A COMPARATIVE ANALYSIS OF THE LAW RELATING TO ANTI-ARBITRATION INJUNCTIONS

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Introduction

With the advent of globalization and with the role of information technology becoming greater in global business, import, export, outsourcing and several other economic activities across borders have increasing at exponential rates, which has created a pressing need for better adjudication of disputes between parties indulging in cross border economic activities.\(^1\) International arbitration has developed as a solution to these needs of parties engaging in international trade, wherein parties from different countries agree to settle their disputes in a particular forum like the International Centre for Settlement of Investment Disputes (ICSID), the International Criminal Court (ICC or ICCt), the Singapore International Arbitration Centre (SIAC) etc., or agree to settle their disputes through ad hoc arbitral tribunals.\(^2\) With the number of international arbitrations increasing, anti-suit/anti-arbitration injunctions have assumed a significant role in this context. It has become very common for one of the parties to institute a parallel court proceedings in another jurisdiction to frustrate the arbitration proceeding which has become a major menace in international arbitration. It is to curb such practices that common law courts have developed the remedy of anti-suit injunctions against parallel court proceedings that are vexatious and oppressive and courts have granted this remedy at all stages of arbitration proceedings, i.e., before, during or after the arbitration proceedings.

The grant of injunctions by courts can generally be classified into two categories, namely anti-suit injunctions granted in favour of arbitration and anti-suit injunctions granted against arbitration, widely known as anti-arbitration injunctions.\(^3\) Anti-suit injunctions can further be classified into injunctions granted by the court and

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\(^{3}\) JEAN FRANÇOIS POUDRET & SÈBASTIEN BESSON, DROIT COMPARÉ DE L’ARBITRAGE INTERNATIONAL (2002).
injunctions granted by the arbitral tribunal. This paper will deal with the concept and context of international arbitration in the first part; will analyze the origin, concept and scope on anti-suit injunctions in international arbitration in the second part and will examine the impact of anti-arbitration injunctions in international arbitration in the third part. This study will be along the lines of injunctions granted by courts, by arbitrators and in favour of arbitration and against arbitration as introduced earlier. The last part of this paper will deal with the concept of anti-suit and anti-arbitration injunctions in India and shall seek to establish a comparison between the principles for granting such injunctions in contemporary jurisdictions.

The Concept and Context of International Arbitration

As stated earlier, owing to the process of globalization, commercial transactions across borders have been more complex and sophisticated and disputes arising therein are no longer pertaining to one jurisdiction but involve parties and law from more than one jurisdiction. To resolve such conflicts, parties have several options such as adjudicating the dispute in the court in one’s own jurisdiction; adjudicating it in the courts in the opposite party’s jurisdiction or resorting to an out of court adjudication mechanism such as arbitration. Today, parties more often than not opt for the third option, i.e., an out of court settlement for its perceived benefits as compared to submitting to the jurisdiction of some court of law. A few advantages stated by authors include (i) an arbitral tribunal is considered a more neutral forum as compared to a state court owing to suspected bias, favouring the local party; (ii) there exists complete party autonomy in choice of law, choice of forum, choice of procedure, powers of arbitrators and others; (iii) resolution of conflict is faster in arbitrations; (iv) subject matter expertise can be ensured in choice of arbitrators; (v) proceedings can be maintained confidential, thereby not affecting value of shares in the stock exchange, company reputation and others; (vi) few authors have also opined that due to the consensual nature of arbitration proceedings, parties readily submit to the jurisdiction of arbitrators and comply with the award.


Pierre Karrer, supra note 1.

Ricardo Quass Duarte, Anti-Suit Injunctions in the Context of International Commercial Arbitration.

Id.

CHRISTIAN BÜHRING-UHLE, LARS KIRCHHOFF & GABRIELE SCHERER, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 17 (Kluwer Law International 2d ed. 2006).

It is submitted that with the increasing number of member nations to the New York Convention, the recognition and enforcement of arbitral awards is also increasing thereby giving parties certainty and ensuring \textit{res judicata} in the adjudication of their disputes. As the Hon'ble Court observed: “\textit{W}hen parties choose arbitration, they trade the procedures and opportunity for review of the court for simplicity, informality and expedition of arbitration”.\(^{10}\)

Similarly, several authors have pointed out several disadvantages and shortcomings of arbitration too such as the proceedings being highly expensive due to the fact that the cost of arbitrators as well as counsels for the arbitration has to be borne by the parties;\(^{11}\) the arbitration proceedings need continuous assistance from courts such as support for investigation, collecting evidence, enforcing awards and others.\(^{12}\) Further, where the execution of the decree is not possible within the state where the award is made due to lack of assets of the losing party in the state, then support from foreign courts is required which shall test the arbitration award in accordance with its domestic law and public policy.\(^{13}\)

Irrespective of these disadvantages, arbitration presents itself as an effective dispute resolution mechanism as its advantages outweigh the possible disadvantages. This can be seen from the fact that arbitration which was once only considered as possible in western common law countries today has become highly famous in Asian as well as South American countries.\(^{14}\) It is reported that in 1963, nearly 75% of the cases in the ICC were from European countries and 20% of the cases came from Americas.\(^{15}\) However, this scenario has drastically changed since the 1990s with the number of cases from European countries to the ICC going below 50%.\(^{16}\) Also, civil law countries from Latin America have also adopted arbitration as a means of dispute resolution with over 10% of the cases in the ICC arising from these states.\(^{17}\) Owing to these developments, it is no longer the case that only European and American countries resort to

\(^{11}\) RUSSEL J.WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION 605 (Carolina Academic Press 5th ed. 2006).
\(^{13}\) Phool Chand v. OOO Pairot.
\(^{15}\) Arnoldo Wald, \textit{As Anti-Suit Injunctions No Direito Brasileiro, 9 REVISTA DE ARBITRAGEM E MEDIÇÃO} 29, 36 (2006).
\(^{16}\) \textit{Id.}
\(^{17}\) BERNARDO M. CREMADES, ENFORCEMENT OF ARBITRATION AGREEMENTS IN LATIN AMERICA 1 (Kluwer Law International 1999).
arbitration as a means to dispute resolution, but also several developing countries such as India, China, Brazil, Argentina and Canada amongst others also have also increasingly participated in arbitration.18

**Origin, Concept and Scope of Anti-Suit Injunctions**

The term ‘anti-suit injunction’ can be defined as an order of a court, requiring the injunction defendant not to commence, or to cease to pursue, or not to advance a particular claim(s), or to take steps to terminate or suspend, court or arbitration proceedings in a foreign jurisdiction.19 The concept of anti-suit injunctions are said to have evolved from the ordinary injunction, which used to be granted by the English Courts of Chancery when the English Common Law Courts’ judgment violated the principles of equity.20 The earliest instance of granting such injunction can be traced back to the 17th century case of *Love v. Baker* wherein the court for the first time granted such injunction.21 However, such injunctions did not become common till the 19th century when the British courts started granting injunctions to restrain proceedings in other jurisdictions under the British Empire.22 Similarly, the concept of granting anti-suit injunctions also developed in the United States of America (hereinafter the U.S.) courts in the early 19th century wherein such injunctions were used to restrain parties from instituting suits in different states within the U.S. for the same cause of action.23 It is only after the 1970s did the U.S. courts started issuing international anti-suit injunctions.24 Today, anti-suit injunctions have grown as a remedy not only in common law jurisdictions, but also in civil law jurisdictions such as Brazil, Venezuela and others.25

With the growth of anti-suit injunctions as a remedy, several approaches have evolved in granting this remedy.26 While the U.S. courts have recognized their power to grant anti-suit injunctions, they have subjected themselves to the satisfaction of two criteria subject to which such injunction shall be granted namely (i) the

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18 *Id.*
19 THOMAS RAPHAEL, THE ANTI-SUIT INJUNCTION 4 (Oxford 2008); See also GEORGE A. BERMANN, TRANSNATIONAL LITIGATION IN A NUTSHELL 113-114 (West 2003).
20 RAPHAEL, *Id.* at 42-43.
21 *Id.* at 42-43.
22 *Id.* at 42-43.
24 *Id.* at 593.
26 George A. Bermann, *supra* note 23.
parties to the suit in U.S. as well as the foreign suit should be the same and (ii) the issues involved in both the suits should be same.\textsuperscript{27} While these are the basic principles that govern the granting of anti-suit injunctions, other factors such as principles of international comity, balance of convenience and others play an important role.\textsuperscript{28} However, these factors are subject to the competing interests in protecting the courts’ jurisdiction, discouraging forum shopping and vexatious litigation, and avoiding conflicting decisions.\textsuperscript{29} It is in balancing these factors that the U.S. Courts have evolved several approaches in granting the remedy of anti-suit injunction.\textsuperscript{30}

While the third, sixth, eighth and D.C. Circuit courts have adopted the ‘conservative standard’;\textsuperscript{31} the fifth, seventh and ninth circuit courts have adopted a liberal standard in granting injunctions.\textsuperscript{32} The first and second circuit courts have adopted the more amicable ‘middle ground standard’ in granting this remedy.\textsuperscript{33} While adopting the conservative standard, courts have given more importance to principles of international comity and granted injunctions only when the principles of \textit{res judicata} apply to bar foreign proceedings or the foreign proceedings in against U.S. public policy.\textsuperscript{34} On the other hand, courts adopting the liberal approach have placed greater emphasis on equitable principles as compared to the principles of international comity.\textsuperscript{35} These courts also consider the principles of international comity while granting injunctions but do not restrict themselves from granting such remedy while the same in equitable unlike the courts adopting the conservational approach.\textsuperscript{36} The courts adopting the middle ground standard have tried to find a balance between the conservative and liberal approach by laying emphasis on principles of international comity to create a rebuttal presumption.

\textsuperscript{27} China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F. 2d 33 (2d Cir. 1987).
\textsuperscript{28} \textit{E.g.}, European Court of Justice Prohibits Anti-Suit Injunctions in Favor of Arbitration between National Courts of Member States, STAY CURRENT, Mar. 13, 2009.
\textsuperscript{29} China Trade & Dev. Corp. v. M.V. Choong Yong, supra note 27.
\textsuperscript{30} Ricardo Quass Duarte, \textit{supra} note 6.
\textsuperscript{31} Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods., N.V., 310 F. 3d 118, 125, 128 (3d Cir. 2002); Gau Shan Co. v. Bankers Trust Co., 956 F. 2d 1349, 1352-54 (6th Cir. 1992); Goss Int’l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F. 3d 355, 361-63 (8th Cir. 2007).
\textsuperscript{33} Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F. 3d 11, 17-19 (1st Cir. 2004); China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F. 2d 33 (2d Cir. 1987).
\textsuperscript{34} Karaha Bodas Co. LLC v. Perusahaan, 264 F. Supp. 2d 470 (S.D. Tex. 2002), rev’d 335 F. 3d 357 (5th Cir. 2003).
\textsuperscript{36} \textit{Id}. 
against the issuance of an injunction. If these courts find it equitable and necessary in light of the facts and circumstances of the case to grant an injunction, then such injunctions are granted.

Like the U.S. courts, the English courts also possess the power to grant anti-suit injunctions by virtue of Section 37(1) of the Supreme Court Act, 1981. It exercises this power in cases where the following two conditions are satisfied, namely (i) the court must be able to assert jurisdiction over the claimant to the foreign litigation proceedings, thereby preventing it from carrying on those proceedings, so that the dispute is resolved in a manner as agreed to by the parties and (ii) the court must be satisfied that it is equitable to do so. The courts have expressed other criteria for the proceeding being oppressive and vexatious; the proceeding being against English public policy; the proceeding being an illegitimate interference with the English process; to protect the jurisdiction of English courts and others.

Thus, the criteria for granting anti-suit injunctions by the U.S. and English courts are similar to the greater extent except that the courts in England treat applications for anti-suit injunctions from Non-European Union (hereinafter the EU) parties different from applications from parties belonging to members from the EU. This difference in treatment in English courts arises by virtue of Article 27 of the Brussels Regulation and its interpretation by the European Court of Justice (ECJ) in Turner v. Grovit to preclude English courts from granting anti-suit injunctions against courts in EU countries, even if such proceedings are vexatious and oppressive.

Although the remedy of anti-suit injunctions are being used more frequently these days and the U.S. and English courts have granted them quite often, the same is not without opposition, especially when the order is made, enjoining commencement or continuation of proceedings in another country. It is argued that although such injunctions are directed against individuals, they have an effect of interfering with the jurisdiction of another sovereign from deciding

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37 See Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, supra note 33.
38 Id.
44 Frédéric Bachand, The UNCITRAL Model Law’s Take on Anti-Suit Injunctions, in IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 87, 102-103 (E. Gaillard ed., 2005).
which cases it should hear and is also considered an offence to international comity. Authors have also argued that such injunctions have the ‘potential for embarrassing the political branches of government and disturbing relations with a foreign country’. Another argument against the issuance of anti-suit injunctions is the principle of *kompetenz-kompetenz* which recognizes the inherent power of courts to determine their own jurisdiction. Owing to these reasons, several problems have stemmed in the efficient adjudication of disputes through international arbitration. One author cites the *Laker Airways* case as an episode to show how a battle of anti-suit and counter anti-suit injunctions may be used to frustrate the purpose of arbitration.

On the other hand, supporters of anti-suit injunctions argue that since the enjoining court issues an injunction against the defendant who is within its own jurisdiction, the court does not interfere with the process of administration of justice in a foreign country. It is submitted that this argument although made very frequently is not very convincing as enjoining a party to a proceeding from continuing the same or preventing a party from commencing a proceeding indeed has the effect of interfering with the jurisdiction of a foreign court. As observed by the Hon’ble Court in *China Trade and Dev. Corp. v. M.V. Choong Yong*: “[T]he fact that the injunction operates only against the parties, and not directly against the foreign court, does not eliminate the need for due regard to principles of international comity, because such an order effectively restricts the jurisdiction of the court of a foreign sovereign”.

**Anti-Suit Injunctions and International Arbitrations**

With growing complexity in international disputes and their resolution mechanisms, international commercial arbitration has become a fertile landscape for anti-suit injunctions, notwithstanding the lack on statistics on this regard. Anti-suit injunctions are

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45 Berman, *supra* note 23 at 597.
47 Berman, *supra* note 23 at 597.
granted either by the arbitrators to preserve the jurisdiction of arbitral tribunals, to safeguard the effectiveness of the award and to prevent the aggravation of the dispute whereas such injunctions are granted by domestic courts to favour or prevent arbitration.\textsuperscript{54} As already noted, such injunctions can be granted at any stage of the proceedings.

\textbf{Anti-Suit Injunctions Ordered by Arbitrators}

It may be noted that while discussing the disadvantages of arbitration, one of the disadvantages stated was its continuous need for support from courts for effectively conducting the arbitration proceeding. This brings us to an important question as to whether the arbitrator possesses any power to order an injunction against instituting a proceeding in a court of law. To answer this question, it is important to understand the scope of the arbitration agreement, which is the primary source of the powers possessed by the arbitral tribunal.\textsuperscript{55} Arbitration being a consensual method of dispute resolution, parties are free to determine through their agreement whether the tribunal shall possess the powers to grant an anti-suit injunction or not.\textsuperscript{56} If the parties fail to determine such powers, then the same shall be governed by the curial law of the arbitration proceeding, i.e., the \textit{lex arbitri}.\textsuperscript{57}

To this end, several conventions which have been adopted by states in their domestic arbitration statues do not provide for a remedy of anti-arbitration injunction. E.g., the New York Convention does not mention whether the arbitrators have a power to grant anti-suit injunction. Similarly, the UNICITRAL Model Law also does not specifically address this issue. However, it is argued that by virtue of Article 17 of the Model Law, which provides for the power of arbitral tribunal to order interim measures, recognizes the power of arbitrators to grant anti-suit injunctions.\textsuperscript{58} One makes this argument in light of the amendment made in 2006 to the aforesaid provision

\textsuperscript{54} Ricardo Quass Duarte, \textit{supra} note 6.
\textsuperscript{55} \textit{E.g.}, The English Arbitration Act, 1996 allows the parties to freely “agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings” (§ 38.1), including “power to order on a provisional basis any relief which it would have power to grant in a final award” (§ 39.1).
\textsuperscript{56} \textit{E.g.}, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“Washington Convention”) art. 47.
\textsuperscript{57} Konstantinos D. Kerameus, \textit{Anti-Suit Injunctions in ICSID Arbitration}, in IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 131, 136 (E. Gaillard ed., 2005).
after specifically considering the issue of the arbitrators’ power to issue anti-suit injunctions. Similarly, the ICC Rules of Arbitration are also silent about this issue, although authors recognize the roots of this power in the principle of *kompetenz-kompetenz* read with Article 6(2) and Article 23(1) of the Rules which recognize the principle of *kompetenz-kompetenz* and the power of the tribunal to order any interim measure it deems appropriate respectively.

Notwithstanding the silence or ambiguity in international law and domestic statues regarding the power of an arbitral tribunal to grant anti-suit injunctions, it is submitted that the tribunal possesses such powers and the same is well founded in the principles of *kompetenz-kompetenz*. It is submitted that the power to determine one’s own jurisdiction includes the power to protect the same and to issue all such orders and directions to this end. The effect of any such injunction which may be granted by the arbitrator is not in the nature of enjoining the courts’ jurisdiction but is in the nature of a remedy of specific performance to ensure that a party which agreed to resolve its disputes through arbitration complies with the same. The first case at the ICSID, where such an injunction was granted was in the case of *Holiday Inns SA v. Morocco* in the year 1972. Subsequently, several orders of this nature have been issued by the ICSID. In the case of *Republic of Ecuador v. Occidental Exploration & Production*, the Hon’ble Court while rejecting the plea of the applicants to vacate an injunction granted by the arbitral tribunal to desist from raising any claim in Ecuadorian courts which has already been dealt with by the tribunal, the court observed that the tribunal was well within its powers to make such orders. Similarly, there have been several instances in the ICC where such injunctions have been granted to protect arbitration proceedings.

However, the issuance of such injunctions is not without problems. As already submitted, the issue of the arbitral tribunals
being subordinate to the courts\textsuperscript{68} and the possibility of the other party pursuing an anti-anti-suit injunction\textsuperscript{69} pose as serious deterents to the remedy being granted by tribunals. Also, the fact that the tribunal depends upon courts to enforce their orders including the anti-suit injunction acts as a serious deterrent in the progress of such remedy in the interests of justice.\textsuperscript{70} To conclude, it is submitted that retaining the power of arbitrators to issue such injunctions will go a long way in effectively conducting arbitration proceedings with minimum interference from courts as is the objective set out in several domestic arbitration acts.

**Anti-Arbitration Injunctions Ordered by Courts**

Apart from the arbitrators, courts also exercise their powers to grant such injunctions, which do not face the same set of problems as faced by the arbitrators, but raise a set of serious questions regarding international comity and sovereignty, especially when such injunctions are granted to stop proceedings in another state.\textsuperscript{71} Injunctions granted by the courts can further be classified into two parts, namely (i) injunctions to prevent arbitration (ii) injunctions to favour arbitration.

**(i) Injunctions to prevent arbitration**

These are the most common types to injunctions granted by courts in relation to arbitration proceedings wherein, the courts order restrains the implementation of arbitration proceedings or prevents actions for the enforcement of arbitral awards. Such injunctions are more commonly known in common-law countries as ‘anti-arbitration injunctions.’\textsuperscript{72} When issued in relation to the international arbitrations, such injunctions have the effect of precluding arbitration proceedings with ‘seat’ outside its territory, thereby violating the rule of territoriality. It is owing to this feature of such injunctions supporters of international arbitration have strongly criticized courts for granting such injunctions. Mr. Stephen Schwebel, former Judge and President of the ICC has opined that granting of such injunctions


\textsuperscript{69} Gaillard, supra note 59, at 262.


\textsuperscript{71} Laurent Lévy, *Anti-Suit Injunctions Issued by Arbitrators*, in IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 115, 128.

\textsuperscript{72} Ricardo Quass Duarte, *supra* note 6.
is against the very tenets of the New York Convention and principles of international law. He states:

“When a domestic court issues an anti-suit injunction blocking the international arbitration agreed to in the contract, that court fails ‘to refer the parties to arbitration’ (Article II(3)). In substance, it fails anticipatorily to ‘recognize arbitral awards as binding and enforce them,’ (Article III) and it pre-emptively refuses recognition and enforcement on grounds that do not, or may not, fall within the bounds of Article V of the New York Convention . . . The object and purpose of the New York Convention is to ensure that agreements to arbitrate and the resultant awards—at any rate, the resultant foreign awards—are recognized and enforced. It follows that the issuance by a court of an anti-suit injunction that, far from recognizing and enforcing an agreement to arbitrate, prevents or immobilizes the arbitration that seeks to implement that agreement, is inconsistent with the obligations of the state under the New York Convention.”

Similar opinion has also been expressed by late Kerr, LJ., when he said: “..[e]very arbitration must have a seat or locus arbitri or forum which subjects its procedural rules to the municipal law there in force... Prima facie, i.e., in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial law of the arbitration is to be the law of X has the consequence that X is also the law of the seat of the arbitration. The lex fori is then the law of X and, accordingly, X is the agreed forum of the arbitration. A further consequence is then that the courts which are competent to control or assist the arbitration are the courts exercising jurisdiction at X.”

Such arbitrations are also criticized on the ground that the same precludes the arbitral tribunal from deciding its own jurisdiction based on the principles of kompetenz-kompetenz, which gives the tribunal the power to adjudicate upon its own jurisdiction.

On the other hand, courts that are less arbitration friendly consider themselves as playing a parentalistic role, thereby trying to enforce rights of parties irrespective of their obligation to arbitrate

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73 Stephen M. Schwebel, Anti-Suit Injunctions in International Arbitration: An Overview, in IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 5, 10-11.
75 PHILIPPE FOUCHARD ET AL., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, ¶ 660 (Kluwer Law International 1999); see also Case No. 12656/KGA/CCO, Partial Award dated Dec. 6, 2004.
disputes. Such courts consider it the sacred right of parties to have a dispute adjudicated by the courts which cannot be taken away by an agreement to arbitrate. One such country to state is Brazil, wherein the courts took almost 5 years to uphold the constitutional validity of the Arbitration Act.

It is owing to this attitude of courts towards arbitration that there have been instances where irrespective of orders of the court enjoining proceedings, arbitral tribunals have proceeded, as in the case of Companhia Paranaense de Energia–COPEL v. UEG Araucaria Ltda. In this case, when according to the agreement, the parties had to adjudicate disputes in the ICC, the plaintiff filed a suit in Brazil and also obtained an anti-arbitration injunction, enjoining the defendant from pursuing arbitration proceedings in the ICC. However, when the matter came up for consideration before the ICC, irrespective of the injunction granted by the court in Brazil, the ICC declared its jurisdiction on the basis of the principle of kompetenz-kompetenz. The Court opined: “As the Parties have agreed that this Tribunal has its judicial seat in Paris and therefore is subject to French arbitration law, any decision of a Brazilian court or any other court as to the validity of the arbitration agreement is not binding on the Tribunal. Under French law as the lex loci arbitri, it is for the Tribunal to decide on the validity of the arbitration clause in the first instance. This decision may be reviewed by state courts only after an award has been rendered . . . The decisions by the lower state court in the State of Parana do not necessarily reflect federal policy regarding arbitration but rather seem to contradict it . . . It is understandable that the lower state courts may be slow to adopt new laws and policies introduced at federal level in Brazil. However, the Supreme Court’s decision represents. Brazilian Federal policy in accepting the consequences of Brazil having joined the family of the New York Convention countries, in particular its treaty obligation to enforce arbitration agreements pursuant to Art. II.”

Another instance of continuation of arbitration proceedings, despite an anti-arbitration injunction, based on the rule of kompetenz-kompetenz is the case of Himpurna California Energy v.

77 E.g., see Case No. SE-AgR 5206, Dec. 12, 2001.
78 Companhia Paranaense de Energia–COPEL v. UEG Araucaria Ltda. Case No. 12656/KGA/CCO.
79 Companhia Paranaense de Energia–COPEL v. UEG Araucaria Ltda. Case No. 24.334/2003, 3rd State Court of Curitiba, PR.
80 Id., Case No. 12656/KGA/CCO, Partial Award dated Dec. 6, 2004.
Indonesia, where an Indonesian court granted an anti-arbitration injunction to prevent further arbitration proceedings to take place, imposing a fine of $1 million dollar per day in case of non-compliance. Nevertheless, the arbitral tribunal found a way to circumvent the injunction; two of the arbitrators met in the Netherlands and made the award, despite the fact that the third arbitrator, who was Indonesian, was prohibited to participate in the proceeding due to an intervention of the Indonesian government.

It is submitted that as a general rule, courts should grant preliminary anti-arbitration injunctions only in cases where a prima facie case of the agreement being void or inoperative has been made, or a prima facie case of the issue being non-arbitrable as in case of fraud has been made, however subject to the rule of kompetenz-kompetenz. Apart from these exceptional cases, courts should refrain from interfering with the arbitration proceedings to ensure party autonomy and to uphold the principle of territoriality. As the New York Court of Appeals put it: “The essence of arbitration is resolving disputes without the interference of the judicial process and its strictures. When international trade is involved, this essence is enhanced by the desire to avoid unfamiliar foreign law. The U.N. Convention has considered the problems and created a solution, one that does not contemplate significant judicial intervention until after an arbitral award is made.”

(ii) Injunctions made in favour of Arbitration

As already submitted, courts have limited powers to interfere with arbitrations, but anti-suit injunctions in favour of arbitrations are highly useful to ensure that parties stick to their agreed obligations to settle their disputes by arbitration. This is all the more useful in the sense that arbitral tribunals have no imperium to enforce their own awards, thereby making such injunctions the call for the day to protect arbitration process from abuse. To this end, several domestic arbitration legislations make it obligatory for courts to refer such matters to arbitration. The basis for these provisions can be found in the New York Convention as well as the UNICITRAL Model

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81 PHILIPPE FOUCHARD ET AL., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, ¶ 660.
82 Julian D.M. Lew, supra note 53.
83 Coopers v. Ateliers De La Motobecane, S.A., 57 N.Y. 2d 408, 416 (N.Y. 1982).
84 José Carlos Fernández Rozas, Anti-suit Injunctions Issued by National Courts–Measures Addressed to the Parties or to the Arbitrators, in IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 73, 74 (E. Gaillard ed., 2005).
Law, wherein assistance by courts in favour of arbitration has been prescribed, such as:

**Article 5:** Extent of court intervention
In matters governed by this Law, no court shall intervene except where so provided in this Law.

**Article 6:** Court or other authority for certain functions of arbitration assistance and supervision
The functions referred to in Articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each state enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

**Article 9:** Arbitration agreement and interim measures by court
It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

**Article 17 J:** Court-ordered interim measures
A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this state, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

It is submitted that a reading of the aforesaid provisions provides an idea about the type of assistance that can be provided by courts in favour of arbitration. Further, the courts can grant anti-suit injunctions with respect to arbitration in two stages, namely (i) during the arbitration proceedings, when the recalcitrant party seeks an action at another court to disrupt the ongoing arbitration proceeding and to avoid that an award is made; (ii) after the award is made, the losing party tries to institute court proceedings to avoid enforcement of the arbitral award or to recover what was paid in connection with the enforcement of an award. In both these scenarios, the losing party may seek to set aside the award or prevent arbitration process by seeking an anti-arbitration injunction, wherein the opposite party may seek an injunction in favour of the arbitration proceeding. One of the famous cases along these lines is the *Pertamina* case, wherein a series of anti-suit and anti-arbitration injunctions were granted by

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the U.S. and Indonesian courts.\textsuperscript{88} In this case, a U.S. company, holding an award in its favour sought to enforce the same in the U.S., which was confirmed. In the mean time, the losing party had applied for a declaration that the award void in Indonesia. The U.S. court granted an anti-suit injunction in favour of the U.S. company. However, the losing party obtained a decree annulling the award, against which another anti-suit injunction was granted by the U.S. court. Finally, the U.S. and Indonesian courts vacated their respective orders and the losing party chose to prefer a challenge the award on grounds of fraud. Dismissing the petition, the Court held:

“After almost six years of litigation in district and appellate courts based on the Arbitral Award, the American courts had finally resolved all the issues presented to them about whether the Arbitral Award should be confirmed and about the method by which KBC should recover the large amount due. Although procedures were available under federal law for Pertamina to make its claim of fraud and to seek to prevent KBC from recovering the $319 million, there was no attempt whatever by Pertamina to make use of such procedures.... Instead, Pertamina engaged in the six years of litigation in the United States without any mention of its claim of fraud. Finally, at the very moment when the litigation was to be legitimately ended, Pertamina brought the action in the Cayman Islands after engaging in literal subterfuge in dealing with the court in New York. The purpose of this lawsuit is to effectively wipe out the effect of the United States judgments and to do this with as great an amount of delay as possible.”\textsuperscript{89}

Confirming the decision of the lower court, the 2nd Circuit Court held: “[F]ederal courts do have inherent power to protect their own judgments from being undermined or vitiated by vexatious litigation in other jurisdictions.... would be undermined were we to permit Pertamina to proceed with protracted and expensive litigation that is intended to vitiate an international arbitral award that federal courts have confirmed and enforced”.\textsuperscript{90}

It is submitted that this approach of the U.S. court in favour of arbitration should be encouraged to support arbitration and to ensure that the process is not abused.


\textsuperscript{89} \textit{Pertamina case}, \textit{supra} note 87, at 12.

\textsuperscript{90} \textit{Id.} at 9.
Anti–Arbitration Injunctions: An Indian Perspective

Having discussed the legal position of anti-suit injunctions in arbitration across jurisdictions, now let’s discuss the Indian position. There is no specific provision in the Indian Arbitration and Conciliation Act, 1996 to empower courts to grant anti-suit injunctions. In fact, some argue that few provisions of the Specific Relief Act, 1963 prohibit the granting of such injunctions. Section 41(b) of the Specific Relief Act provides that: ‘An injunction cannot be granted... to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought...’\textsuperscript{91} A literal interpretation of the said section would mean that a court could only grant an anti-suit injunction in a matter involving a court subordinate to it. Thus, the Delhi High Court can grant an anti-suit injunction in relation to a matter in a court subordinate to it, but not to a court subordinate to the Madras High Court. A simple extension of the same would mean that no such injunction could be granted against a foreign arbitration as no foreign court is subordinate to an Indian Court. One way to overcome the same is by construing the term “court” to mean an “Indian court”. This seems to be the approach adopted by the Madras High Court in the case of Rajshree Sugars v. Axis Bank, where the Court held: “Thus, Cotton Corporation case was distinguished in Oil and Natural Gas Commission case, to the limited extent of recognizing the power of the courts to grant anti-suit injunctions despite the principle of subordination of courts, found in Section 41(b) of the Specific Relief Act, 1963.”\textsuperscript{92}

In the context of the Arbitration and Conciliation Act, 1996, the rule of \textit{kompetenz-kompetenz} as enshrined in Section 16 of the Act empowers the arbitral tribunal to rule on its own jurisdiction.\textsuperscript{93} To this end, Section 8 of the Act makes it obligatory on courts to refer parties to arbitration where the court finds that there exists a valid agreement to arbitrate disputes between the parties.\textsuperscript{94} However, Section 9 and Section 45 of the Act provide certain powers to the court to interfere with such proceedings in domestic and foreign arbitrations respectively.\textsuperscript{95} Section 9 empowers the court to grant interim remedies in support of arbitration during the pendency of the proceedings\textsuperscript{96} whereas Section 45 of the Act requires the court to refer parties to arbitration unless it finds the arbitration agreement to

\textsuperscript{91} The Specific Relief Act, 1963 § 41(b).
\textsuperscript{92} Rajshree Sugars v. Axis Bank.
\textsuperscript{93} Arbitration and Conciliation Act, 1996 § 16.
\textsuperscript{94} \textit{id.} § 8.
\textsuperscript{95} \textit{id.} §§ 9, 45.
\textsuperscript{96} \textit{id.} § 9.
be null and void or inoperative. Although there is no provision in Part II of the Act like Section 34 of the Act and the Supreme Court in *BALCO v. Kaiser Aluminium* has held that Section 34 is not applicable to foreign arbitrations, which empowers the courts to set aside foreign arbitral awards, Section 45 still seeks to limit the costs of parties who contest that there exists no valid arbitration agreement, as getting such declaration from the courts of the seat of arbitration may be costly. It is submitted that this rule under Section 45 is subject to the general principle of *kompetenz-kompetenz* governing arbitration, which although present only in Part–I of the Act, is a general principle in the New York Convention and governs all arbitrations. Thus, courts as a general rule refuse to interfere with arbitral proceedings where parties have willingly agreed to arbitrate disputes with one another.

The Andhra Pradesh High Court in *Cultor Ford Science v. Nicholas Piramal*, refused to grant an injunction against arbitration under the LCIA Rules as the parties had willingly entered into the agreement and had spent a considerable amount of money in participating in the proceedings. However, in conditions where the court deems it necessary to intervene, injunction is granted against commencing the arbitration proceeding. The Delhi High Court in *Union of India v. Dabhol Power*, held that the Section 45 does not oust the jurisdiction of the court from issuing an injunction if the proceedings are found to be oppressive, which essentially means that the courts have powers to grant injunctions against arbitral proceedings, in cases where it deems it necessary. The Bombay High Court in *MSM Satellite (Singapore) Pvt. Ltd. v. World Sport Group (Mauritius) Limited* granted injunction against a foreign arbitration between two foreign parties in which the subject matter of the dispute was in India.

Thus, from the above discussion, it is submitted that courts in India possess a limited power to grant anti-arbitration injunctions, subject to Sections 8 and 16 of the Act. Such powers should be used by the courts only in extreme cases where the balance of conveniences is strongly in favour of granting such injunctions and such injunctions propel the end of preventing abuse of process of arbitration to frustrate the other parties’ claims.

97 Id. § 45.
100 *id.; see also Shakthi Bhog Foods Ltd. v. Kola Shipping Ltd.*, (2009) 2 SCC 134.
Conclusion

In conclusion, it is submitted that common law courts have time and again exercised their jurisdiction to grant anti-suit and anti-arbitration injunctions in favour of as well as in derogation of arbitration proceedings. Although such injunctions are said to be granting against parties, their inevitable consequence is that they have an effect of enjoining a proceeding in a foreign court. However, this alone, such not restrict common law courts from granting such injunctions when the conditions are such that justice and equity demand the grant of such injunctions. To this end, the author disagrees with the strict view taken by certain civil law countries which have weighed international comity over the fundamental rule of justice. However, caution must be taken here not to grant anti-arbitration injunctions frequently but only to exercise such jurisdiction in extraordinary circumstances as the very object of the Arbitration and Conciliation Act is to reduce the interference by courts in arbitration proceedings. Thus, the correct approach to have in granting anti-arbitration injunctions is the middle-ground approach as has been adopted by the 1st and 2nd Circuit Courts in the U.S. in granting such injunctions. The author hereby submits that to resolve problems raised by civil law nations regarding sovereignty and international comity, the right approach would be to improve upon the existing New York Convention to enable courts to grant such injunctions in certain circumstances and for foreign courts to recognize such injunctions if certain conditions are satisfied. Consensus on the said point would remove concerns raised on points of sovereignty and international comity.