RE-VISITING THE CONCEPT OF ANTI-ARBITRATION INJUNCTIONS IN LIGHT OF INTERIM INJUNCTIONS

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Abstract

*Anti-arbitration injunctions ["**AAI or AAIs**"] have been used as a tool for legal protectionism. However, scholars have justified AAI based on the consensual nature of arbitration. Indian courts have now gained the reputation of being anti-arbitration, due to the frequent issue of AAI, and the recently developing murky jurisprudence around interim AAI. The travaux préparatoires of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] do not render much support to AAI. Similarly, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ["**ICSID Convention**"] establishes a stricter approach to AAI. In this article, the authors analyse the legal framework and approaches to AAI in India, Malaysia and other jurisdictions. The authors demonstrate how Indian courts have conflated AAI with anti-suit injunctions ["**ASI**"], and hence broadened its scope. This position has further harmed the interest of the parties with the recent issuance of interim AAIs. The authors have demonstrated potential harmful effects of continuing on this path through a comparative analysis to Malaysia. Malaysia has taken a liberal approach in issuing AAI, and conflated them with ASI; thereby losing its status as a sought-after jurisdiction for arbitration. In contrast, other jurisdictions such as the United States of America ["**US**"] and the United*

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*Kingdom ["**UK**"] have restricted the scope of issue of AAI in international commercial arbitration. In light of this, the authors suggest that the principles of the ICSID Convention can be transposed to the New York Convention with respect to the subject matter of AAI. Further, it is imperative that India develops a more measured approach to issuing AAI which is only based on exceptional grounds.*

I. Introduction

International Commercial Arbitration ["**ICA**"] has been, for a considerable time, a popular choice for resolving cross-border disputes, especially those concerning business.[1] ICA is envisioned as a transnational mode of dispute resolution that must not be bound by the shackles of national moralities.[2] Hence, as multiple jurisdictions are developing their own ICA jurisprudence, the debates surrounding the interpretation of the New York Convention that executes ICA proceedings are also increasing. One such debate is apropos AAI. The two main effects of an arbitration agreement are to *first*, oblige the parties to submit the disputes within the arbitration agreement to arbitration; and *second*, for the arbitral tribunal to be given the jurisdiction to hear all these disputes.[3] This confers on the tribunal the jurisdiction to hear its own matters, which is known as the principle of *kompetenz-kompetenz*.[4] These two conflicting concepts; *first*, AAI, which provides greater power to national courts to influence the course of

1 Richard Garnett, *National Court Intervention in Arbitration as an Investment Treaty Claim*, 60(2) INT'L & COMP. L.Q. 485 (2011) [*hereinafter* "Garnett"].

2 Emmanuel Gaillard, *Three Philosophies of International Arbitration, in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION 308 (Arthur W. Rovine ed. 2009) [*hereinafter* "Galliard"].

3 EMMANUEL GAILLARD, *Antisuit Injunctions Issued by Arbitrators, in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?: ICCA CONGRESS SERIES NO. 13 238 (Albert Jan van den Berg ed. 2006).

4 FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 388 (Emmanuel Gaillard & John Savage eds. 1999).

arbitration proceedings and; *second*, the principle of *kompetenz-kompetenz*, which restricts it, are the source of such debates.

This article relies on the following literature to analyse AAIs. Emmanuel Gaillard, in his book, subscribes to the ideology that AAIs should not be mechanically accepted by an arbitrator.[5] Gary Born, in his commentary on ICA, advocates that it is more acceptable to refuse to enforce an award under question without encroaching upon others' jurisdiction than issuing AAIs.[6] Some other commentators such as Fouchard justify AAI in limited circumstances by emphasising that AAIs should not be granted only in an "*ideal*" world.[7] S.R. Subramanian traces succinctly the development of AAI in Indian private international law to conclude that India is moving towards a dangerous unfettered discretion being granted to courts to issue AAIs.[8] The case of *Devi Resources Limited* v. *Ambo Exports Limited* ["**Devi Resources**"], in which an interim AAI was issued, is an example of such dangerous precedent.[9] The Malaysian case of *Government of Malaysia* v. *Nurhima Kiram Fornan* shows how unfettered discretion results in addition of grounds for issuing AAIs, which were hitherto absent.[10]

In light of this literature, the objective of this article is to revisit the whole jurisprudence on AAI, given the plethora of decisions that are being

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5 GAILLARD, *supra* note 2, at 308; *see also* PIERRE A. KARRER, ANTI-ARBITRATION INJUNCTIONS: THEORY AND PRACTICE: ICCA Congress Series No. 13 228 (Wolters Kluwer 2007).

6 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1274 (Wolters Kluwer 2014) [*hereinafter* "Born"]; *see also,* Michael E. Schneider, *Court Actions in Defence Against Anti-Suit Injunction, in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION: IAI SERIES NO. 2 41 (Emmanuel Gaillard ed., 2005).

7 Philippe Fouchard, *Anti-Suit Injunctions in International Arbitration What Remedie' Injunction, in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION: IAI SERIES NO. 2 154 (Emmanuel Gaillard ed., 2005).

8 S.R. 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*, ARB. INT'L 1 (2018).

9 Devi Resources Limited v. Ambo Exports Limited, 2019 SCC OnLine Cal 7774 [*hereinafter* "Ambo exports"].

10 Government of Malaysia v. Nurhima Kiram Fornan, [2020] MLJU 425.

rendered in India on AAIs. The scope of the article is to review the multiplicity of arguments in favour and against AAI while reviewing the positions of India and Malaysia in this respect.

Malaysia has been chosen for the comparative study due to its similar socio-economic status and growth as a developing ICA state like India. While this article is limited to the analysis of Indian and Malaysian framework, it seeks support from the jurisprudence of developed countries to make its argument.

Thus, this article, in lieu of its objective, examines *first*, the origin of AAIs; *second*, their incidence in the New York Convention, in light of the approach taken in investment arbitration and *third*, the legal framework of the Indian approach to AAI in the context of Malaysian jurisprudence. The article concludes with the hypothesis that it is imperative for India to develop strict and rigid rules towards the issuance of AAIs to prevent itself from being termed as a jurisdiction of arbitral terrorism.

II. AAIs – A Conceptual Understanding

ASIs are the genesis of the concept of AAIs. While even the former is debated as an injunctive relief, the latter has dire implications. It is important to note that ASI can be traced to the principle of *forum non-conveniens*.[11] However, the same cannot justify AAIs since AAI is restricted by the principle of party autonomy. ASI is an order to the party acting in breach of their contractual terms and employing delay tactics.[12] AAI, in turn, incentivises the breach of the agreement and party autonomy, especially when different standards are exercised in evaluating the validity of an arbitration agreement.[13] The difference in the nature of ASI and AAI is recognised in the legal arena and hence ASIs are proliferated as compared

11 Johnson v. Spider Staging Corp. 87 Wn.2d 577 (1976).

12 Olga Vishnevskaya, *Anti-Suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?*, 32(2) J. INT'L ARB. 173, 177 (2015).

13 *Supra* note 12, at 179.

to AAIs.[14] The Working Group on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration has itself encouraged ASI by an amendment as a response to the prejudicial tactics undermining the arbitral process.[15] However, AAIs are frowned upon in the arena of ICA.

There is a tussle between the civil law and common law countries in the issuance of AAI. The former disparages the latter for issuing frequent AAIs as a tool for legal protectionism and frustrating the principles of ICA.[16] Historically, AAIs have had a reputation to be granted by courts in an attempt to thwart foreign arbitral proceedings, resorting to judicial protectionism of their own national companies.[17] Franco Ferrari, an eminent scholar believes that AAIs are predominantly sought to shop for a convenient forum or delays, regardless of the existence of a valid arbitration agreement.[18] Such commentators reject the idea that decisions by state courts are inherently superior to those of the arbitral tribunal.[19]

On the other hand, another set of scholars justify AAIs by focusing on the consensual nature of arbitration. This means that a party must be referred

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14 Ceskoslovenska Obchodni Banka (CSOB) v. Slovak Republic Procedural Order No. 5, at 2 - 3 (2000).

15 Working Group, Report of the Working Group on Arbitration and Conciliation on the work of its forty-third session 23 (UNCITRAL, 43rd Session, A/CN.9/589, (2005).

16 Abhishree Manikantan & Aayush Bapat, *Anti Arbitration Injunctions: The Endless Tussle for Jurisdiction* (The American Rev. on Intl Arb., 17 May 2021), *available at* https://aria.law.columbia.edu/anti-arbitration-injunctions-the-endless-tussle-for-jurisdiction/.

17 *An Overview of International Arbitration, in* NIGEL BLACKABY, CONSTANTINE PARTASIDES AND ALAN REDFERN, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 1 83 (7d ed. 2009).

18 FRANCO FERRARI, *Forum Shopping in the International Commercial Arbitration Context: Setting the Stage, in* FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT (2013).

19 KARRER, *supra* note 5, at 228.

to arbitration only when it has contractually agreed to it.[20] A contract cannot cloak the arbitral tribunal with such jurisdiction, if the parties never entered into it.[21] When there is a question as to the existence or sanctity of such contract, arbitration must not be pursued. Commentators like Nicholas Poon opine that the principle of *kompetenz-kompetenz* does not preclude judicial view.[22] They even disparage the use of ASI, since it interferes with the court's jurisdiction to prevent "*a perverted and unjust end*," which is encouraged by AAI.[23] As opposed to prevalent notions, they believe that it is far better to issue AAIs than wasting the time and resources of the tribunals and the parties.[24] However, this argument has limited weightage since arbitral tribunals are specialised bodies, which do not have excessive backlogs as opposed to national courts.

There is a pro-enforcement bias present in the vehicles of ICA, that is, New York Convention, which is the most extensively tool of implementing ICA. The note by the Secretary-General clearly show that the drafters wanted the convention to be "*a simplified and expeditious procedure, … [and a] less onerous*" instrument of enforcing the awards.[25] Thus, conceptually, the enforcement of ASI is perceived to be less abhorrent than AAI. The former is seen as an aid to the enforcement of arbitral awards.[26]

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20 *Anti-Suit and Anti-Arbitration Injunctions, in* AJAR RAB, INTERIM MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE REVIEW OF THE INDIAN EXPERIENCE 165 (2022).

21 Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan [2010] 3 WLR 1472, ¶ 24.

22 Nicholas Poon, *The Use and Abuse of Anti-Arbitration Injunctions* 25 SING. ACADEMY OF L.J. 244, 251 (2013) [*hereinafter* "Poon"].

23 McHenry v. Lewis (1882), 22 Ch. D. 397, at 407.

24 *Supra* note 22.

25 UN Conference on International Commercial Arbitration, Comments on Draft Convention on Recognition and Enforcement of Foreign Arbitral Awards: Note by Secretary General (UNECOSOC, 6 March 1958, E/CONF.26/2).

26 William G. Bassler, *The Symbiotic Relationship between International Arbitration and National Courts*, 7 DISP. RES. INT'L 101, 107 (2013).

III. Analysis of the New York Convention in light of the ICSID Convention

A. New York Convention

The New York Convention is envisioned as a transnational instrument wherein all states collectively recognise and enforce an award, which meets certain standards of validity and legitimacy.[27] While the enforcement order operates independently, it is nonetheless grounded in the underlying principles of each nation's legal framework. Some commentators argue that in such truly transnational systems, the tribunals will not accept the incidence of AAI, since such instruments provide a single system of authority to regulate transnational systems, which is undesirable.[28]

The drafters of the New York Convention initially wanted to separate the recognition and enforcement of arbitral awards from the validity of arbitration agreement.[29] Thus, Article II, which provides courts the flexibility to grant AAIs, was incorporated only less than three weeks prior to adoption of the convention in a rushed manner.[30] It provides that the court of a contracting state shall refer the parties to arbitration who have made an agreement to do so in compliance with Article II(1), unless it is found to be "*null and void, inoperative or incapable of being performed.*"[31] Provisions similar to Article II(3) of the New York Convention, exist in the

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27 GAILLARD, *supra* note 2, at 307.

28 *Id.* at 308.

29 Dorothee Schramm, Elliott Geisinger & Phillippe Pinsolle, *Article II, in*, RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 40 (Herbert Kronke, Patricia Nacimiento, ET AL. eds. 2010).

30 Hassan Raza, *New York Convention Article II(3) – 'Refer the Parties to Arbitration' – Shield or a Compelling Measure?*, KLUWER ARBITRATION BLOG (Nov. 03, 2020), *available at* https://arbitrationblog.kluwerarbitration.com/2020/11/03/new-york-convention-article-ii3-refer-the-parties-to-arbitration-shield-or-a-compelling-measure/.

31 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 3, Article II(3) (*hereinafter* "New York Convention").

Geneva Protocol of 1923 under Article 4 read with Article 1.[32] However, a similar provision on reference was absent in the Geneva Convention of 1927.[33] The proposal for Article II came from the delegates of Netherlands, which was opposed by Belgium since it did not want to concede to the proposed standards of validity of arbitration agreements.[34] There was hardly any discussion on the impugned provision. The debates pivoted around enforcement of the awards and the procedure therein.[35] It was nonetheless adopted by a vote of 18 in favour and eight against it, not being one of the popular and well-received provision.[36] The final text of the article was suggested five days before and confirmed merely two days before the convention was passed.[37]

The *travaux préparatoires* are silent on the subject of AAI and have not envisioned the same under Article II(3).[38] The initial drafts were significantly different and did not even accord the courts with the authority to reject a reference to arbitration. However, the provision was introduced

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32 United Nations Protocol on Arbitration Clauses, 24 Sept. 1923, art. 1, 4.

33 United Nations Convention on the Execution of Foreign Arbitral Awards, 26 Sept. 1927.

34 UN Conference on International Commercial Arbitration, Summary Records of the United Nations Conference on International Commercial Arbitration, New York (UNECOSOC, 20 May – 10 June 1958) 21st meeting [E/CONF.26/SR.21 - E/2704 and Corr.1, E/2822 and Add.1 to 6, E/CONF.26/2, 3 and Add.1, E/CONF.26/4, 7, E/CONF.26/L.16, L.28, L.49, L.52, L.55, L.56],17.

35 UN Conference on International Commercial Arbitration, *Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (UNECOSOC, 1958) E/CONF.26/L.36 – Amendment to Article 2; *see also* UN Conference on International Commercial Arbitration, Report by the Secretary-General, Recognition and Enforcement of Foreign Arbitral Awards (UNECOSOC, 31 January 1956) E/2822, 11.

36 UN Conference on International Commercial Arbitration, *21st meeting [E/CONF.26/SR.21 - E/2704 and Corr.1, E/2822 and Add.1 to 6, E/CONF.26/2, 3 and Add.1, E/CONF.26/4, 7, E/CONF.26/L.16, L.28, L.49, L.52, L.55, L.56]* (UNECOSOC, 5 June 1958) 17.

37 UN Conference on International Commercial Arbitration, *E/CONF.26/L.54 - Netherlands: Amendment to proposal made by Working Party No. 2 (E/CONF.26/L.52)* (UNECOSOC, 5 June 1958); *see also* UN Conference on International Commercial Arbitration, E/CONF.26/L.59 - Text of new article to be included in the Convention, adopted by the Conference at its 21st meeting (UNECOSOC, 6 June 1958).

38 UNCITRAL, UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 68 (UNCITRAL, 2016).

later to prevent the parties from "*sabotaging*" the arbitration agreement that they are party to, by unnecessarily referring the dispute to a regular court.[39] This can be noted in the suggestions of Sweden's and Belgium's committees wherein it was required that the contracting parties to submit to the jurisdiction of arbitral tribunal apropos the validity of arbitration agreement rather than the application of conflicting private international law.[40] Thus, by interpreting Article II(3) in the context of Articles 31 and 32 of the Vienna Convention on the Law of the Treaties, it runs counter to the concept of AAI.[41] Nevertheless, certain scholars argue that AAIs can be justified within the ambit of Article II(3), when the arbitration agreement does not exist in the first place.[42]

The enforcement and recognition of foreign arbitral awards places a positive and a negative effect on the courts to enforce the arbitral award rendered and prevent parties from approaching alternate forums in violation of *pacta sunt servanda*, respectively.[43] The issuance of AAI depends on the extent of the negative effect a nation employs. The New York Convention puts the burden on the courts to compel arbitration in light of an agreement.[44] AAIs and the principle of *kompetenz-kompetenz* interact together to render a position wherein despite an AAI, the tribunals proceed with the arbitration and independently decide their own jurisdiction based

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39 UN Conference on International Commercial Arbitration, *E/CONF.26/2 - General observations and presentation of the objective of the Conference* (UNECOSOC, 6 March 1958), at 25; *see also GreCon Dimter Inc. v. J.R. Normand Inc. and Scierie Thomas-Louis Tremblay Inc* [2003] Q.J. No. 1262 (QL).

40 UN Conference on International Commercial Arbitration, *E/2822/Add.1 - General Observations, Comments on Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15* (UNECOSOC, 21 February 1956); *see also* UN Conference on International Commercial Arbitration, *E/CONF.26/C.3/L.3 - Belgium: Working Paper on the draft Supplementary Protocol* (UNECOSOC, 3 June 1958).

41 IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (1973).

42 Richard Garnett, *Anti-arbitration injunctions: walking the tightrope*, 26 ARB. INT'L 1, 48 (2020).

43 BORN, *supra* note 6, at 2116.

44 Sourcing Unlimited Inc. v. Asimco International Inc., 526 F.3d 38 (1st Cir. 2008).

on the principle of *kompetenz-kompetenz*, ignoring the principle of *lis pendens*.[45] Some commentators believe that the arbitral tribunal not only has such a right, but an obligation as well.[46] This has become a common phenomenon in India as discussed later in the article.

In foreign arbitral awards, the question of AAI becomes crucial since granting one would interfere with the jurisdiction of the court at seat of arbitration.[47] The New York Convention is seen through a lens of comity, that the court seized of an injunction petition owes a duty to the foreign courts and arbitral tribunals to not encroach upon their territory.[48] Hence, the ground for questioning the validity of arbitration agreement or the jurisdiction of arbitral tribunal is limited to Article II(3).

It has been recognised by commentators arguing on both sides that there is nothing in the text of the New York Convention that may stop a national court from enjoining arbitration proceedings.[49] However, it is the nature of ICA that rationalises not engaging in AAI. These commentators argue that the determination of a dispute to be non-arbitrable or against public policy must not be a ground for enjoining the arbitration.[50] The same can be denied enforcement in those particular countries later, since individual conceptions of morality and public policy must not be imposed on other jurisdictions.[51]

45 Olga Vishnevskaya, *Anti-Suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?* 32(2) J. INT'L ARB. 173, 185 (2015).

46 BORN, *supra* note 6, at 2161.

47 Black Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG [1981] 2 Lloyd's Rep 446.

48 GARNETT, *supra* note 42, at 3.

49 BORN, *supra* note 6.

50 *Supra* note 45, at 202.

51 BORN, *supra* note 6, at 2160.

B. ICSID Convention

In contrast, the ICSID Convention specifically gives an additional protection from AAI in the form of Article 26.[52] Issuance of AAIs is generally considered a violation of the Convention.[53] This article provides for a deemed consent of the parties to arbitration under this Convention, unless agreed to the contrary. The ICSID arbitration, once initiated, is a self-contained legislation, and provides for the arbitration to proceed even without the cooperation of one party under the Convention.[54] Arbitration is a sought-after forum for investment disputes and hence both the host-state and investor prefer insulation of the arbitration from domestic or foreign courts. Such non-interference by the national courts, especially the courts of the state party to the agreement, prevent the investor from being particularly targeted.[55] The courts, nonetheless, have interfered with enforcement proceedings by breaching the ICSID.[56] However, the settled position of ICSID and the tribunal therein is that such interference will be a denial of justice and abhorrent to the principles of international law.[57] ICSID may not be entirely applicable to regular foreign arbitral proceedings since AAIs are not tantamount to denial of justice by the state court.[58] However, in the New York Convention, similar considerations of international principles, party autonomy, and the use of AAIs to frustrate

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52 Convention on the Settlement of Investment Disputes between States and the Nationals of other States, October 14, 1966, art. 26.

53 Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, ¶ 166.

54 CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 351 (2009).

55 S SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 61 (1987).

56 Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited, ICSID Case No. ARB/10/20; *see also,* SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13.

57 *Supra* note 53.

58 Sabahi Rubins, *National Court Interference: Anti-Arbitration Injunctions*, *in* INVESTOR-STATE ARBITRATION (2d. ed., Borzu Sabahi, Noah Rubins, ET AL. eds. 2019).

the proceedings resulting in denial of justice for the losing party, dissuade their employment.[59]

An argument that has been gaining momentum, even within investment arbitration, is that the courts in the jurisdiction of the seat of arbitration have supervisory jurisdiction and high degree of injustice must be portrayed to annul any AAIs issued by such States.[60] Such views are based on an extended application of the principle of *lex loci arbitri*.[61] However, such views contrast the de-localised nature of proceedings held in *Salini Costruttori SpA* v. *The Federal Democratic Republic of Ethiopia*.[62] For ICA, merely restricting the AAIs to jurisdiction of *lex arbitri* may not be enough since the parties will still be forced to expend time and money in a foreign jurisdiction. AAIs are understood to be issued to restrain a party than an arbitral tribunal, and the court of seat does not exercise jurisdiction over foreign parties.[63]

IV. Legal Framework

A. India

The debate surrounding AAIs in India deals with the proposition as to whether Part I of Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] is applicable to Part II. Section 5 of the Arbitration Act restricts judicial intervention by the courts in matters of arbitration and is a notwithstanding clause.[64] Section 16 incorporates the principle of *kompetenz-*

59 GARNETT, *supra* note 1 at 490; *see also* Mondev International Ltd v. United States of America, 6 ICSID Rep 1.

60 *Id.*

61 Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17(1) ARB. INT'L 19 (2001); *see also* Albert Jan Van Den Berg, *Control of Jurisdiction by Injunctions Issued by National Courts*, *in* 13 INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? ICCA CONGRESS SERIES, 2006 MONTREAL 192 (2007).

62 Salini Costruttori SpA v. The Federal Democratic Republic of Ethiopia, ICC Arbitration No. 10623/AER/ACS.

63 Sharad Bansal and Divyanshu Agarwal, *Are anti-arbitration injunctions a malaise? An analysis in the context of Indian law*, 31 ARB. INT'L 613, 621 (2015).

64 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 5.

kompetenz.[65] The legislature incorporated Article II(3) in form of Section 45 of the Arbitration Act.[66] Some decisions like *Chatterjee Petrochemical Co.* v. *Haldia Petrochemicals Ltd.* ["**Chatterjee Petrochemical**"], have read these three provisions to statutorily bar the use of AAI. This represented the former position adopted in India.[67] However, the Court in *World Sport Group (Mauritius) Limited* v. *MSM Sattelite (Singapore) Pvt. Ltd.* ["**World Sports Group**"] has noted that Section 45 in the Part II of the Arbitration Act is a notwithstanding clause that excludes the applicability of Part I to ICA.[68] Further, many decisions argue that Indian courts have wide powers under the Code of Civil Procedure, 1908 ["**CPC**"] (Order XXXIX) to grant interim reliefs akin to AAI.[69]

B. Malaysia

Malaysia has a developing jurisprudence on AAI. It has a separate chapter for the recognition and enforcement of foreign arbitral awards that incorporates the scheme of the New York Convention, under the Arbitration Act, 2005 ["**Malaysian Arbitration Act**"].[70] However, Malaysia has specified that Chapter I, II and IV of the Malaysian Arbitration Act apply to ICA, while Chapter III does not, unless explicitly incorporated by

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65 Jyoti Dastidar and Aman Chandola*, Anti-Arbitration Injunctions: Judicial Trends and Finding the Middle Path,* CYRIL AMARCHAND MANGALDAS (Nov. 27, 2020), *available at* https://corporate.cyrilamarchandblogs.com/2020/11/anti-arbitration-injunctions-judicial-trends-and-finding-the-middle-path/.

66 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 45.

67 Chatterjee Petrochem Co. v. Haldia Petrochemicals Ltd., (2014) 14 SCC 574 [*hereinafter* "Haldia Petrochemicals"; *see also* Modi Entertainment Network v. WSG Cricket Pte Ltd., AIR 2003 SC 1177.

68 World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd., (2014) 11 SCC 639.

69 HALDIA PETROCHEMICALS, supra note 67.

70 Tan Sri Cecil Abraham and Thayananthan Baskaran, *Malaysia, in* ASIA ARBITRATION HANDBOOK 627 (Michael J. Moser & John Choong eds., 2011)[*herinafter* "Thayananthan Baskaran"].

the parties.[71] Section 88, applicable to ICA, limits court intervention to only those circumstances that are provided for under the Malaysian Arbitration Act.[72] It incorporates Article II(3) within Section 10, whose textual interpretation gives even narrower grounds for intervention by the court than the New York Convention. Here, the term "*valid*" as a prefix to the arbitration agreement has been omitted by the legislature. Hence, the only line of inquiry by the courts must be whether the arbitration agreement is "*null and void, inoperative or incapable of being performed.*"

V. Approach to AAIs

A. India

Section 45 of the Arbitration Act, which incorporates Article II(3) of the New York Convention, limits the application of AAIs to merely cases wherein it is prima facie found that the agreement is "*null and void, inoperative or incapable of being performed.*" The Indian jurisprudence continues the debate over the interpretation of this phrase. One key case that emerged in 2005 was the *Union of India* v. *Dabhol Power Co.* that broadened the scope of such injunctions and conflated it with the grounds of ASI.[73] It ignored the conceptual differences between both the injunctive reliefs, and held in line with the United Kingdom ["**UK**"] precedent *Excalibur Ventures LLC* v. *Texas Keystone Inc.* that AAIs can be granted even when the proceedings are vexatious or unconscionable, which are broad grounds to restrict the principle of *kompetenz-kompetenz*.[74] It is opined that enjoining an arbitration proceeding merely on the ground of oppressive proceedings is in contravention with the New York Convention and general international law principles.[75] This was later remedied by the Supreme Court in *World Sport*

71 Arbitration Act, Laws of Malaysia Act 646 of 2005, § 3(3) (Malaysia) [*hereinafter* "Malaysian Arbitration Act"].

72 MALASIAN ARBITRATION ACT, *supra* note 71, § 8.

73 Union of India v Dabhol Power Co., IA No 6663/ 2003, Suit No 1268/2003.

74 Excalibur Ventures LLC v. Texas Keystone Inc., 2011 EWHC 2411.

75 *Supra* note 63, at 620.

Group where it held that the conditions for granting AAI must be more exacting than ASI.[76] However, the applicability of this judgement has been limited by the persisting argument that interim reliefs are equitable in nature. Additionally, the applicability of the CPC to the Arbitration Act has been upheld by the courts. Hence, the grounds hitherto disregarded in *World Sports Group*, which have been applied to AAIs by the virtue of it being an interim relief, may continue to be applied in Indian jurisprudence, labelling India as an anti-arbitration jurisdiction. This is evident from the decision in *Vikram Bakshi* v. *McDonald's India Pvt. Ltd.* which applied the grounds discarded.[77]

The Indian court in *Shin Etsu Co. Ltd.* v. *Aksh Optifibre Limited* held that while the New York Convention does not stipulate prima facie or ex facie review, the former would serve a better purpose for the ICA.[78] It would prevent delay and judicial intervention and its validity of the award may again be challenged at the enforcement stage. Thereafter, the legislature, via an amendment in 2019, has itself specified a prima facie standard to be followed in such cases.[79]

A lacuna that has developed in Indian jurisprudence is apropos the novated concept of interim AAIs. Recent the decisions of the Calcutta and Delhi High Court have resulted in inefficiency in arbitration in every conceivable manner.[80] In these cases, the foreign arbitration proceedings were continued and an award was passed in subsistence of an interim AAI. However, the interim AAI was later vacated. In the Calcutta High Court's decision, one of the parties abstained from giving further evidence or

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76 World Sport Group (Mauritius) Limited v. MSM Sattelite (Singapore) Pvt. Ltd., (2010) 112 BOMLR 2942.

77 Vikram Bakshi v. State, 2012 SCC OnLine Del 4316.

78 Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234.

79 The Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Acts of Parliament, 2019, § 11.

80 AMBO EXPORTS, *supra* note 9; see also ADM International SRL v. Sunraja Oil Industries Private Limited, (2021) 4 Mad LJ 147.

pleadings in the matter due to the interim AAI.[81] However, the courts, in both these cases occupied a "*pro-arbitration*" stance by preaching their lack of jurisdiction, comity with foreign jurisdictions and prevention of one-upmanship, and allowing the order to subsist.[82] This means that the efficacy of the interim order would be known only when it attains finality. Thus, in such cases the courts claim their jurisdiction to issue AAIs as well as contest the same jurisdiction at a later stage.[83] This renders the interim order to be a fiction, which goes against the basic tenets of the arguments in favour of AAI. Resultantly, the purported pro-arbitration stance harms the interest of parties, making the process unpredictable, increasing delay and costs along with problematising the jurisprudence on AAIs.

B. Malaysia

An important case that has developed in Malaysia vis-à-vis AAIs is *Jaya Sudhir Jayaram* v. *Nautical Supreme Sdn Bhd*.[84] While this case deals with a domestic-seated arbitration, it lays the foundation of AAI in Malaysia. The court here adopted a very liberal approach, despite the narrow legal framework, based on the fairest approach to all the stakeholders involved.[85] It rejected the exceptional circumstances approach and advocated litigation since a third-party was involved. It noted that instruments like the New York Convention regrettably promote fragmentation of dispute resolution in the garb of encouraging enforcement.[86] This has been criticised by commentators for extending the power of the courts beyond the limited circumstance, by which an opportunistic third party may circumvent arbitral proceedings while the tribunal may have jurisdiction.[87]

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81 ADM International SRL v. Sunraja Oil Industries Private Limited, (2021) 4 Mad LJ 147.
82 ADM International SRL v. Sunraja Oil Industries Private Limited, (2021) 4 Mad LJ 147
83 Saarthak Jain and Kashish Makkar, *The dilution of interim anti-arbitration injunctions in Devi Resources: pro-enforcement approach gone too far?*, 36 ARB. INT'L 297, 301 (2020).
84 Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd, [2019] CLJ JT (3).
85 *Id.*
86 *Id.* at 20.
87 *Supra* note 1.

The transnational decisions in Malaysia have a liberal approach towards issuing AAIs. The courts have issued AAIs in Malaysia based on the United States of America's approach for grant of interim injunctions as laid down in *American Cyanamid* v. *Ethicon* ["**American Cyanamide**"].[88] Similar to *Chatterjee Petrochemical*, Malaysia has also conflated the grounds for ASI and AAI. The *American Cyanamid* case allows courts to interfere with the jurisdiction of arbitral tribunals when *first*, there are serious issues to be tried, *second*, damages would not be an adequate remedy, and *third*, mere balance of convenience lies in favour of injunction. These grounds have been criticised to be too broad, non-specific, and in contravention of the conditions of the New York Convention. While some courts have attempted to narrow the grounds and increase the threshold for foreign arbitral proceedings,[89] the courts have still employed the *American Cyanamid* test.[90] Moreover, Malaysia has added even further grounds of its own. For instance, Malaysian courts can be the natural and proper forum wherein there are concerns of sovereign immunity, hitherto not a ground under the New York Convention.[91] The only arena wherein the Malaysian stance on AAIs has been praised is based on their adoption of the prima facie standard of review that emphasises on greater *kompetenz-kompetenz*.[92]

Section 10(3) of the Malayisan Arbitration Act, 2005 statutorily incorporates the issue arising in Indian jurisdiction vis-à-vis interim AAI.[93] It mandates that the arbitral proceedings may be commenced or continued and an award can be rendered during the pendency of any matter under Section 10(1), which incorporates Article II(3). This limits the issue of an

88 MICS Behad v. Cockett Marine Oil (Asia) Pte Ltd. [2023] 1 CLJ 20; American Cyanamid v. Ethicon (1975) UKHL 1.

89 Government of Malaysia v. Nurhima Kiram Fornan, [2020] MLJU 425.

90 Lysught Corrugated Pipe Sdn Bhd and Anoor v. Popeye Resources [2022] 1 LNS 191.

91 Government of Malaysia v. Nurhima Kiram Fornan, [2020] MLJU 425; *see also*, Hetal Doshi and Sankalp Udgata, *Anti-arbitration injunction by Malaysian High Court—un(measured) invocation of sovereign immunity*, 36(3) ARB. INT'L 415, 418 (2020).

92 MICS Behad v. Cockett Marine Oil (Asia) Pte Ltd. [2023] 1 CLJ 20.

93 MALAYSIAN ARBITRATION ACT, *supra* note 71, §10(1).

interim AAI, since statutorily the tribunal is allowed to proceed with the arbitration. This means that the courts have to pass a final order issuing AAIs without proper examination or else the AAI remains ineffective.

C. Other Prominent Jurisdictions

While American courts in general issue AAIs, they have, in the view of comity and deference to the supervisory authority of foreign courts, restricted its use in context of ICA.[94] While for domestic agreements, the inquiry is apropos the determination of the validity of arbitration agreements,[95] for ICA, they limit it to the remedies in the New York Convention or the Federal Arbitration Act.[96] The United Kingdom ["**UK**"] has explicitly held that the supervisory jurisdiction of the courts is limited only to the circumstances mentioned in the Arbitration Act, 1996, which is an incorporation of the New York Convention.[97] However, UK has exercised AAIs more in the foreign arbitration context than in its domestic cases.[98] They rely on the principle of *forum non-conveniens*, which is misconceived.[99] Nonetheless, the principles that are employed by the courts in the UK limit the exercise of AAIs to exceptional circumstances.[100] The courts have noted that different tests must apply to AAIs in ICA.[101] It cannot be issued on mere inconvenience.[102] Such cases only arise when the arbitration agreement does not exist in the first place, as stipulated under

94 URS Corp. v. Lebanese Co. for the Dev. & Reconstruction of Beirut Cent. Dist. SAL, 512 F.Supp.2d 199, 210 (D. Del. 2007).

95 First Options v. Kaplan, 514 U.S. 938 (1995).

96 Ghassabian v. Hematian, No. 08 Civ. 4400 (SAS) (2008).

97 Elektrim SA v. Vivendi Universal SA [2007] EWHC 571 (Comm) ¶ 75.

98 GARNETT, *Supra* note 1, at 8.

99 J Jarvis & Sons Ltd v. Blue Circle Dartford Estates Ltd. (2007) EWIC (TCC) 1262, ¶ 19; *see also* Internet FZCO v. Ansol Ltd. (2007) EWHC (Comm) 226, ¶ 1.

100 Weissfisch v. Julius [2006] EWCA Civ 218, ¶ 33.

101 Elektrim SA v. Vivendi Universal SA [2007] EWHC 571 (Comm).

102 J Jarvis & Sons Ltd v. Blue Circle Dartford Estates Ltd. (2007) EWIC (TCC) 1262; *see also* GARNETT, *supra* note 1, at 6.

Article II(1) of the New York Convention.[103] Consequently, there has been a growing reluctance amongst States to issue AAIs. Particularly, in mature arbitration jurisdictions like Singapore, AAIs have been not been issued easily.[104]

Since the New York Convention introduced a minimal definition of valid arbitration agreement to the body of norms, the jurisprudence on standard of review is vague.[105] However, previous commentators who have engaged in a comparative study opine that counterintuitively prima facie test is not dominant at the pre-award phase.[106] However, states like the UK are moving away from their hitherto position in determining the jurisdictional questions by a full scrutiny test and the prima facie test is now gaining momentum.[107] This momentum is due to increased issuance of AAI, and delay and disregard for the principle of *kompetenz-kompetenz*. A full scrutiny may enable courts to undertake an unfettered review of the decision of an arbitral tribunal, whose jurisdiction is conferred through party autonomy.[108] Hence, the review is limited to invalidity *qui crèvent les yeux* (which are astonishing).[109]

The issue of interim AAIs arises in other jurisdictions as well. For instance, in *Fomento de Construcciones y Contratos SA* v. *Colon Container Terminal SA*, the

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103 Albon v. Naza Motor Trading Sdn B EWCA Civ 1124; *see also* Kazakhstan v. Istil Group Inc. 4 [2007] EWHC 2729 (Comm.).

104 Mitsui Engineering and Shipbuilding Co Ltd v. Easton Graham Rush [2004] 2 SLR(R) 14.

105 UN Conference on International Commercial Arbitration, 9th Mtg, E/CONF.26/SR.9 (UNECOSOC 1958) 9-13; *see also* REINMAR WOLFF, *Article II, in* NEW YORK CONVENTION: COMMENTARY 93ff (Reinmar Wolff ed., 2012).

106 GIACOMO MARCHISIO, THE VALIDITY OF THE ARBITRATION AGREEMENT IN INTERNATIONAL COMMERCIAL ARBITRATION 36 (2014).

107 Louis Flannery, *The English Statutory Framework, in* ARBITRATION IN ENGLAND, WITH CHAPTERS ON SCOTLAND AND IRELAND 210 (Julian DM Lew ET AL. eds., 2013); *see also* Fiona Trust & Holding Corp v. Privalov [2007] UKHL 40.

108 *Supra* note 5, at 228.

109 Yves Strickler, *Arbitres et juges internes, in* L'ARBITRAGE: QUESTIONS CONTEMPORAINES 78 (Yves Strickler and Jean-Baptiste Racine eds., 2012).

Swiss Federal Tribunal has annulled the arbitral tribunal's awards on the ground of not exercising *lis pendens* to halt the arbitration proceedings in subsistence of pending litigation proceedings in the national courts.[110] However, the Swiss Federal Tribunal also noted that with objections to the arbitration agreement and jurisdiction, both the forums had an "*equal vocation*" to adjudicate.[111] While this is indeed a more desirable approach than the Indian position, it must be noted that issuing interim AAIs have severe consequences. The arbitral tribunals have powers to render awards even in default of the participation of the applicant of the AAI.[112] In ICA, what qualifies as a valid arbitration agreement is a low threshold, and imposing the decisions rendered in one nation cannot be said to be binding on the other.[113] Issuing interim AAIs will breach the de-localised manner of ICA, combined with subsistence of parallel and conflicting proceedings.

VI. Conclusion

The *travaux préparatoires* of the New York Convention provides minimal support to the issue of AAIs. While Article II(3) may be interpreted to give the flexibility to the courts to issue AAI, the policy arguments, and the nature of the New York Convention as a vehicle of enforcement and recognition of arbitral awards, demand the same to be issued in limited circumstances. In India, the lack of a definitive Supreme Court decision on this matter has contributed to a perception of the judiciary as anti-arbitration. This perception aligns with broader, often negative stereotypes held by developed nations about third-world countries' approaches to arbitration. Continuing on this path would render India being accused of arbitral terrorism or the act of dissuading arbitration in favour of one's legal

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110 Fomento de Construcciones y Contrates SA v. Colon Container Terminal SA DFT 127 III 279 [*hereinafter* "Fomento"].

111 FOMENTO, *supra* note 110, at 286.

112 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, G.A. Res 40/72 (Dec. 11, 1985), as amended by G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) art. 25(c)

113 Indonesia v. Himpurna Cal. Energy Ltd. XXV Y.B. Comm. Arb. 469, 473 [*hereinafter* "Himpurna"].

system.[114] The Indian courts have conflated the grounds for ASI and AAI, created a murky jurisprudence on interim AAIs and have ignored the consequences of such approach. It must learn the valuable lessons from Malaysia's unfavourable approach. While Malaysia has stricter statutory conditions, the courts have liberalised its approach at an exponential rate, which is abhorrent to the basic tenets of ICA. Malaysian jurisprudence is hardly preferred by countries for ICA.[115]

The developed jurisprudences on AAI of US, UK etc., require India to adopt a more restrictive approach to AAI. While ICSID establishes a stricter approach to AAI based on the State being a party, it must be remembered that in any foreign arbitral proceedings, repudiating from a contract which one is a party to, whether it is the state or otherwise, and an unreasonable conduct of national courts is in breach of universal international arbitration principles.[116] Hence, such approach can be transposed to AAIs in ICA as well. It is imperative that India must not merely claim to be a pro-arbitration jurisdiction on the face of it, while rendering the parties hapless, as is the case in *Devi Resources*.[117] It must understand the severe complications of AAI separate it from understanding of ASI and develop rigid guidelines while issuing AAI. A measured approach to AAI may promote arbitration.[118] Nevertheless, in absence of any rigid guidelines or affirmed principles, India will not be able to develop the reputation as an arbitration-friendly jurisdiction. It must issue AAIs only based on the exceptional ground stipulated in Article II(3) of the New York Convention by a prima facie judicial determination.

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114 Doak Bishop, *Combating Arbitral Terrorism: Anti-Arbitration Injunctions increasingly threaten to frustrate the International Arbitral System*, *available at*: https://www.kslaw.com/library/pdf/bishop7.pdf.

115 THAYANANTHAN BASKARAN, *supra* note 70.

116 HIMPURNA, *supra* note 113, 187.

117 AMBO EXPORTS, *supra* note 9.

118 POON, *supra* note, 260.