# PERMISSIBILITY OF ANTI-ARBITRATION INJUNCTIONS IN INDIA AND ITS IMPACT ON COMMERCIAL BUSINESS: A STEP TOWARDS BEING AN ARBITRATION-FRIENDLY JURISDICTION?

*Ravitej Chilumuri*[*] *and Sameer Bindra*[†]

**Abstract**: *The concept of 'anti-arbitration injunctions' has always been in muddy waters in India. In this paper, we try to give a complete overview of this concept and its impact on commercial transactions. The paper also aims to cover and address the Indian and English jurisprudence on anti-arbitration injunctions, along with instances of deviation. Finally, we shed light on the compatibility of the judicial approach on this issue with the legislative scheme, and some practical issues that may arise and impact commercial transactions*.

## I. INTRODUCTION

Since India's first Arbitration Act was enforced in 1899, India has been viewed as having an archaic system of arbitration rules. However, during the last few years, a series of court decisions and legislative enactments and amendments have strengthened the country's pro-arbitration policy, bringing it closer to being a hub for both domestic and international arbitration. This article seeks to study and reconcile the emerging phenomenon of Anti-Arbitration Injunctions with the evolving pro-arbitration outlook of Indian policy and its impact on commercial business.

An anti-arbitration injunction ('**AAI**') is essentially an injunction order issued against a party and/or an arbitral tribunal, precluding the initiation or continuation of arbitration.[1] To put it simply, AAIs are passed by a court to stop an entity from arbitrating a dispute or continuing the arbitral proceedings. AAIs increase the risk of judicial intervention by stripping the tribunal of the power to determine its jurisdiction and have historically been used as a delaying and obstructionist tactic.[2] Other jurisdictions have also cautioned against the use of AAIs and allow such a remedy only in exceptional circumstances where the arbitration itself would be

[*] Partner, Khaitan & Co.
[†] Senior Associate, Khaitan & Co.

[1] Sharad Bansal and Divyanshu Agarwal, 'Are Anti-Arbitration Injunctions A Malaise? An Analysis in the Context of Indian Law' (2015) 31(4) Arbitration International 613; Hakeem Seriki, *Injunctive Relief and International Arbitration* (Informa Law from Routledge 2015); Jennifer L Gorskie, 'US Courts and the Anti-Arbitration Injunction' (2012) 28(2) Arbitration International 295.

[2] *See*, Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 1349-422.

vexatious, oppressive, and unconscionable.[3] However, courts in India grant such remedies on a host of other grounds, including invalidity of the arbitration agreement and non-arbitrability of the subject matter.[4]

The phenomenon of AAIs, therefore, presents a conceptual conundrum for arbitration policy. On one hand, AAIs stand in contradiction to the foundational concept of '*kompetenz-kompetenz*'[5] and the legislative intent towards minimising judicial interference.[6] However, on the other hand, various jurisdictions regard the power of tribunals as non-exclusive, giving the courts scope of intervention in certain situations.[7] The issue of AAIs concern essential questions of court interference in arbitration proceedings by way of potentially obstructionist remedies.[8] In the Indian context, the question remains contentious owing to the lack of an authoritative ruling in this regard and the absence of an express provision authorising the grant of AAIs.

Therefore, it is important to study the concept of AAIs in India in juxtaposition to the legislative scheme of the Arbitration and Conciliation Act, 1996 ('**the Act'**). Further, evolving jurisprudence on AAIs must be analysed, with insights from other jurisdictions, to determine whether a harmonious approach to grant of AAIs exists in India. In this connection, this article will examine the current position of law with respect to AAIs in India while analysing the decisions of international arbitral bodies and the domestic practice in common law countries. For the same, Part II of this article shall deal with the common law jurisprudence on anti-arbitration injunctions; Part III shall cover the scheme of remedies and jurisprudence in terms of Indian law; and Part IV shall entail a discussion on the current best practices and improvements that can be brought under Indian law before concluding.

---

[3] *Excalibur Ventures LLC v Texas Keystone Inc* [2011] 2 Lloyd's Rep 289; Nicholas Poon, 'The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore' (2013) 25 Singapore Academy Law Journal 244–95; Sairam Subramanian, 'Anti-arbitration injunctions and their compatibility with the New York convention and the Indian law of arbitration: future directions for Indian law and policy' (2018) 34(2) Arbitration International 185.

[4] For instance, *see*, *Bina Modi v Lalit Modi* (2020) SCC Online Del 1678 (Delhi High Court); *Chatterjee Petrochem Co v Haldia Petrochemicals Ltd* (2014) 14 SCC 574 (Supreme Court of India).

[5] UNCITRAL Arbitration Rules 2010, art 23; Emmanuel Gaillard, 'Reflections on the Use of Anti-Suit Injunction in International Arbitration' in Loukas Mistelis and Julian Lew (ed), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 203–15.

[6] As is evident from Arbitration and Conciliation (Amendment Act) 2015 and Arbitration and Conciliation (Amendment Act) 2021.

[7] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46; *North London Railway Co v Great Northern Railway Co* [1883] 11 QBD 30.

[8] n (1).

## II. COMMON LAW JURISPRUDENCE ON AAIS

Under common law, the courts have adopted a reserved approach in the grant of an AAI. The non-interventionist approach of the courts with ongoing arbitration proceedings appears to be in line with the text of the domestic arbitration acts. For instance, under the English Arbitration Act, there is an express prohibition on judicial intervention, except in circumstances expressly laid down under the Act itself.[9] The limited scope of judicial intervention is visible in three particular instances: *firstly*, when the arbitration agreement is "*invalid, inoperative or incapable of being performed*"[10]; *secondly*, a challenge to an award rendered under the English Arbitration Act on certain grounds[11]; and *thirdly*, when relief is sought by a party alleged to be a party but had taken no part in the proceedings.[12]

Naturally, given the construct of the English Arbitration Act, the courts have shown a tendency to forbid the grant of injunction, except under exceptional circumstances.[13] The question of granting an injunction on account of concurrent proceedings before different forums has come before the English courts in various instances. They include concurrent proceedings before the court and arbitral tribunal as seen in *J. Jarvis & Sons Pty Ltd.* v. *Blue Circle Datford Estates Ltd*[14] as well as between two separate arbitral tribunals as seen in *Elektrim SA* v. *Vivendi Universal SA.*[15] In all such instances, the Court has taken recourse to the exceptional circumstances test to deny the grant of AAI.

The courts in Hong Kong have also usually refused to grant AAIs in concurrent proceedings before it, in favour of arbitration proceedings.[16] While doing so, the courts have acknowledged that Article 5 of the Model clause does not completely preclude the courts from granting anti-arbitration injunctions. However, in a similar vein to the English authorities, the court has held that the power must be exercised 'sparingly' and in 'exceptional circumstances'.[17] Moreover, AAIs should not be granted in instances where the arbitral tribunal has refused a challenge to its jurisdictions.

---

[9] Hakeem Seriki, 'Anti-Arbitration Injunctions and the English Courts: Judicial Intervention or Judicial Protection' (2013) 16(2) International Arbitration Law Review 43.
[10] The Arbitration Act 1996, s 1(c) (United Kingdom).
[11] The Arbitration Act 1996, s 67 (United Kingdom).
[12] The Arbitration Act 1996, s 72 (United Kingdom).
[13] Subramanian (n 2) 185 – 217.
[14] [2007] EWHC 1262 (TCC).
[15] [2007] EWHC 571 (Comm).
[16] *SA v KB* [2011] HKCFI 2029 (Hong Kong Court of First Instance); *Lin Ming v Chen Shu Quan* [2012] HKFCI 328 (Hong Kong Court of First Instance).
[17] Subramanian (n 2) 185 – 217.

As stated, there is no complete restraint on the grant of AAIs; the courts do tend to grant such injunctions when the continuance of the proceedings is evidently *oppressive* and *vexatious.* In the English Court of Appeal decision in *Minister of Finance (Inc) and Malaysian Development Berhad* v. *International Petroleum Investment Coy*,[18] a deed entered into between the parties contained a clause for reference of any dispute between them to arbitration. Accordingly, a London-seated arbitration between the parties culminated in a consent award. The Claimant before the Court sought to set aside this consent award on the ground that the same was obtained by way of fraud or in a way that was contrary to public policy. The Respondent, in response to this challenge, initiated a second arbitration claiming that certain events of defaults had occurred under the settlement deed. This also included the challenge to the consent award by the Claimant as the parties had waived their right to challenge a consent award on grounds of jurisdiction or for any other reason through the settlement deed. The Claimant sought an AAI against the second arbitration proceedings. The Court granted the same on the grounds that the Respondent's action to hinder the supervisory jurisdiction of the Court was vexatious.

Notably, the aforementioned decisions were given in domestic arbitrations. Unlike the uniform stance taken for domestic arbitrations, the grant of AAIs in foreign-seated arbitration has seen some variance. The English Court, in *Excalibur Ventures LLC* v. *Texas Keystone Inc*,[19] had to determine a jurisdictional issue in the proceedings initiated before it, being also the subject of proceedings in a New York-seated arbitration. The Court passed an injunction order against the foreign arbitral proceedings with one of the key considerations being the convenience of the parties since the Defendants had no connection with the jurisdiction. Thus, the Court, *inter alia,* applied the doctrine of *forum non-conveniens* to grant an injunction, departing from the limited grounds of 'exceptional circumstances' and continuance of proceedings being 'oppressive and vexatious' as the English courts had previously restricted themselves to in cases of domestic arbitrations. A similar stance was taken by the Court in some other instances.[20]

This trend has however seen a reversal in recent times, with the English courts following the jurisprudence similar to that of domestic arbitration. An instance of it can be seen in *Sabbagh* v. *Khoury*[21]wherein the dispute was between the daughter (Claimant before the English Court)

[18] [2019] EWCA Civ 2080.
[19] [2011] EWHC 1624 (Comm).
[20] *Internet FZCO v Ansol Ltd* [2007] EWHC 266 (Comm); *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd* [2013] EWHC 1240 (Comm).
[21] [2019] EWCA Civ 1219.

and sons (Claimant before an arbitral tribunal seated in Lebanon) of a deceased businessman. The daughter sought an AAI. The sons argued against it on the ground that the Court could grant the same only if and when England was a natural forum relying on the *Excalibur* case. The Court rejected the argument on the reasoning that the said approach is followed in anti-suit injunctions to prevent any interference with other country's sovereign jurisdiction and the same logic cannot be extended to anti-arbitration injunctions, where no interference with a foreign court is permissible during the continuation of arbitral proceedings.

Even on questions pertaining to validity/non-existence of an arbitration agreement, which have not been subject to prior determination by the Court, the courts should refrain from granting injunctions and defer the matter to the tribunal to decide upon its jurisdictions based upon the principle of *kompetenz-kompetenz*.[22]

The Canadian Court[23] granted an AAI wherein parallel proceedings were initiated before the local court and a foreign arbitral tribunal upon two primary grounds: (1) the contract contacting the arbitration clause contained an exclusive jurisdiction clause mentioning Ontario; and (2) the parties were participating before the court proceedings in Ontario. The Court considered these factors as amounting to a waiver on part of the parties to conduct arbitration before the foreign forum.

A cumulative reading of the aforementioned authorities leads to a deduction that the courts following common law have largely maintained the least-interventionist approach with respect to ongoing arbitration proceedings, following a similar course in respect of domestic as well as foreign-seated arbitration.

A holistic reading of all the instances cited above show the pro-arbitration stance adopted in most common law precedents. Barring a few exceptions, the courts have always been cautious in granting AAIs given the essence of their arbitration regimes and international obligation, all of which advocate for minimum intervention by the courts in a matter subject to arbitration proceedings. Accordingly, the courts have only granted AAIs in exceptional circumstances namely – the existence of any prior court ruling holding the arbitration agreement/clause as invalid or non-existent; continuance of proceedings being oppressive or vexatious; or waiver of the right to arbitrate by mutual consent or conduct of the parties.

[22] ibid 111.
[23] *Dent Wizard International Corp v Brazeau* (1998) 78 OTC 286.

## III. SCHEME OF REMEDIES UNDER THE ACT

Through a range of judicial decisions and legislative enactments subsequent to the Law Commission's Report issued in August 2014, Indian arbitration law has undergone numerous pro-arbitration reforms.[24] Modelled on the internationally accepted standards laid down in the UNCITRAL Model Law,[25] the Act stands on the core principle of *'kompetenz-kompetenz'* and grants power to the arbitral tribunal to determine its own jurisdictional competence, including any objections with respect to the existence/validity of the arbitration agreement itself.[26] As it currently stands, the Act not only confers unfettered jurisdiction to the arbitral tribunal to grant interim reliefs after the commencement of arbitration proceedings,[27] it also minimises the scope of judicial interference at the reference stage to a *prima facie* view.[28] Furthermore, the Specific Relief Act, 1963, which confers upon civil courts' power to grant injunctive remedies, also puts an embargo on such reliefs in cases where equally efficacious relief can be obtained.[29]

In light of this scheme of statutory remedies pertaining to arbitration, the concept of AAIs raises peculiar questions about the efficacy and practical implications of such a remedy and to what extent is it permissible under the law. While courts in India have granted AAIs on primarily *four* grounds analysed herein, it is argued that an "*equally efficacious relief*" can be obtained under provisions of the Act itself, rather than taking recourse to remedies putting a bar to arbitration itself.

## IV. INDIAN JURISPRUDENCE ON AAIS AND INSTANCES OF DEVIATION

### A. Grounds for Granting AAIs

Parties have approached Courts in India to grant AAIs primarily on limited grounds (detailed hereinafter). Out of these four grounds, the Calcutta High Court, in *The Board of Trustees of Port of Kolkata* v. *Louis Dreyfus Armatures SAS*,[30] has recognized the courts to authority grant AAI on three grounds which are as follows:

[24] Suvrajyoti Gupta, 'Injunction Raj: Whether Anti-arbitration Injunctions are a Threat to International Arbitrations in India' (2012) International Arbitration Law Review 1.
[25] SR Subramanian, 'BITs and Pieces in International Investment Law: Enforcement of Investment Treaty Awards in the Non-ICSID States: The Case of India' (2013) 14(1) Journal of World Investment & Trade 198.
[26] The Arbitration and Conciliation Act 1996, s 16.
[27] The Arbitration and Conciliation Act 1996, s 17.
[28] The Arbitration and Conciliation Act 1996, s 11.
[29] The Specific Relief Act 1963, s 41
[30] (2014) SCC Online Cal 17695 (Calcutta High Court).

1. Where an issue is raised as to whether there is any valid arbitration agreement between the parties and the court finds that no agreement exists.

2. Where the arbitration agreement is null and void, inoperative, or incapable of being performed.

3. Where continuation of foreign arbitration proceedings might be oppressive or vexatious or unconscionable.

### *1. Validity of the Arbitration Agreement*

One of the most common grounds on which AAIs have been sought in India is: *firstly*, where the arbitration agreement itself is either invalid[31] or is null and void, inoperative or incapable of being performed, as under Section 45[32] of the Act.

In *Chatterjee Petrochem Co and another v Haldia Petrochemicals Ltd*,[33] the issue before the Court was whether the agreement between the parties conferred exclusive jurisdiction upon the courts in Calcutta and, consequently, whether an AAI could be granted restraining the arbitration proceedings initiated at ICC, Paris. Relying on the decision in *SBP & Co*,[34] the Court observed that where the subject matter of the claim is covered by an arbitration agreement which is valid and enforceable, then the dispute ought to be resolved by arbitration. However, the Court observed that civil courts in India have the power to grant AAIs in foreign seated arbitrations on the grounds specified under Section 45 of the Act.

In a similar fashion, the Supreme Court, in *World Sport Group (Mauritius) Ltd* v. *MSM Satellite (Singapore) Pte Ltd*,[35] refused to grant AAI on the ground that the applicant did not fulfil the criteria laid down in Section 45. However, it observed that civil courts retained the power to

[31] The Arbitration and Conciliation Act 1996, s 8.
[32] The Arbitration and Conciliation Act 1996, s 45:
> "*Power of judicial authority to refer parties to arbitration.—Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908),a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, [unless it prima facie finds] that the said agreement is null and void, inoperative or incapable of being performed.*"

[33] *Chatterjee Petrochem Co v Haldia Petrochemicals Ltd* (2014) 14 SCC 574 (Supreme Court of India).
[34] *SBP & Co v Patel Engineering Ltd* (2005) 8 SCC 618 (Supreme Court of India).
[35] (2014) 11 SCC 639 (Supreme Court of India).

grant AAIs in cases where the arbitration agreement is null and void, inoperative or incapable of being performed.

### *2. Arbitrability of the Dispute*

Further, AAIs have been sought by parties and have also been granted where the dispute is not arbitrable. This question however is sometimes controversial as it essentially involves a jurisdictional tussle between the court and tribunal.

In 2001, the Supreme Court, in *Kvaerner Cementation India Ltd. v. Bajranglal Agarwal &Anr*,[36] declined to grant an AAI based on the ground that the tribunal has the power to decide on its own jurisdictional competence. However, consequent decisions of the Supreme Court have taken contradictory views. In *SBP & Co* v. *Patel Engineering Limited*,[37] the Court held that an arbitral tribunal does not have an absolute right to decide on its own jurisdiction. Civil courts retain jurisdiction to grant injunctions under Section 9 of the Code of Civil Procedure, 1908 ('**CPC**').

A recent and much-debated decision in this regard was delivered by the Delhi High Court in *Bina Modi & Ors.* v. *Lalit Modi &Ors*.[38] A single-judge bench, relying on the Supreme Court's decision in *Kvaerner*, held that civil courts in India lack the power to grant AAIs when the challenge is primarily on jurisdiction. It held, arguably in consonance with the scheme of the Act, that when the arbitral proceedings have already commenced, the parties have an equal and efficacious remedy under Section 16 of the Act where the arbitral tribunal can adjudicate and rule on its own jurisdiction and validity of the arbitration agreement. In such a scenario, Section 41(h) of the Specific Relief Act, 1963, bars courts from granting injunctions in cases where an equal and efficacious remedy could be obtained. However, the decision was overruled by a Division Bench[39] and an AAI was granted restraining the arbitral proceedings in Singapore. The Division Bench disagreed with the ruling in *Kvaerner* and recognized that certain exceptions are carved out in Section 5 of the Act and that civil courts have the jurisdiction to dwell upon the arbitrability of disputes. Therefore, it is open for a civil court to consider questions of arbitrability in granting AAIs. Upon finding that the dispute itself was in-arbitrable, the Court proceeded to grant an AAI.

[36] (2012) 5 SCC 214 (Supreme Court of India).
[37] *SBP & Co* (n 34).
[38] (2020) SCC Online Del 901 (Delhi High Court).
[39] (2020) SCC Online Del 1678 (Delhi High Court).

The courts in India, in the mentioned authorities, have granted AAIs on reaching a finding of non-arbitrability of the dispute. As mentioned above, under the common law jurisprudence, the ground of arbitrability of a dispute does not find explicit inclusion in the jurisprudence laid down for the grant of AAIs. The question pertaining to the arbitrability of a dispute is essentially a jurisdictional question, which is within the authority of the tribunal to decide based on the principle of *Kompetenz-Kompetenz*, as recognised under the Act.[40] Thus, essentially, the court in granting such injunctions is stepping in a space where the arbitral tribunal as a forum has adequate authority to provide remedial measures under the Act. Moreover, if any party is aggrieved by the finding reached by the tribunal in this regard, it even has the right to challenge the same before the appropriate forum. Hence, the court in doing so is disregarding its non-interventionist obligation under Section 5 of the Act and the bar on its jurisdiction under Section 41(h) of the Specific Relief Act, 1963 when an "equally efficacious" remedy is available before another forum.

### *3. Competence of the Arbitrators*

Next, parties have also sought injunctions on the ground of the incompetence of arbitrators. For instance, in *Ravi Arya v. Palmview Investments Overseas*,[41] the central issue before the Bombay High Court was whether an AAI should be granted when an allegation is made regarding the improper constitution of the arbitral tribunal. The Court rightly found that where a remedy is available under the Act (Section 12), the Court cannot bypass its provisions and grant an AAI. This approach is similar to the common law approach.[42] The rationale was again based on the tribunal's authority to determine its own jurisdiction including ruling upon any challenge to its authority.

Although the Court has opined against the grant of AAI on the grounds of a tribunal's competence, this might not necessarily preclude the parties from bringing such claims before the court. The reason for the same is that post the 2016 amendment to the Arbitration Act; a dichotomy exists under Section 12 between the arbitrators against whose independence and ineligibility there is some justifiable doubt and those who are "ineligible" per se.[43] The decision in *Ravi Arya* falls under the former. In the case of the latter, the grant of AAI is not only a possibility but might happen in all likelihood. Against any person "ineligible" under Section

[40] The Arbitration and Conciliation Act, s 16.
[41] (2019) SCC Online Bom 251 (Bombay High Court).
[42] Arbitration and Conciliation Act, 1996, s 12.
[43] Arbitration and Conciliation Act, 1996, s 12(5).

12(5) read with Schedule VII, the party can directly approach the court under Section 14(2)[44] for terminating the mandate of the arbitrator.

### *4. Oppressive, Vexatious and Unconscionable Nature of the Arbitration Proceedings*

The final ground on which Courts have granted AAIs is that the continuance of the arbitration would be oppressive, vexatious, and unconscionable or an abuse of process. This ground is derived from the principles of AAIs in English Law, laid down in the case of *J Jarvis and Sons Ltd* v. *Blue Circle Dartford Estates Ltd*[45] and followed in subsequent decisions.[46] The Court in, *J Jarvis*, held that in order to grant an AAI, the Court must be satisfied that exceptional circumstances exist, where the continuance of the arbitration would be oppressive, vexatious, and unconscionable or there has been an abuse of process. Other English decisions have also discussed the aspect of "exceptional circumstances" while granting an AAI.[47] Courts in Malaysia[48] and Singapore[49] have also granted AAIs on such grounds, however, "very sparingly" and with abundant caution.

Similarly, the Delhi High Court, in *McDonald's India Private Limited* v. *Vikram Bakshi and Ors*[50]and *Himachal Sorang Power Pvt. Limited (HSPL)* v. *NCC Infrastructure Holdings Limited (NCCL)*,[51] recognised the principles laid down in *J Jarvis* and held that an AAI can only be granted in 'exceptional cases' where the holding of arbitration proceedings would be oppressive or unconscionable. For instance, where the issue is whether the parties have consented to the arbitration or where there is an allegation that the arbitration agreement itself is forged. In *McDonald's India*, it was specifically stated that, "*while courts in India may have*

---

[44] Arbitration and Conciliation Act, 1996, s 14(2).
[45] [2007] EWHC 1262 (TCC).
[46] *See also*, *Republic of Kazakhstan v Istil Group Inc (No 2)* [2008] 1 Lloyd's Rep 382; *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KFT* [2010] EWHC 2567 (Comm); *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2011] EWHC 337 (Comm); *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi TBK Ltd and Anr* [2013] EWHC 1240 (Comm).
[47] Gupta (n 24).
[48] The Federal Court of Malaysia decided that the test developed by *J Jarvis* would be applicable where an injunction application is sought by a party to an arbitration agreement. *See*, *Jaya Sudhir A/L Jayaram v Nautical Supreme Sdn Bhd* [2019] 5 MLJ 1 (Federal Court of Malaysia).
[49] *See*, *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] SGHC 26 (High Court of Singapore); *Malini Ventura v Knight Capital Pte Ltd and others* [2015] SGHC 225 (High Court of Singapore); The High Court of Singapore refused AAIs on the grounds that for Arbitrations based on UNCITRAL Model Law, and where the Plaintiff sought an injunction on the ground that he did not enter into an arbitration agreement, however, could not prove the same an injunction must not be granted. The Court has thus left the door open for AAIs to be granted under Singapore law under more exceptional circumstances.
[50] (2016) SCC Online Del 3949 (Delhi High Court).
[51] (2019) SCC Online Del 7575 (Delhi High Court).

*the power to injunct arbitration proceedings, they must exercise that power rarely and only on principles analogous to those found in sections 8 and 45, as the case may be, of the 1996 Act.*" The principles which the Court was referring to were that the arbitration agreement was null and void on account of it being formed without free consent.

While such a position is consistent with wider common law and is cognisant of the exceptional and potentially obstructionist nature of AAIs, in general, Indian courts have gone beyond international principles to grant AAIs on other grounds, including in-arbitrability of the dispute and invalidity of the arbitration agreement. It may be arguable that granting AAI on these grounds is counterproductive because the entire purpose behind AAIs is to streamline the arbitration process and weed out cases which may eventually be set aside at the enforcement stage. However, by injuncting an arbitration proceeding on grounds that the Tribunal itself is competent to hear, the approach runs counter to the legislative intent of promoting arbitration.

### B. Consonance of the Judicial Approach with the Legislative Scheme

On the grounds of incompetency of the arbitrator, the Court in *Ravi Arya* was right in holding that the remedies provided for under the Act cannot be bypassed by granting an AAI. Similarly, the granting of AAI as an exceptional remedy, where the continuance of arbitration proceedings itself may be vexatious or oppressive, is in line with international precedent. However, granting of AAIs on the grounds on the remaining two grounds is contentious.

It must be observed that the court under Section 9 as well as the tribunal under Section 17 of the Act have been given the authority to grant interim reliefs in respect of an arbitration. This power is inclusive of the power to grant interim injunctions. While the arbitral tribunal can grant such reliefs pertaining to the subject matter of the disputes, the court's powers are not always limited to the subject matter of the dispute. Previously, courts[52] have held that an injunction sought is in the nature of equitable remedy that takes the form of a Court order and requires a party to do or refrain from doing particular activities under Section 151 of the CPC, thereby not limiting them only to the subject matter of the dispute. It is a court order that prohibits one of the parties to a suit in equity from doing or allowing people under his control to act in a manner unjust to the other party. Further, any relief granted by the court/tribunal

[52] 'Inside Arbitration: ASIS to the Rescue Using Anti-Suit Injunctions to Protect an Arbitration Agreement' (*Herbert Smith Freehills*, 25 February 2021) <www.herbertsmithfreehills.com/latest-thinking/inside-arbitration-asis-to-the-rescue-using-anti-suit-injunctions-to-protect-an> accessed 9 September 2022; *GM Telephones, Hyderabad v Jeelal Jaiswal* (1988) 2 LS 46 (SC) (Supreme Court of India).

under these provisions can be challenged before the court under Section 37 of the Act. Additionally, the Act is a self-contained code in relation to the provision of relief of injunction and provides adequate remedial measures to the party aggrieved by the grant or refusal of such injunction. Accordingly, the recourse to courts under the CPC is largely avoidable and unnecessary.

However, a common thread binding most of these decisions is the courts retaining the power to grant AAIs where the arbitration agreement is itself invalid or null and void, or where the dispute is in-arbitrable. However, such cases must be viewed in light of the distinction between pre-commencement and post-commencement stages in the arbitration. It is now a settled position of law that after the commencement of the arbitration proceedings, civil courts ought not to, except in exceptional cases,[53] impinge upon the tribunal's jurisdiction and exercise powers to grant interim measures under Section 9 of the Act. The sole authority to grant such interim relief remains with the tribunal in accordance with Section 17 of the Act. In such a situation, the grant of AAIs in the post-commencement stage not only presents a direct incongruity with the scheme of the Act but also raises questions about the efficacy of AAI.

Further, the decision delivered by the Division Bench in *Bina Modi* raises key issues about its compatibility with the scheme of the Act. It is arguable that the Single Judge, in recognising the presence of equal and efficacious remedy under Section 16 of the Act and the embargo in Section 41(h) of the Specific Relief Act, 1963, rightly reconciled the remedy of AAI with the legislative intent behind the Act. However, the Division Bench, in holding that AAI can be granted on the grounds of in-arbitrability, failed to consider the tribunal's jurisdiction to rule on questions of arbitrability.

### C. Issues from a Practical Perspective

Given that anti-arbitration injunctions are court orders that expressly prohibit parties from commencing and/or continuing arbitration proceedings, it tends to elongate the arbitral process and restores parties to a position comparable to that of a suit/court proceeding.

From an international perspective, both the UNCITRAL Model Law 1985 and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, which form the basis for the Act, do not provide for an express provision authorising the grant of

[53] A detailed discussion on this aspect was done by the Supreme Court. *See*, *Arcelormittal Nippon Steel (India) Ltd v Essar Bulk Terminal Ltd* (2022) 1 SCC 712 (Supreme Court of India).

AAIs by courts.[54] Further, it is important to note that, Section 5 and Section 16 of the Act, indicate the Legislature's intention of upholding the gravitas and sanctity of the arbitral process and minimising the interference of civil courts.

While the grant of AAIs may be justified under certain scenarios as demonstrated in this article, the greater question that remains is whether the remedy in the nature of an AAI can only be granted by courts? There is a tendency amongst the parties to approach the courts for grant of an injunction under the CPC against the arbitration proceedings, with no regard to the seat of arbitration, on the grounds specified in this article above. This is despite the arbitral proceedings being made independent of the provisions under the CPC and the Indian Evidence Act.

The ambiguity, contradictions, and inconsistency in the parameters to be followed when granting or rejecting anti-arbitration injunctions in the Indian arbitral scenario comes in the way while framing a conclusive view.

However, Indian courts appear to agree on one point, i.e., the civil court's power to grant injunctions in anti-arbitration suits should be used sparingly. This is a much-required reprieve granted by Indian courts, tipping the scales in favour of arbitration. Popular opinion holds that a pro-arbitration stance in the Indian legal scenario is necessary, given that the civil and commercial courts of India are overburdened with cases. Prolonged adjudication of such anti-arbitration suits may defeat the purpose of the Act. Narrowing the scope of examination for civil court intervention in anti-arbitration injunction suits would go a long way toward resolving this issue and dilemma.

The article has touched upon the threat of overarching jurisdiction of the courts over the arbitral tribunal in grant of AAIs. The power of the court to grant an injunction under the CPC is much wider compared to the power of injunction provided to the courts under Section 9 of the Act or Section 17 to the arbitral tribunal. The acceptance of such application by the courts thus makes the scope of interfering with the arbitral proceedings much wider, which is not in consonance with the scheme of the Act. The effect of increased court intervention by way of grant of AAIs is also increasingly seen as a commonly used delay tactic. Thus, rethinking the approach to AAIs is imperative.

[54] Stephen Schwebel, 'Anti-Suit Injunctions in International Arbitration: An Overview' in Emmanuel Gaillard (ed), *Anti-Suit Injunctions in International Arbitration* (JurisNet LLC 2005); Bansal and Agarwal (n 1) 613.

## V. CONCLUSION

Although AAIs may be used as a weapon to disrupt and stall the Arbitral process, there may be some situations where an AAI may actually be justified. For instance, the English courts' inculcation of the principles of common law justice and equity have prevented them from completely denouncing AAIs.

Since, the law of injunction in India derives its importance from English equitable principles/jurisprudence,[55] a civil dispute requiring preventative remedies may present itself in any form, and in awarding relief, courts/tribunals are guided by considerations of equity, justice, and good conscience. When equitable consideration demands and justifies it, there should be no hesitancy.[56] The jurisdiction to issue injunctions was thus affirmed and the remedy which is termed as the strong arm of the courts of equity has contributed a lot to consolidate the position of the judiciary in dispensing justice between the litigant parties.[57] The Indian approach to AAIs must be further brought in line with these common law principles. The power to exercise AAIs should be sparingly exercised and be granted only in exceptional circumstances – as specified in this article.

The advantage of using this alternative of giving a restrictive approach to the power of granting injunction has several advantageous effects. The same includes – the maintenance of sanctity of the arbitral process; upholding the authority of the arbitral tribunal; providing an efficacious and timely remedy without any unnecessary delays; and most importantly avoiding unwarranted intervention by the courts, which is what is one of the primary intents of the parties to pick arbitration as the preferred method of dispute resolution.

[55] RRK Trivedi, 'Law of Injunctions' (1996) Judicial Training & Research Institute Journal 1.
[56] ibid.
[57] ibid.