moroccan courts regarding issues that were also before the arbitral tribunal. The tribunal held that:

> the Moroccan tribunals should refrain from making decisions until the Arbitral Tribunal has decided these questions or, if the Tribunal had already decided them, the Moroccan tribunals should follow its opinion. Any other solution would, or might, put in issue the responsibility of the Moroccan State and would endanger the rule that international proceedings prevail over internal proceedings (*Holiday Inns v Morocco*, 160).

39 In *CSOB v Slovak Republic* (1998), the investor requested an ICSID tribunal to suspend bankruptcy proceedings before the Bratislava Regional Court since the arbitration and the bankruptcy case involved the same issues. The tribunal recommended the suspension of the proceedings, which dealt 'with matters under consideration by the Tribunal in the instant arbitration', given that the Regional Court had denied the claimant's application for a stay (*CSOB v Slovak Republic*, 2).

40 In *Tokios Tokeles v Ukraine* (2003), the claimant requested an ICSID tribunal to issue an ASI to restrain the respondent from continuing with national proceedings. The tribunal considered that it was the only competent authority to decide on the alleged violations of the applicable investment treaty signed between Ukraine and Lithuania and issued an Order (*Tokios Tokeles v Ukraine*, 2). It stated that the judicial authorities in the host state had the legal obligation:

> to abstain from, and to suspend and discontinue, any proceedings before any domestic body, whether judicial or other, which might in any way jeopardize die principle of exclusivity of ICSID proceedings or aggravate die dispute before it (*Tokios Tokeles v Ukraine*, 3).

41 In *Plama v Bulgaria* (2005), the investor asked an ICSID tribunal to order the respondent to cease all pending Bulgarian court proceedings allegedly relating to the arbitration. The tribunal rejected the investor's request on the grounds that the conditions for the granting of the injunction were not met. According to the tribunal, the request was not aimed at protecting 'rights relating to the dispute' since the Bulgarian proceedings would have 'no foreseeable effect on the Arbitral Tribunal's ability to make a determination of the issues in the arbitration' (*Plama v Bulgaria*, 14). Nonetheless, the tribunal acknowledged the power of ICSID tribunals to grant an ASI when necessary to protect ICSID jurisdiction:

> Provisional measures are appropriate to preserve the exclusivity of ICSID arbitration to the exclusion of local administrative or judicial remedies as prescribed in Art 26 of the ICSID Convention. They are also appropriate to prevent parties from taking measures capable of having a prejudicial effect on the rendering or implementation of an eventual award or which might aggravate or extend the dispute or render its resolution more difficult (*Plama v Bulgaria*, 12).

42 The tribunal also noted that 'the right to non-aggravation of the dispute refers to actions which would make resolution of the dispute by the Tribunal more difficult' and would threaten 'the ability of the Arbitral Tribunal to grant the relief which a party seeks and the capability of giving effect to the relief' (*Plama v Bulgaria*, 15). In the present case, the tribunal concluded, the pending Bulgarian proceedings did not violate 'the right to non-aggravation right', which would have justified the issuance of the ASI.

3. European Union

43 For a period of time, there were intense debates in the international arbitration community as to whether EU law (in particular Council Regulation (EC) No 44/2001 ('*Brussels I Regulation*')) permitted courts in Member States to issue an ASI. This was because under the Brussels I Regulation the court of a European State first seized of a legal question—including, for example, whether an arbitration agreement was valid or not—had priority to determine the question. Accordingly, if a case had been filed in the courts of one European country, then the courts of another European country could not subsequently issue an injunction effectively preventing the courts of the first country from passing a judgment on the matter referred to it. On the other hand, the Brussels I Regulation contained a provision stating that arbitration was not covered by the scope of the Regulation (the 'Arbitration Exception').

44 The question of the compatibility of an ASI with the Brussels 1 Regulation was examined by the House of Lords in the *West Tankers* case. The House of Lords referred the question to the CJEU for final determination in 2007. In 2009, the CJEU held that granting an ASI was incompatible with the Regulation. The CJEU held that:

> It is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of a Member State on the ground that such proceedings would be contrary to an arbitration agreement. [Allowing a court in a Member State to grant an ASI in these circumstances] necessarily amounts to stripping [the other court] of the power to rule on its own jurisdiction under [the] Regulation' (*Alianz SpA v West Tankers*, 2009, 37)

45 UK courts have reaffirmed the *West Tankers* decision in subsequent cases (see eg *Nori Holdings v Public Joint Stock Company*, 2018). Presumably, however, since 1 January 2021, the UK is no longer bound by the Brussels I Regulation and the decisions of the CJEU. In other words, following Britain's exit from the EU, UK courts should be able to issue anti-suit relief in respect of court proceedings in an EU member state, including to protect an arbitration agreement.

46 Leaving that thought aside, the decision in *West Tankers* left doubt as to whether an ASI can be granted by arbitral tribunals. In *Gazprom*, the CJEU answered this question in the affirmative. The tribunal in that case had issued an ASI against the Lithuanian Ministry of Energy requesting it to withdraw or limit some of the claims it had brought in the Lithuanian courts. The CJEU held that ASIs issued by arbitral tribunals are not covered by the Brussels I Regulation, which:

> must be interpreted as not precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement, in a

> Member State, of an arbitral award issued by an arbitral tribunal in another Member State (*Gazprom v Lithuania*, 2015, 44).

47 Consequently, unlike courts within the EU, arbitral tribunals have the power to issue an ASI to prevent court proceedings in another EU Member State.

D. Anti-Arbitration Injunctions (AAIs)

48 An AAI seeks to prevent the initiation or continuation of arbitration proceedings, as opposed to court proceedings (Nedumpara, 2019, 23). It could be granted by a court where a party has commenced arbitration proceedings on the basis of an invalid arbitration agreement. The idea is that the relevant dispute should be heard by national courts rather than by arbitrators.

49 The issuance of this type of relief has long been a subject of controversy (for a detailed analysis of AAIs see Garnett, 2020; Subramanian, 2018). Some authors have condemned the practice on grounds of undue interference in arbitral proceedings (Born, 2009, 1025). Because most arbitration laws recognize the principle of *kompetenz-kompetenz,* according to which arbitral tribunals have the competence to determine their own jurisdiction (Cook, 2014, 19), many courts will be reluctant to grant an AAI unless the parallel arbitration proceedings in question are manifestly based on a null and void arbitration agreement, or flagrantly in breach of a valid arbitration agreement. As one author has noted:

> More recent authorities demonstrate that anti-arbitration injunctions have been granted in response to a breach of an agreement not to arbitrate, an arbitration of an issue that is res judicata, a breach of an exclusive jurisdiction agreement and the commencement of arbitration against a third party who was not party to the arbitration agreement (Loon, 2013, 248).

50 Normally, courts will only entertain applications for an AAI if the relevant arbitration proceedings are seated in the Court's own jurisdiction. Exceptionally, however, certain courts such as English courts may accept AAI applications despite the fact that the seat of the relevant arbitration is abroad.

51 Courts have dealt with AAI requests in both commercial and investment arbitration cases. Some of these cases are discussed below.

1. Commercial arbitration

52 In *Excalibur v Texas Keystone*, an English court held that an AAI should be granted in 'exceptional circumstances and with caution' (2011, at 45). The court considered that if the continuation of arbitration proceedings 'would be unconscionable, oppressive, vexatious or otherwise an abuse of the due process of the court' (at 56), the injunction should be granted. In this case, the court found that there was strong evidence suggesting that the Gulf companies were not parties to the arbitration agreement and thus forcing them to participate in the arbitration would be 'unconscionable' (*Excalibur v Texas Keystone*, 70).

53 This position has been confirmed in other cases. In the recent *Sabbagh v Khoury* case, for instance, the English High Court issued an AAI to restrain arbitration proceedings commenced in Lebanon on the basis that, contrary to the Lebanese arbitral tribunal's findings, the tribunal did not have jurisdiction to hear the case (*Sabbagh v Khoury*, 2019).

54 Courts in civil law jurisdictions have also shown their willingness to issue this type of relief. In *Energia v Sul America*, for instance, the São Paulo Court of Appeal ordered the suspension of an ICC arbitration on the grounds of 'an erroneous interpretation of a hybrid arbitration agreement, which provided that the arbitration would be administered by the Institute of Engineering, applying the ICC Rules' (Albanesi, 2015, 31). The Court held that 'the Institute of Engineering was better placed than the ICC to administer an engineering dispute, and also took into account the fact that both parties were established in Brazil and the project was to be performed in Brazil' (at 31).

55 Another relevant case is *Salini v Ethiopia* (2001), which raised the question of whether an arbitral tribunal should, in fact, abide by an AAI issued by a court. The case involved a construction dispute arising out of a contract containing an ICC arbitration with Addis Ababa as the seat. After Salini initiated arbitration proceedings, Ethiopia requested the ICC Court to remove all arbitrators and requested from the Ethiopian courts an AAI against the ICC tribunal, which was granted. The tribunal ignored the injunction, however, and continued proceedings based on 'three guiding principles of international arbitration': the primary duty of the arbitral tribunal is owed to the parties, the arbitral tribunal's duty to make every effort to render an enforceable award, a State or State entity cannot resort to the State's courts to frustrate an arbitration agreement. The tribunal also stated:

> An international arbitral tribunal is not an organ of the State in which it has its seat in the same way that a court of the seat would be. The primary source of the Tribunal's powers is the parties' agreement to arbitrate. An important consequence of this is that the Tribunal has a duty vis-à-vis the parties to ensure that their arbitration agreement is not frustrated. In certain circumstances, it may be necessary to decline to comply with an order issued by a court of the seat, in the fulfilment of the Tribunal's larger duty to the parties (*Salini v Ethiopia*, 45).

2. Investment Arbitration

56 AAIs have also been sought in investment arbitration disputes. Among the cases that deserve scrutiny is *Vodafone v India*, which was the first public decision where a respondent state asked its own courts to issue an AAI in a case involving an abuse of process objection. It provides a new perspective on cases where an AAI may become a relevant tool in investment arbitration proceedings. The case concerns two UNCITRAL arbitration proceedings instituted against India: one initiated in 2014 by Vodafone's Dutch subsidiary under the Netherlands–India bilateral investment treaty ('BIT') ('First Arbitration') and the other in 2017 by Vodafone's UK companies under the UK–India BIT ('Second Arbitration'). The Second Arbitration sought to overcome a jurisdictional objection raised in the First Arbitration, thus increasing the company's chances of success (for a comprehensive analysis of the cases, see Chiang, 2018 and Desai, 2020). On 25 September 2020, the tribunal in the First Arbitration rendered an award against India, finding that the state had violated the fair and equitable treatment standard under the India–Netherlands BIT. In both proceedings, the claimants brought claims seeking compensation for the retroactive imposition of a withholding tax liability (*Vodafone v India I*; *Vodafone v India II*).

57 India attempted to stop the Second Arbitration by filing a civil suit before its own courts, in particular, the Delhi High Court. India requested that the court restrain Vodafone UK from continuing with the Second Arbitration, arguing that this would amount to an abuse of process as two different arbitrations on the same issue would amount to parallel proceedings, and would run the risk of inconsistent awards (*Union of India v Vodafone*,

Delhi High Court, 2017; → *Parallel Proceedings: Investment Arbitration*; → *Abuse of Process in International Arbitration*).

58 In a short decision of 22 August 2017, the Delhi High Court granted a temporary *ex parte* AAI. Without providing a clear legal basis of jurisdiction, the Court considered that it was competent to restrain 'foreign arbitration' proceedings arising from a BIT by resorting to 'the same principle as [Indian courts] apply to the grant of injunctions restraining foreign court proceedings' (*Union of India v Vodafone*, Delhi High Court, 2017, 4). The Court relied on the Indian Supreme Court decision in *Modi Entertainment Networks v WSG Cricket* and noted that the power to issue an AAI should be exercised on the ground that the foreign proceedings, in this case, the Second Arbitration, are oppressive, vexatious, inequitable, or an abuse of process (at 4).

59 In so holding, the Court considered part of the reasoning adopted in *Orascom v Algeria* (2017). In that case, a company registered in Luxembourg, Orascom TMT Investments, instituted ICSID proceedings under the Algeria–Belgium and Luxembourg BIT against Algeria. The company's ultimate shareholder had previously sued Algeria under other BITs for the same treaty breach by invoking the nationality of several subsidiary entities in the corporate chain. The tribunal held that, although structuring an investment to access a BIT 'is not illegitimate', an investor 'may commit an abuse' if it sues a host state 'multiple times [through] various entities under the same control that are part of the vertical chain in relation to the same investment, the same measures and the same harm' (*Orascom v Algeria*, 553).

60 Based on that reasoning**,** the Delhi High Court held that claimants forming 'part of the same corporate group being run, governed and managed by the same set of shareholders' cannot 'file two independent arbitral proceedings as that amounts to abuse of process of law' (*Union of India v Vodafone*, Delhi High Court, 2017, 6). According to the Court, the UK companies and the Dutch subsidiary constituted a 'single economic entity' bringing 'virtually identical' claims (at 6). Allowing parallel proceedings involving a 'duplication of the parties and the issues', the Court added, would risk 'inconsistent decisions' and 'would be inequitable, unfair and unjust' to the state party to those proceedings (at 4).

61 India requested the Delhi High Court to convert the interim order of 22 August 2017 into a decree of permanent injunction, which was followed by an offer by Vodafone UK to consolidate the two arbitrations. The same judge of the Delhi High Court maintained his view that 'there is no threshold bar or inherent lack of jurisdiction in the court to deal with [BIT] Arbitrations', including the issuance of an AAI against a claimant investor 'over whom it has personal [and subject matter] jurisdiction' (*Union of India v Vodafone*, Delhi High Court, 2018, 66). The Court reasoned that, as a company 'making an investment in India, holding economic interests in India and carrying on business in India', Vodafone UK 'had purposefully availed of Indian jurisdiction' (at 50). In addition, the Court noted that 'the agreement to arbitrate between an investor and a host State is … not itself a treaty' but a 'contractual obligation' and there is therefore jurisdiction of the court to hear the present case (at 56).

62 The Court then held that Indian courts should exercise their jurisdiction to enjoin BIT proceedings 'with great self-restraint and grant injunction only if there are compelling circumstances' (*Union of India v Vodafone*, Delhi High Court, 2018, 81). It stated that 'compelling circumstances' include situations where 'it is positively shown that the arbitration proceedings would be oppressive, vexatious, inequitable, or an abuse of process' (at 66). Thus, the Court was, once again, faced with the question of whether the

Second Arbitration amounted to an abuse of process. This time, however, the Court took a different position.

63 In what the author considers a misleading departure from its interim order, the Court held that, in accordance with the principle of *kompetenz-kompetenz*, which is reflected in Article 21 UNCITRAL Arbitration Rules, the tribunal in the Second Arbitration 'would be better placed to assess' the impact of parallel proceedings (*Union of India v Vodafone*, Delhi High Court, 2018, 78). However, notwithstanding its intent to follow Article 21, the Court decided to delve into the abuse of process allegation, holding in *obiter* that 'filing of multiple claims by entities in the same vertical corporate chain with regard to the same measure is [not] per se vexatious' (at 72). In adding a new element to the 'compelling circumstances' test established in *Modi Entertainment*, the Court reasoned that investment arbitration proceedings 'could be vexatious where they are absurd' (at 72), that is, when an investor that has not succeeded with a treaty claim invokes another BIT for the same claim without having made an investment through the second host state. This scenario is significantly different from the case at hand where Vodafone UK, the Court remarked, has 'substantial reasons to bring the two sets of proceedings simultaneously' (at 73), one of these reasons being that India had already objected to jurisdiction in the First Arbitration. Accordingly, as the Court concluded, the initiation of the Second Arbitration 'cannot be regarded as an abuse *per se*' and the anti-arbitration injunction of 22 August 2017 should be vacated (at 73).

64 The reader may be left wondering what made the Delhi High Court change its position. The answer may lie in two final, yet important, findings of the Court. One relates to the concerns expressed by India about the potential risks associated with parallel proceedings: conflicting awards, double relief, and the unfair maximization of Vodafone's chances of success. The Court observed that an alternative remedy to resolve these risks would be accepting Vodafone UK's offer to conduct both arbitrations before the same tribunal, an option that would seemingly 'cure' a potential abuse of process by Vodafone.

65 With respect to the second finding, the Court noted that the reason for granting the interim measure of 22 August 2017 was to avoid the constitution of the arbitral tribunal in the Second Arbitration without India being represented. However, India ended up participating in the proceedings with the appointment of its arbitrator, which, according to the Court, implied that '[t]he challenge to the invocation [of the second BIT] has run its course' (*Union of India v Vodafone*, Delhi High Court, 2018, 77). In other words, in the Court's view, a permanent AAI was no longer necessary, and any objection on abusive parallel proceedings must be resolved before the full tribunal. These findings appear to be at odds with the realities that shaped India's exposure and objections to the two arbitrations.

66 The Court disregarded that it was the invocation of two BITs by the same investor, and not the request for an AAI, which placed India in the position of having to refuse Vodafone's consolidation offer in the first place. A refusal that is understandable. Accepting an offer to conduct both arbitrations before the same tribunal would not, in actuality, prevent the risks inherent in parallel proceedings since 'India would still have to defend two claims on merits by filing separate pleadings and advancing separate arguments' (*Union of India v Vodafone*, Delhi High Court, 2018, 15).

67 The Court's approach to India's participation in the Second Arbitration through the appointment of its arbitrator is equally misplaced. The Court overlooked that India was at all times reluctant to participate in the Second Arbitration. This reluctance resulted in numerous warnings of an imminent default appointment by the chosen institution, the → *Permanent Court of Arbitration (PCA)*, which gave India no other choice but to appoint its

arbitrator. It is difficult to see how an appointment of this nature can be considered as an agreement by India to participate in the Second Arbitration, an agreement that ultimately warranted the revocation of the AAI. If one were to accept the perspectives of the author, then the question why the Delhi High Court changed its position remains a mystery. At any rate, a lesson to be learned from this decision is that there is no 'absolute proposition of law' to restrain international treaty arbitrations that constitute an abuse of the legal process (*Union of India v Vodafone*, Delhi High Court, 2018, 15).

68 The decision in *Vodafone* allows other respondent states to draw a persuasive inference about the non-treaty mechanisms that can be used to prevent parallel proceedings. As a matter of principle, national courts retain the general power to grant injunctive relief to restrain treaty-based investment arbitrations and that power should be exercised when the pursuit of the treaty claim would constitute an abuse of process. The more difficult question, however, is whether a court should deem the initiation of parallel proceedings by investors in the same corporate group regarding the same investment and against the same host state measures as procedurally abusive.

69 When deciding a request for an AAI, courts should adopt a policy-oriented approach and to consider the negative externalities generated by parallel claims. An order enjoining the investor from proceeding with the concurrent arbitration will not only avert the risks of procedural unfairness and double recovery but will also ensure that the investment treaty regime benefits all stakeholders, an objective that the Delhi High Court ultimately disregarded. There are, however other considerations that can play a part in determining whether an AAI should be granted.

70 As previously mentioned, an AAI undermines the tribunal's ability to ascertain its own jurisdiction under the doctrine of *kompetenz-kompetenz* and to decide whether to stay arbitral proceedings pending the outcome of any related BIT arbitration (Lew, 2009, 509). One should not, however lose sight of the fact that, as Lord Collins observed in *Dallah v Pakistan*, the principle of *kompetenz-kompetenz* is not absolute:

> So also the principle that a tribunal in an international commercial arbitration has the power to consider its own jurisdiction is no doubt a general principle of law. It is a principle which is connected with, but not dependent upon, the principle that the arbitration agreement is separate from the contract of which it normally forms a part. But it does not follow that the tribunal has the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it (2010, at 84).

71 If, as occurred in *Vodafone*, a tribunal in a non-ICSID arbitration declines to grant an injunction resulting from an abuse of process objection, its decision will be subject to *de novo* judicial review at the annulment or enforcement stage. Thus, for reasons of procedural efficiency, prudence would require that national courts determine the jurisdictional challenge from the outset, before referring the respondent state back to arbitration.

72 If we accept the permissibility of judicial intervention, a further concern arises as to whether a 'foreign' court is competent to grant an order preventing an investment treaty arbitration from proceeding. In practice, as we have seen in *Vodafone*, parties tend to seek an injunction from their own state court, that court not being the seat of the arbitration (Lew, 2006, 201). This will deprive the courts at the seat of their supervisory and curial role. Solely for the purpose of preserving the supervisory function of the courts at the seat, an investment treaty arbitration conducted outside of the ICSID regime should not be treated

differently from a commercial arbitration. Accordingly, respondent states should request the injunction before the courts of the seat of the arbitration.

73 That being said, the most obvious justification for a respondent state to seek assistance from its own courts would be the absence of an agreement regarding the seat. But even in this eventuality, it is recommended that respondent states wait for the designation of the seat by the tribunal or the arbitral institution. A judgment rendered by the courts of the respondent state granting an injunction will have little or no practical implications, as only the courts at the seat are vested with the right to confirm or set aside the award. This brings me to a final consideration.

74 It must be emphasized that, as an order that acts *in personam*, an AAI is directed against both the investor and the arbitral tribunal. The investor may elect not to comply with the injunction and proceed with the arbitration. Likewise, the arbitral tribunal may decide that the injunction has no effect on the exercise of its jurisdiction. As we have seen, this occurred in *Salini v Ethiopia*, when a tribunal seated in Addis Ababa did not comply with a temporary injunction from the Ethiopian Supreme Court ordering the suspension of the arbitration. A breach of an AAI issued by a court at the seat will have significant practical consequences (for an analysis of the different practical implications of refusing to comply with an AAI see Dulac, 2014). For example, an investor who disregards an order from a national court may be held in contempt and be punished by a fine or imprisonment. Moreover, if the tribunal continues its case and the investors obtain a favourable award, such award will, in all probability, be set aside by the competent court at the seat. In this context, an award rendered in breach of an injunction may also be considered unenforceable in the jurisdiction of the issuing court.

E. Freezing injunction

75 A freezing injunction, also called a ‘Mareva’ injunction in England and other jurisdictions like Singapore, is an interim order that restrains a party from dissipating ‘funds or assets that would otherwise be available for satisfaction of the award’ (Welsh, 2019, 1). In the words of Buckley LJ:

> A [freezing] injunction, however, even if it relates only to a particularised asset … is relief *in personam* … All that the injunction achieves is in truth to prohibit the owner from doing certain things in relation to the asset. It is consequently, in my judgment, not strictly accurate to refer to a [freezing] injunction as a pretrial attachment (*Cretanor Maritime v Irish Marine*, 1978, 974).

76 The legal threshold or legal test for the granting of such measures varies from jurisdiction to jurisdiction but as a general rule, if the claimant can demonstrate that there is an arguable case based on an underlying cause of action, and there is a risk that the defendant will dissipate assets, and the balance of convenience militates in favour of granting the measure, then a freezing order may be granted over assets held by the defendant. This may also include any assets held by a third party on behalf of the defendant.

77 In principle, both courts and tribunals have jurisdiction to issue a freezing injunction order. As explained above, major institutional arbitration rules include broad power for the grant of interim and conservatory measures. However, as one author aptly notes, ‘[w]hile an argument can be advanced that an Arbitral Tribunal should ideally be empowered to grant a freezing injunction … it is to be noted that a freezing injunction is a remedy which would require, at times, extra-territorial enforcement or adjudication of rights of third

parties' (Muthusubbarayan, 2019, 1). Therefore, it can be argued that a national court may be better placed to grant to grant such remedy.

78 In most jurisdictions freezing orders will only be available if the assets concerned are located within the jurisdiction of the court. However, in some jurisdictions like England, the courts have the power to issue orders even if the assets are located abroad. This is known as a Worldwide Freezing Order ('WFO'). A WFO allows a defendant's assets located across the world to be frozen, rather than those limited to within the jurisdiction where the arbitration is seated. English courts are likely to issue a WFO in cases where the defendant does not have sufficient assets within the jurisdiction to cover the claim.

79 English courts are known for their readiness to grant this type of interim relief in support of arbitration proceedings when the circumstances of the case so require. To be successful, an application for a freezing injunction must satisfy both the requirements to obtain a freezing order and those under section 44 English Arbitration Act. As already explained, section 44 'provides the Courts with wide powers to order interim relief while seeking to preserve the fine balance between the powers of the tribunal and the supervisory powers of the Court' (Bor, 2014, 1).

80 The requirements for the issuance of a freezing injunction were established in *Belair v Bassel*: 'a good arguable case as to the merits of claim; whether an order will be effective over the respondents' assets; whether there is a real risk of dissipation; and whether the granting of an order is just and convenient' (Bor, 2014, 2; *Belair v Bassel*, 2009, at 19).

81 The powers conferred on the court by section 44 Arbitration Act has been applied in WFO scenarios, that is, when the seat of the arbitration is outside England. For instance, in *U & M Mining Zambia v Konkola Copper Mines*, an English court found that whilst the natural court for granting of interim injunctive relief would be the court of the seat of the arbitration, a party may in any event exceptionally be entitled to seek interim relief in the courts other than those of the seat where 'for practical reasons the application can only sensibly be made there' (2014, at 78).

82 However, as occurred in *Mobil Cerro Negro Ltd v Petroleos De Venezuela SA* ('PdVSA') (2008), a WFO can be refused when the fact that the seat is outside England makes its issuance inappropriate. Mobil commenced an ICC arbitration seated in New York City against PdVSA. Before the ICC tribunal was constituted, Mobil applied to English courts for a WFO of USD 12 billion. The order was initially granted, but the Court of Appeal removed the order as the applicant had 'failed to show a real risk of dissipation of assets or that the case was one of urgency' (Nappert, 2008, 106).

83 More recently, the English High Court also refused an application for a WFO in support of Arcelor Mittal's claim for damages of USD 1.5 billion against the defendants resulting from an ICC arbitration seated in Minneapolis, on the grounds that the applicant had failed to show that it had a good arguable case or that there was a risk of dissipation (*ArcelorMittal v Essar Steel Limited*, 2019).

84 Another jurisdiction where courts have considered freezing injunctions is Singapore. The power of courts to grant this kind of relief is established in section 12A (2) Singapore International Arbitration Act (2002), which provides that:

> the General Division of the High Court shall have the same power of making an order in respect of any of the matters set out in section 12(1)(*c*) to (*j*) as it has for the purpose of and in relation to an action or a matter in the court.

85 For its part, Article 12 (1) (h) states that:

> (1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for … ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party (Art 12 (1) (h) Singapore International Arbitration Act).

86 Thus, the Singapore Arbitration Act empowers both courts and arbitrators to issue freezing injunctions. With respect to courts, it extends the power to order interim measures extraterritorially 'in relation to an arbitration … irrespective of whether the place of arbitration is in the territory of Singapore' (Art 12A (1) (b) Singapore International Arbitration Act). As in England, the competent court in Singapore may refuse to entertain a freezing order if 'the fact that the place of arbitration is outside Singapore or likely to be outside Singapore when it is designated or determined makes it inappropriate to make such order' (Art 12A (3)).

87 Article 12A (4)–(6) specifies the conditions under which a freezing order may be granted:

> (4) If the case is one of urgency, the General Division of the High Court may, on the application of a party or proposed party to the arbitral proceedings, make such orders under subsection (2) as the General Division of the High Court thinks necessary for the purpose of preserving evidence or assets.
>
> (5) If the case is not one of urgency, the General Division of the High Court shall make an order under subsection (2) only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the arbitral tribunal) made with the permission of the arbitral tribunal or the agreement in writing of the other parties.
>
> (6) In every case, the General Division of the High Court shall make an order under subsection (2) only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

88 In *Bouvier v Delight*, the Singapore Court of Appeal held that 'Worldwide Mareva injunctions have rightly been said to be exceptional, but the same rationale and test informs the grant of a Mareva injunction, whether over assets within the jurisdiction or over assets without' (2015, at 37). The Court then referred to the requirements for the issuance of a freezing injunction: '(a) a good arguable case on the merits of the plaintiff's claim; and (b) a real risk that the defendant will dissipate his assets to frustrate the enforcement of an anticipated judgment of the court' (at 36). The Court, nonetheless, observed that even if the test for 'a worldwide Mareva injunction may be the same as that for a Mareva injunction over assets within the jurisdiction, the circumstances that will have to be established in order to cross the threshold of necessity will likely be more exacting where a worldwide Mareva injunction is concerned' (at 37).

89 It is not clear if what the Court meant by 'more exacting' is that more stringent requirements should apply in the case of a WFO. This notwithstanding, it is clear that a Mareva injunction is a powerful tool that requires careful handling. As Welsh notes '[a] respondent subject to a freezing injunction may face serious restrictions on how it can conduct its business strategy when its handling of certain funds requires party agreement or the sanction of the court or tribunal' (2019, at 19). A court or a tribunal should be

mindful of this and other factors when considering freezing the assets of the respondent that may be made available in satisfaction of the award.

F. Conclusion

90 Parties in arbitration proceedings may at times require support prior to the final determination of their dispute to ensure that the case is resolved justly, and that the integrity of the arbitral process is maintained. The solution to this potential need for assistance is for arbitral tribunals or courts to order interim relief—also called interim measures or conservatory measures. Most arbitration laws are permissive about what interim relief powers parties can give to arbitrators. Moreover, most parties tend to confer broad powers by adopting arbitration rules of institutions such as the ICC and the LCIA.

91 This entry has examined ASIs as interim relief that generally aims at preserving the *status quo*, and freezing orders as those that aim at facilitating the enforcement of an eventual award. Though most arbitration laws and institutional rules give arbitrators broad powers to grant this type of relief, the question may arise as to whether national courts are better suited to do so. Resorting to a national court may be a more sensible choice when the tribunal has not yet been formed or when there is a risk of non-compliance by the party asked take or desist from action. Courts are better equipped to enforce their own interim measures as they can fine a party that fails to comply with the measure. This is particularly true with respect to freezing injunctions, which normally require extra-territorial enforcement or adjudication of rights of third parties.

92 This entry also explored the controversial AAIs. Commentators have expressed the concern that this type of relief can undermine contractual or treaty-based obligations relating to the way a particular dispute should be resolved. A more practical question has been raised as to whether courts should be able to grant orders prohibiting international arbitrations from proceeding. In investment arbitration, AAIs can be a useful tool to use in cases where it can be positively shown that the arbitration proceedings would be an abuse of process. Although in *Vodafone v India* the injunction was not ultimately granted, this case illustrates that national courts retain the power to issue this type of relief in those circumstances and are willing to do so if the threshold is met.

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