ANTI-ARBITRATION INJUNCTIONS ON FOREIGN ARBITRATIONS AND THE NEW YORK CONVENTION: AN ANATHEMA?

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Abstract

*This article explores the contours of the validity of anti-arbitration injunctions, so far as they conflict with kompetenz-kompetenz and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1961 ["**New York Convention**"]. For this purpose, the article, first, establishes that the obligation to compel parties to arbitrate is not absolute. Rather, it is contingent on certain qualifications that must be met by the arbitration agreement, for it to be recognised. Second, it explores how national courts have interpreted the sources of their authority to enjoin foreign arbitrations. Then, the article will engage with the argument that issuing anti-arbitration injunctions would be against the principle of kompetenz-kompetenz. Lastly, the article will establish that enjoining foreign arbitrations violates the structure of the New York Convention and the principle of international comity. In this light, National Courts should not grant injunctions that seek to interfere with the functioning of foreign courts, especially of the Member States of the New York Convention.*

I. Introduction

An arbitral tribunal has the authority (and the duty) to resolve disputes which the parties have agreed to submit to arbitration.[1] This authority flows from the arbitration agreement, which is born out of the parties' consent. The New York Convention creates an obligation on States to respect and enforce arbitration agreements.[2] The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ["**Model Law**"] obligates any judicial authority to refer a dispute to arbitration unless it finds that the arbitration agreement is "*null and void, inoperative or incapable of being performed.*"[3] This position is fairly settled across non-UNCITRAL jurisdictions as well, such as the English Arbitration Act ["**EAA**"][4] and the US Federal Arbitration Act ["**FAA**"].[5]

Despite this, arbitration proceedings may be resisted. According to Redfern and Hunter, a respondent may choose to boycott the proceedings, challenge the jurisdiction of the tribunal, or challenge the

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1 Nigel Blackaby and Constantine Partasides (eds.), REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 23-24 (6th ed., 2015) [*hereinafter* "REDFERN & HUNTER"].

2 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3, art. II [*hereinafter* "New York Convention"].

3 United Nations Comm'n on Int'l Trade Law, Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), art. 8, as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) [*hereinafter* "UNCITRAL Model Law"].

4 English Arbitration Act, 1996, cl. 23, § 9.

5 United States Arbitration Act, 9 U.S.C. § 3 (1925).

award once it has been made.[6] The tribunal typically has the power to go ahead with the proceedings *ex parte* in case a party refuses to attend.[7] Provisions are also provided in, *inter alia*, the Singapore International Arbitration Centre ["**SIAC**"], United Nations Commission on International Trade Law ["**UNCITRAL**"], and the London Court of International Arbitration ["**LCIA**"] Rules.[8] Provided the tribunal gives appropriate notice of the proceedings, the hearing is not affected by a party's non-attendance.[9]

Arbitration laws further seek to minimise the need to go to court. *Kompetenz-kompetenz* provides tribunals with wide powers to rule on their jurisdiction, which extends to determining the validity of the underlying contract, or the arbitration agreement.[10]

Despite the rule of *kompetenz-kompetenz*, parties may approach a national court for an anti-arbitration injunction. National courts have continuously accepted that they have the authority to issue an injunction enjoining arbitration proceedings.[11] Some national courts have enjoined arbitrations seated in other jurisdictions.[12] Tribunals have not always acceded to anti-arbitration injunctions and have continued the proceedings despite the proscriptions issued by national courts.[13]

The article will explore the contours of the validity of such injunctions, especially ones that seek to proscribe foreign-seated arbitrations.

II. Article II of The New York Convention

The New York Convention places an obligation to recognise and enforce arbitration agreements in writing under Article II, which is mirrored in the Model Law, and numerous national laws.[14] The provision reads as follows:

> *"1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*

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6 REDFERN AND HUNTER, *supra* note 1, 345-347.

7 *See* Singapore International Arbitration Centre (SIAC) Rules 2016, rule 24 ("If any party fails to appear at a meeting or hearing without showing sufficient cause for such failure, the Tribunal may proceed with the arbitration and may make the Award based on the submissions and evidence before it in case a party refuses to attend a meeting without cause.").

8 *Ibid*.; United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, as revised in 2010 (with addendum added in 2013), rule 30; London Court of International Arbitration (LCIA) Arbitration Rules 2020, rule 15.8; ICC Arbitration Rules 2021, art. 26(2).

9 *Ibid*.; English Arbitration Act 1996, cl. 23, § 41; Arbitration & Conciliation Act, No. 26 of 1996, § 25 (India); *see* Sohan Lal Gupta v. Asha Devi Gupta, (2003) 7 SCC 492.

10 *See* discussion on *kompetenz-kompetenz*, infra; *See also* Fiona Trust v Yuri Privalov, [2007] EWCA Civ 20.

11 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1410-1415 (3d ed., 2021) [*hereinafter* "BORN"].

12 Société Nationale Industrielle Aerospatiale v. Lee Kui Jak, 1978 AC 871 (U.K.).

13 *See* Himpurna Cal. Energy Ltd v. Indonesia, Interim Award & Final Award in Ad Hoc Case of 26 September 1999 & 16 October 1999, XXV Y.B. COMM. ARB. 109, 110 (2000).

14 *See* Arbitration & Conciliation Act, No. 26 of 1996, §§ 8, 45 (India); United States Arbitration Act, 9 U.S.C. § 3 (1925); English Arbitration Act 1996, cl. 23, § 9; Federal Act on Private International Law 1987, art. 7 (Switz.); UNCITRAL Model Law, art. 7.

> *[…]*
>
> *2) The court of a Contracting State […] [shall] refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed."*[15]

Therefore, from a plain reading of the provision, it is clear that courts need not recognise arbitration agreements in certain situations. First, arbitration agreements must be in writing. The Model Law also recognises any agreement which is recorded in a permanent form to be an agreement in writing.[16] Illustratively, the Indian Supreme Court in *Great Offshore* v. *Iranian Offshore* held that agreements made over an exchange of faxed documents would be considered written arbitration agreements.[17]

Second, the agreement must provide for arbitration between parties that have a defined legal relationship. In this respect, the phrase has not been subject to much legal scrutiny.[18] Still, the New Zealand Court of Appeal in *Methanex* v. *Spellman* held that a defined legal relationship, by itself, would give rise to certain legal claims and obligations.[19] Therefore, the arbitration clause can be extremely wide, but it needs to relate to a predetermined relationship between the parties.[20]

Third, the requirement of arbitrability. Arbitrability generally depends on the relevant national law. Differences may arise between them, however, so far as disputes deal with the rights and obligations amongst the partis, they are generally deemed arbitrable. For instance, Common law jurisdictions allow disputes which do not impact the rights of third parties to be arbitrable.[21] Similarly, Swiss law allows "*Any claim involving an economic interest*" to be arbitrated.[22] On the other hand, certain jurisdictions like France limit arbitrability if the State is involved in the dispute.[23]

Lastly, an arbitration agreement must be in existence. It must not be void, inoperative, or incapable of being performed. Notably, this ground, along with arbitrability, is often invoked to grant anti-arbitration injunctions. However, the standard for invalidity is very high. In this regard, the French Cour de Cassation in *Weissberg* v. *Subway* held that the standard of invalidity is a manifest standard. As long as the determination of invalidity would be open to a legitimate dispute between the parties, the Court could not invalidate the arbitration agreement.[24] The party resisting the agreement must meet the manifest standard and establish the impossibility of the agreement.[25] Similarly, the Indian Supreme Court in *World Sport* v. *MSM Singapore* ["**World Sport**"] held that a mere allegation of invalidity because

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15 New York Convention, art. II.

16 UNCITRAL Model Law, art. 7, option 1; *see* Arbitration & Conciliation Act, No. 26 of 1996, § 7 (India).

17 Great Offshore Ltd v. Iranian Offshore Engineering and Construction Co, (2008) 14 SCC 240 (India).

18 BORN, *supra* note 11, at 320-323.

19 Methanex Motonui Ltd. v. Joseph Spellman, [2004] 1 NZLR 95 (N.Z.).

20 BORN, *supra* note 11.

21 *See* Fulham Football Club (1987) Ltd v. Sir David Richards, [2011] EWCA Civ 855; *see also* Booz Allen & Hamilton Inc v. SBI Home Finance Ltd, (2011) 5 SCC 532 (India) [*hereinafter* "Booz Allen v. SBI Home Finance"].

22 Federal Act on Private International Law 1987, art. 177(1) (Switz.).

23 French Code of Civil Procedure, art. 2060; Conseil D'état, Code of Administrative Justice, art. 311.

24 Weissberg SRL v. Subway International BV (Cour de Cassation), Y.B. COMM. ARB. 2016 - Volume XLI [*hereinafter* "Weissberg SRL v. Subway International"].

25 *Ibid.*

of fraud would not invalidate the arbitration clause.[26] The Court in *Claxton Engineering* v. *TAX Olaj-es* ["**Claxton Engineering**"] injuncted a foreign arbitration based on this ground where it determined that the alleged arbitration agreement did not exist *de jure*.[27]

While the New York Convention places conditions on an arbitration agreement, it does not explicitly establish a court's power to issue an anti-arbitration injunction. There is no provision that empowers a court to enjoin arbitration. However, national courts have often relied on Article II as the source of the authority to issue anti-arbitration injunctions.[28] It has been argued that this is incompatible with *kompetenz-kompetenz*[29] and international law obligations flowing from the New York Convention.[30]

III. National Courts' Interpretations of Their Source of Authority

National courts have affirmed their powers to enjoin international arbitration proceedings so consistently that it has become a settled question for some jurisdictions.[31] However, different courts have sought to rely on different principles to justify their powers to issue anti-arbitration injunctions even against foreign arbitrations.

A. Inherent Powers of Court: England and India

The EAA's applicability is limited to arbitrations seated in England, Wales, and Northern Ireland.[32] Therefore, an English court cannot rely on it to injunct foreign arbitrations. Still, English courts have affirmed their authority to issue such injunctions. As affirmed by the English Courts, on multiple occasions,[33] they are empowered under section 37 of the Senior Courts Act, 1981 ["**SCA**"] to grant injunctions "*in all cases in which it appears to the court to be just and convenient to do so.*"[34]

The Court of Appeal in *Weissfisch* v. *Julius* has held that this power is inherent to the court and can exist despite the jurisdictional restriction in the EAA.[35] However, the Court held that this must be viewed alongside the principle that courts of the seat must have supervisory jurisdiction over the

26 World Sport Group (Mauritius) v. MSM Satellite (Singapore), (2014) 11 SCC 639 (India) [*hereinafter* "World Sport v. MSM Satellite"].

27 Claxton Engineering Services Limited v. TAX Olaj-es Gazkutato Ktf, [2011] EWHC 345 (Comm) [*hereinafter* "Claxton Engineering v. TAX"].

28 *See* Jennifer L. Gorskie, *US Courts and the Anti-Arbitration Injunction*, 28(2) ARB. INT'L 295 (2012) (for US Courts) [*hereinafter* "Jennifer L. Gorskie"].

29 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*, 34(2) ARB. INT'L 185 (2018) [*hereinafter* "Sairam Subramanian"].

30 Martin Schwebel, Anti-Suit Injunctions in International Arbitration: An Overview, *in* E. Gaillard (ed.), ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 5 (2005) [*hereinafter* "Martin Schwebel"].

31 *See* Sabbagh v. Khoury, [2019] EWCA Civ 1219 [*hereinafter* "Sabbagh v. Khoury"].

32 English Arbitration Act 1996, cl. 23, § 2(1).

33 Elektrim SA v. Vivendi Universal SA [2007] 2 Lloyd's Rep 8; Intermet FCZO v Ansol Ltd [2007] EWHC 226 (Comm); J Jarvis & Sons Ltd v. Blue Circle Dartford Estates Ltd [2007] BLR 439.

34 Senior Courts Act 1981, cl. 9, § 37 (U.K.).

35 Weissfisch v. Julius, [2006] EWCA Civ 218 [*hereinafter* "Weissfisch v. Julius"].

proceedings,[36] and the obligations imposed by the New York Convention. So, the court held that such injunctions should be very carefully considered.[37]

Mere questions on the invalidity of the arbitration agreement would not invite such an injunction. The invalidity of the agreement (or other such circumstances) must be so egregious that compelling the parties to arbitration would be oppressive for one party.[38]

The High Court has, in the past, imposed injunctions on arbitrations abroad using these inherent powers. As already discussed, the High Court in *Claxton Engineering*[39] granted an anti-arbitration injunction, holding that the alleged arbitration agreement itself did not exist. In *Excalibur* v. *Texas Keystone* ["**Excalibur**"], the same party had commenced Court proceedings in England and sought commencement of arbitral proceedings in New York. The High Court granted the anti-arbitration injunction. It reasoned that one of the parties was not a party to the arbitration agreement, and had no connection with the contract through which the arbitration agreement was being claimed. Further, all parties had already accepted the jurisdiction of the Commercial Court. In light of this, the Court ruled that the Court would be the proper forum for the resolution of the parties' dispute.[40]

The Court of Appeal in *Sabbagh* v. *Khoury* has affirmed this position. The Court ruled that if arbitration was oppressive or prime facie vexatious, an English Court could issue an anti-arbitration injunction even if England was not the natural forum for the dispute.[41] The Court reasoned that issuing anti-arbitration injunctions where England was not the natural forum was permissible because this would not involve any question over the jurisdiction of foreign courts, but rather over the jurisdiction of the tribunal.[42]

The Hong Kong Court of First Instance in *Lin Min* v. *Chen Shu Quan* has specifically referred to Section 37(1) of the English SCA.[43] In this case, the Court was confronted by a conflict between Section 12 of the Arbitration Ordinance,[44] and Section 21(L) of the High Court Ordinance, which is analogous to Section 37(1) of the SCA.[45] It decided that Section 12 of the Arbitration Ordinance did not impinge on its general jurisdiction to grant injunctions to arbitrations. In holding so, it relied on the English position which maintains that the power bestowed upon the courts under Section 37(1) does not capitulate to the provisions of the EAA.

Indian Courts have also partly relied on English jurisprudence on the matter of enjoining foreign arbitrations. For instance, the Division bench in *McDonald's India Private Limited* v. *Vikram Bakshi* relied

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36 *See* Naviera Amazonica Peruana SA v. Compania Internacional de Seguros del Peru [1988] 1 Lloyd's Rep 116 (principle that Seat of arbitration provides exclusive jurisdiction).

37 Weissfisch v. Julius, [2006] EWCA Civ 218.

38 *See* Albon (t/a NA Carriage Co) v. Naza Motor Trading SDN BHD [2007] EWCA Civ 1124.

39 Claxton Engineering v. TAX, [2011] EWHC 345 (Comm).

40 Excalibur Ventures LLC v. Texas Keystone Inc & Ors [2011] EWHC 1624 (Comm).

41 Sabbagh v, Khoury & Ors [2019] EWCA Civ 1219.

42 *Id.* ¶¶ 110-114.

43 Lin Min v. Chen Shu Quan [2012] HKCFI 328.

44 Arbitration Ordinance, Cap 609 (H.K.); the ordinance is similar to Article 5 of the Model Law that prohibits intervention by courts, except where provided by the statutory instrument.

45 High Court Ordinance (Cap 4), § 21L(1) (H.K.).

on Excalibur to suggest that none of the conditions which would make an arbitration "oppressive" were present.[46]

A key example is the Delhi High Court decision in *Union of India* v. *Dabhol Power Company* ["**Dabhol Power Company**"]. The Court held that being a court of equity, it had the inherent power to injunct a party from pursuing oppressive proceedings.[47] The Court held that the Indian Arbitration and Conciliation Act, 1996 ["**ACA**"] could not stand in its way and restrict its inherent power found in equity. Here, the parties sought to invoke a London seated arbitration clause. The Court reasoned that conducting the proceedings while a question that formed the root of the dispute was sub-judice would be oppressive to parties.[48] Here, the Court provided an injunction not because of section 45 of the ACA, but despite it. It held that it could not be bound by the narrow grounds in the ACA where the balance of convenience favoured an injunction. This reasoning is very similar to the one used by English courts.

Further, *Dabhol Power Company* has attracted considerable criticism on the grounds that it is indicative of the growing tendency of courts in developing countries like India, Bangladesh,[49] Pakistan,[50] and Indonesia,[51] to grant anti-arbitration injunctions that further the endeavour of protecting domestic entities and state-run companies. This trend posits a major policy-based issue with granting anti-arbitration injunctions owing to its potential consequence of frustrating the global arbitration system.[52]

B. Derivation From the Obligation to Compel Arbitration: US and India

As seen above, Article II of the New York Convention places certain conditions on the enforcement and recognition of arbitration agreements. US Courts have consistently held that their authority to enjoin arbitral proceedings arises from the power concomitant with their power to compel arbitration under FAA Sections 3 and 4.[53] This is despite the fact that the FAA, like the New York Convention, does not provide the court the power to injunct an arbitration.[54] For instance, the US Supreme Court in *First Options* affirmed the principle that US Courts would only assume negative *kompetenz-kompetenz* where parties have bestowed such power to the tribunal.[55] The US Appeals Court in *SGS* v.

46 McDonald's India Private Limited v. Vikram Bakshi, 2016 SCC OnLine Del 3949 (India).

47 Union of India v. Dabhol Power Company, IA 6663/2003 in Suit 1268/2003 (India), unreported, DELHI HIGH COURT, *available at* delhihighcourt.nic.in/dhcqrydisp_j.asp?pn=104242&yr=2004) ("This Court being a Court of equity has inherent powers to injunct a party from proceeding further with oppressive proceedings in a foreign country especially when temporary deferment thereof is not going to make much difference").

48 *Ibid.*

49 *See* Saipem SpA v. The People's Republic of Bangladesh, ICSID Case No ARB/05/7 (June 30, 2009).

50 *See* SGS v. Pakistan (2003) 19 Arbitration International 182 (Pakistan Supreme Court 2002); The Hub Power Co v. Pakistan WAPDA (2000) 16 Arbitration International 439 (Pakistan Supreme Court 2000).

51 *See* Persusahaan Pertambangan Minyak Dan Gas Bumi Negara v Karaha Bodas Co (District Court of Central Jakarta), Unpublished Judgment of 1 April 2002, *as cited in* BORN, *supra* note 11.

52 Sharad Bansal & Divyanshu Agrawal, *Are anti-arbitration injunctions a malaise? An analysis in the context of Indian law*, 31(4) ARB. INT'L (2015) [*hereinafter* "Bansal & Agarwal"].

53 Jennifer L. Gorskie, *supra* note 27.

54 *Ibid.*

55 First Options of Chicago Inc v. Kaplan, 514 U.S. 938 (1995).

REMSCO,[56] injuncted a Boston seated International Chambers of Commerce ["**ICC**"] arbitration, observing that the Boston proceedings were not envisioned in the agreement.

However, the US courts have consistently held that they enjoy the power to enjoin arbitral proceedings in case of international arbitrations seated in the US. This power does not extend to tribunals seated beyond the jurisdiction of the FAA.[57] A US federal court even declared that granting injunctions on foreign seated arbitrations would be against the New York Convention.[58]

Therefore, it is observed that even as the US courts enjoin arbitral proceedings, they maintain a strict observance of the Seat Theory. This is not true in the case of other jurisdictions. For instance, Indian courts have repeatedly affirmed their power to foreign arbitrations through the obligation to enforce arbitration agreements.[59]

Indian courts typically exercise the power to enjoin India seated arbitrations through Section 8, and foreign arbitrations through Section 45.[60] However, the grounds provided in both provisions mirror Article II(3) of the New York Convention. It is now settled from the decisions in *Vidya Drolia* v. *Durga Trading* and *Shin-Etsu Chemical Co. Ltd.* v. *Aksh Opti-fibre Ltd.* that the court at the referral stage can only undertake a prima facie analysis in case of both foreign and India seated arbitrations.[61]

It has been argued that the question of enjoining foreign arbitrations has not been definitively settled by the Supreme Court. The Courts have focussed more on the parties' case than their powers to issue the relevant injunction.[62] For instance, in *World Sport*, the Supreme Court did not undertake a detailed discussion of whether section 45 gave it the authority to enjoin a Singapore arbitration. Rather, it simply moved on to analyse the case of the parties as to the validity of the arbitration agreement, which it upheld. The Supreme Court was also beset with the question of enjoining a foreign arbitration in *Chatterjee Petrochem* v. *Haldia Petrochemicals Limited*,[63] wherein again the court did not consider the validity of enjoining foreign arbitrations under the New York Convention. It simply went into the parties' agreement and determined that the arbitration agreement calling for an ICC arbitration was

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56 Societe Generale De Surveillance SA v. Raytheon European Management and Systems Company, 643 F.2d 863 (1st Cir. 1981).

57 Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287 (5th Cir. 2004); 10 Civ. 04541 (CM), 2011 WL 666174 (S.D.N.Y. Feb. 8, 2011); *See also* Dedon GmbH v. Janus et Cie, 411 F. App'x 361 (2d Cir. 2011) (appeal in US Appeals Courts).

58 URS Corp. v. Lebanese Co. for the Development & Reconstruction of Beirut Central District SAL, 512 F. Supp. 2d 199 (D. Del. 2007) [*hereinafter* "URS Corp. v. Lebanese Co."].

59 World Sport v. MSM Satellite, (2014) 11 SCC 639 (India).

60 *See* Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc, (2012) 9 SCC 552 (India); this section will focus on foreign arbitrations. However, please refer to the following cases where the Courts have utilised section 8 to enjoin arbitrations: Booz Allen v. SBI Home Finance, (2011) 5 SCC 532 (India), Sukanya Holdings (P) Ltd v. Jayesh H Pandya, (2003) 5 SCC 531 (India), Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 (India). The following illustrations are where the same Section 8 petitions have failed: Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1 (India) [*hereinafter* "Vidya Drolia v. Durga Trading"], Deccan Paper Mills Co Ltd v. Regency Mahavir Properties, (2021) 4 SCC 786 (India).

61 Shin-Etsu Chemical Co. Ltd. v. Aksh Opti-fibre Ltd, (2005) 7 SCC 234 (India); Vidya Drolia v. Durga Trading, (2021) 2 SCC 1 (India).

62 Sairam Subramanian, *supra* note 29.

63 Chatterjee Petrochem Co v. Haldia Petrochemicals Ltd, (2014) 14 SCC 574 (India).

valid, and hence enforceable. It is unclear (or rather, unsaid) on what legal principles the Supreme Court could have stayed the arbitration had the agreement been manifestly void.

High Courts have been more decisive (more often in error) when issuing anti-arbitration injunctions under Section 45. The Calcutta High Court issued an anti-arbitration injunction in *Kolkata Port Trust* v. *Louis Dreyfus*,[64] which involved an incorrectly advanced investment treaty claim. Louis Dreyfus had attempted to compel arbitration against the Port Trust under the France-India Bilateral Investment Treaty. The High Court determined that the Kolkata Port Trust was not a party to the arbitration agreement under the Bilateral Investment Treaty ["**BIT**"], and therefore could not be made a party to an arbitration. Therefore, there was no valid arbitration agreement between the parties, and Louis Dreyfus was enjoined from pursuing the arbitration proceedings. This decision again does not answer the question as to the power of Section 45 to stop foreign proceedings, and simply proceeds on facts. It also seems to ignore that Indian courts have considered that the ACA is not applicable in case of investment treaty claims.[65]

The Delhi High Court, in the first instance, cited inarbitrability of minority oppression claims in *Vikram Bakshi* v. *McDonald's* to stay a London seated arbitration under the LCIA.[66] However, the Division Bench, relying on English decisions, reversed the decision on the ground that it did meet the "*exceptional conditions*" required to injunct foreign proceedings.[67]

Even recently, the Calcutta High Court's decision in *Balasore* v. *Medima*[68] attempted to clear the air regarding the power of an Indian court to issue anti-arbitration injunctions towards foreign arbitrations. The Court firmly reasoned that the Indian courts could provide anti-arbitration injunctions for foreign seated arbitrations in case certain conditions were met.

This decision is defective because it depends on *Modi Entertainment Network* v. *W.S.G. Cricket ["**Modi Entertainment**"]* to establish the conditions to be met for issuing an anti-arbitration injunction.[69] Modi Entertainment had dealt with grounds for granting anti-suit injunctions, which is fundamentally distinct from an anti-arbitration injunction on multiple levels.[70] Although it is true that both of them essentially restrict the rights of parties to approach dispute resolution forums,[71] while anti-suit injunctions only bind the parties, anti-arbitration injunctions may be issued against both parties and arbitrators.[72] The necessity for granting an anti-suit injunction may arise when proceedings are initiated

64 Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS, 2014 SCC OnLine Cal 17695 (India).

65 Union of India v. Vodafone Group Plc 2018 SCC OnLine Del 8842 (India), Union of India v. Khaitan Holdings 2019 SCC OnLine Del 6755 (India); Pratyush Miglani, Nikhil Varma and Prakhar Srivastava, *BIT Arbitral Awards Virtually Non-Enforceable in India: Does the Delhi High Court Need Course Correction*, SCC ONLINE (Apr. 10, 2021), *available at* https://www.scconline.com/blog/post/2021/04/10/arbitral-awards-2/#_ftnref42.

66 Vikram Bakshi v. McDonalds India Pvt Ltd, 2014 SCC OnLine Del 7249 (India).

67 McDonald's India Private Limited v. Vikram Bakshi, 2016 SCC OnLine Del 3949 (India).

68 Balasore Alloys Limited v. Medima LLC, 2020 SCC Online Cal 1699 (India).

69 Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd., (2003) 4 SCC 341 (India).

70 Romesh Weeramantry, *Anti-Arbitration Injunctions: The Core Concepts*, NAT'L UNIV. SING., *available at* https://cil.nus.edu.sg/wp-content/uploads/2014/06/Note-on-anti-arbitration-injunctions.pdf.

71 BORN, *supra* note 11, at 1410.

72 *Id.; see also* Weissfisch v. Julius, [2006] EWCA Civ 218.

by one of the parties in a foreign court to its advantage. However, the absence of an arbitration agreement, violation of the arbitration agreement's condition precedents, and claims of vexatious or oppressive proceedings, all constitute valid grounds that may warrant granting an anti-arbitration injunction, where such authority exists. Furthermore, anti-suit injunctions pose a threat to the principle of state sovereignty and the parties' access to courts,[73] whereas anti-arbitration injunctions additionally jeopardize party autonomy and infringe upon the fundamental principles of *kompetenz-kompetenz* and separability.[74]

Additionally, the Delhi High Court's ruling in *Dabhol Power Company* supports the view that the arbitrations can be enjoined if they are oppressive or *prima facie* vexatious in the exercise of equity. These grounds are not mentioned in section 45, or the New York Convention. This view, much like most other Indian decisions on this point, has omitted considering the New York Convention. The courts do not appear to have demonstrated cognisance of the fact that they act as an extension of the State for the activities for which the State is held accountable internationally. An order by a domestic court preventing the contract's agreed-upon international arbitration reflects a failure on the court's part to "*refer the parties to arbitration*", as mandated by Article II(3) of the New York Convention. Moreover, it has been argued that this approach fails to anticipatorily "*recognize arbitral awards as binding and enforce them*", as required by Article III of the New York Convention. Thus, it pre-emptively rejects recognition and enforcement on the basis of reasons that may be beyond the scope of Article V of the New York Convention.[75]

Further, this seems to be in dissonance with the law laid down in *Bharat Aluminium Company* v. *Kaiser Aluminium Technical Services Inc.* ["**BALCO**"] regarding the sole supervisory jurisdiction of the seat. Even if the decision in BALCO dealt with whether Part I of the ACA could be applied to foreign seated arbitrations, it is argued that the interpretation that Section 45 can be used to enjoin foreign arbitrations stands in the dissonance of the general principle of the seat expounded by the Court.[76]

It is visible that the Indian judicial position seems to mix Section 45 with the court's inherent powers. This, it is argued, cannot be permitted since the ACA is a code in itself.[77] As such, it is argued that the High Court seems to have affirmed its power to enjoin foreign proceedings in ignorance of its source. The same may be said of other decisions discussed in this section.

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73 Marseilles Fret SA v. Seatrano Shipping Co Ltd [2002] ECR I-3383 (Tribunal de Commerce, Marseille); Re the Enforcement of an English Anti-Suit Injunction [1997] ILPr 320 (Oberlandesgericht Dusseldorf) C-24/02; *see* Nicolas Poon, *The Use and Abuse of Anti-Arbitration Injunctions*, 25 SING. ACAD. L. J. 247 (2013).

74 Martin Schwebel, *supra* note 29.

75 *Id.*

76 *Cf* Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 (India) [*hereinafter* "BALCO v. Kaiser Aluminium"] ("The legal position that emerges from a conspectus of all the decisions, seems to be, that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings.").

77 Bina Modi v. Lalit Modi, 2020 SCC OnLine Del 901 (India).

In sum, while Section 45 may be applicable to foreign arbitrations, imposing an additional, non-statutory requirement of "*oppressive or vexatious*" claims on such injunctions confuses the jurisprudence around the subject even further.

IV. Negative *Kompetenz-Kompetenz* Obligations on National Courts: Enough to Stop Anti-arbitration Injunctions?

Kompetenz-kompetenz is envisaged in Article 16 of the Model Law. Like Article II, it is mirrored almost universally. The relevant extract of the provision is as follows:

> "*(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement*…."[78]

Additionally, it has been argued that the principle of *kompetenz-kompetenz* imposes a negative obligation on national courts to refer questions of jurisdiction and validity to arbitral tribunals.[79] This ensures that the authority of arbitrators cannot be impeded by parties trying to avoid arbitration.[80]

However, this is not reflected uniformly in national courts. For instance, the US FAA does not seem to adopt the principle.[81] FAA Section 3 requires a US court to satisfy itself with the validity and enforceability of the arbitration agreement before referring the parties to arbitration.[82] Further, Section 4 requires the courts to determine the validity of the agreement as a precondition to compel arbitration.[83] Therefore, unsurprisingly, US courts have had a greater tendency to enjoin arbitration proceedings.[84] However, US Federal courts have progressively read *kompetenz-kompetenz* into the FAA.[85] The US Supreme Court in *Preston* v. *Ferrer* involved a question of arbitrability in proceedings governed by the American Arbitration Association Rules ["**AAA**"]. The court affirmed that the authority of the tribunal to determine the validity of the agreement would first go to the tribunal, and then the relevant judicial authority.[86] However, the Court reached this conclusion because the parties, through the AAA rules, had agreed that the tribunal had the authority to determine the validity of the contract. This view was strengthened in *Schein* v. *Archer*, where the court held that it was within the parties' competence to authorise the tribunal to rule on arbitrability. In such a case, the tribunal would

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78 UNCITRAL Model Law, art. 16.

79 Pratyush Panjwani and Harshad Pathak, *Assimilating the Negative Effect of Kompetenz-Kompetenz in India: Need to Revisit the Question of Judicial Intervention?*, 2(2) INDIAN J. ARB. L. 1 (2013).

80 Phillip Landolt, *The Inconvenience of Principle: Separability and Kompetenz-Kompetenz*, 30(5) J. INT'L ARB. 511 (2013).

81 Stavros Brekoulakis, *Chapter II: The Arbitrator and the Arbitration Procedure - The Negative Effect of Compétence-Compétence: The Verdict has to be Negative*, in Christian Klausegger, Peter Klein, Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nikolaus Pitkowitz, Jenny Power, Irene Weiser & Gerold Zeiler eds., AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 237 (2009) [*hereinafter* "Stavros Brekoulakis"].

82 United States Arbitration Act, 9 U.S.C. §3 (1925).

83 United States Arbitration Act, 9 U.S.C. §4 (1925).

84 Jennifer L Gorskie, *supra* note 28.

85 *See* Stavros Brekoulakis, *supra* note 81.

86 Preston v. Ferrer, 552 U.S. 346 (2008) ("[The] contract […] provides for arbitration in accordance with the AAA rules. [The] rules states that "[t]he arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part." The incorporation of the AAA rules, and in particular Rule 7(b), weighs against inferring from the choice-of-law clause an understanding shared by Ferrer and Preston that their disputes would be heard, in the first instance, by the Labor Commissioner.").

have the primacy to rule on that issue.[87] Therefore, while the FAA does not recognise the principle, the negative obligation of *kompetenz-kompetenz* will bind the court where parties bestow such a power to the tribunal.[88]

Contrary to the United States, French law seems to favour *kompetenz-kompetenz* to a much greater extent. Once the tribunal has been constituted, Article 1458 of the French Code of Civil Procedure dictates that a state court "*shall declare itself incompetent*" to rule on any dispute already before the tribunal.[89] Further, if the tribunal has not been constituted, the court would still compel parties to arbitration unless the arbitration agreement is manifestly null and void.[90] The Cour De Cassation in *Weissberg* v. *Subway* added that the court could only enjoin proceedings if it is impossible to set the arbitration in motion.[91] Therefore, French courts are almost completely subservient to the arbitral tribunal. The Swiss position in this regard is also quite similar. In a case regarding the grant of anti-arbitration injunctions, a Swiss Court has pronounced that judicial tutelage to the effect of issuing such injunctions is not permissible under Swiss law since both the positive and negative effects of the principle of *kompetenz-kompetenz* are duly recognised by it.[92]

Jurisprudence in the EAA is more ambivalent. The EAA affirms a tribunal's power to rule on its jurisdiction.[93] The tribunal is the natural forum for the determination of substantive jurisdiction.[94] EAA empowers a court to determine the invalidity of the arbitration agreement, and mirrors Article II of the New York Convention.[95] Further, a person who is not a party to the proceedings can question the validity and existence of the agreement before the court.[96] Much like the US FAA, the text of the EAA does not seem to explicitly provide a negative *kompetenz-kompetenz* obligation. Again, much like US Federal courts, English courts have also read this negative obligation into the act to a limited extent.

The Queen's Bench in *Harbour Insurance* v. *Kansa* held that it was within the powers of the arbitral tribunal to determine the validity of the contract, even when it was alleged to have been struck by *ab-initio* invalidity due to illegality. However, the court opined that the power of the arbitrator was merely

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87 Henry Schein Inc v. Archer & White Sales Inc, 586 U.S. (2019) ("When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract. […] [However,] courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so."").

88 *See ibid.*; *also see* First Options of Chicago Inc v. Kaplan, 514 U.S. 938 (1995).

89 French Code of Civil Procedure, art. 1458.

90 Gefu Kuchenboss Gmbh und Co KG v. Corema, Cour de Cassation 08-17548 (2009).

91 Weissberg SRL v. Subway International, Y.B. COMM. ARB. 2016 - Volume XLI ("Nothing shows that setting such arbitration in motion would be impossible. By correctly finding that the alleged non-applicability was not manifestly apparent, the Court of Appeal decided, according to the law, to refer the parties [to arbitration].").

92 Air (PTY) Ltd v. International Air Transport Association (IATA) and CSA in Liquidation, Case No C/1043/2005-15SP, Republic and Canton of Geneva Judiciary, Court of First Instance, 2 May 2005; *see* Matthias Scherer and Werner Jahnel, *Anti-Suit and Anti-Arbitration Injunctions in International Arbitration: A Swiss Perspective*, 4 INT'L ARB. L. REV. (2009).

93 English Arbitration Act, 1996, cl. 23, § 31.

94 *See* English Arbitration Act, 1996, cl. 23, § 31; Stavros Brekoulakis, *supra* note 81.

95 English Arbitration Act, 1996, cl. 23, § 9.

96 English Arbitration Act, 1996, cl. 23, § 72.

one of convenience. It could not affect the legal rights of the parties, who could then approach the Commercial Court.

Therefore, while the question of jurisdiction could be answered by the arbitral tribunal, only a court could settle it definitively.[97] Although this position was pronounced under older legislation, it is reflected in the possibility of bringing jurisdictional questions to court in a 'second look' jurisdiction.[98]

In *Owens Corning* v. *XL Insurance*, the court upheld the principle that while the arbitral tribunal's determination of validity must come first, the court could undertake a *prima facie* analysis of the validity of the agreement.[99] The Court of Appeal in *Fiona Trust* v. *Privalov* has also affirmed that the tribunal should be the one to rule on its jurisdiction. However, the Court clarified that the court could exercise some discretion when the question involved the validity or the existence of the arbitration agreement itself.[100] However, it is a settled position that a "*first-look*" analysis by an English Court only involves a *prima facie* analysis.[101]

The Indian ACA is a Model Law compliant statute.[102] Still, the stance of the Indian courts towards the negative effect of *kompetenz-kompetenz* is quite nebulous. In *Kvaerner Cementation* v. *Bajranglal Agarwal ["**Kvaerner**"],*[103] the Supreme Court emphasized the substance of Section 16 that reflects the principle of *kompetenz-kompetenz* to hold that regardless of claims that the arbitration agreement was illegal, it is beyond the jurisdiction of national courts to scrutinize the maintainability of arbitral proceedings. In holding so, it adopted the negative aspect of *kompetenz-kompetenz* into Indian law. It did so by attributing precedence to the arbitral tribunal over its jurisdiction. However, subsequent judgments by the Supreme Court in 2005[104] and 2014,[105] had appeared to have overruled *Kvaerner*. These pronouncements recognized the competence of national courts to prevent arbitration under Sections 8 or 45 of the ACA, respectively. Nevertheless, the dust had not yet settled. *Kvaerner* was later cited

97 Harbour Assurance Co Ltd v. Kansa General International Insurance Co Ltd, [1992] 1 Lloyd's L Rep 81 ("The approach in English law is simple, straightforward and practical. As a matter of convenience arbitrators may consider, and decide, whether, they have jurisdiction or not: they may decide to assume or decline jurisdiction. But it is well settled in English law that the. result of such a preliminary decision has no effect whatsoever on the legal rights of the parties. Only the Court can definitively rule on issues relating to the jurisdiction of arbitrators.").

98 English Arbitration Act, 1996, cl. 23, § 30; Karyl Nairn, *National Report for England and Wales (2019 through 2020)*, *in* Lise Bosman (ed), ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, (2020, Supplement No. 110, April 2020) 1–97, 71; *see* Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46 [*hereinafter* "Dallah v. Pakistan"].

99 XL Insurance Limited v. Owens Corning, [2000] 2 Lloyd's Rep 500.

100 Fiona Trust v. Yuri Privalov, [2007] EWCA Civ 20.

101 *Ibid.*

102 United Nations Commission on International Trade Law, *Status: UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006*, *available at* https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

103 Kvaerner Cementation Ltd. v. Bajranglal Agarwal, (2012) 5 SCC 214 (India) ("3. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an Arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the civil court cannot have jurisdiction to go into that question.").

104 SBP & Co. v. Patel Eng'g. Ltd., (2005) 8 SCC 618 (India).

105 World Sport v. MSM Satellite, (2014) 11 SCC 639 (India).

with approval by the Supreme Court in *Ayyasamy* v. *Paramsivam*.[106] Furthermore, in 2019, reliance on *Kvaerner* was again placed by the Supreme Court to rule that any issue, whether over jurisdiction or the legality of the arbitration agreement, should be resolved by the arbitrator alone and that Civil Courts had no authority over the subject.[107] The variety of conflicting authorities on this subject is reflective of the cloud of ambiguity that looms over the grant of anti-arbitration injunctions in India. Be that as it may, it is safe to conclude that the negative effect of *kompetenz-kompetenz* goes unrecognized in cases that involve arbitrability.[108]

The contours of the negative obligations were defined recently in *Vidya Drolia* v. *Durga Trading*. The Supreme Court held that the arbitrator must have the first opportunity to rule on its jurisdiction. The Court can only pre-empt the question of jurisdiction at the stage of compelling arbitration when the arbitration agreement is *ex facie* unenforceable. The court reasoned that parties cannot be compelled to arbitrate a dispute which is demonstrably non-arbitrable.

In this light, Indian Courts do not firmly recognise the negative obligation of *kompetenz-kompetenz*. At best, the Indian position is ambivalent. Given the recent resurgence of *Kvaerner*, the principle of negative *kompetenz-kompetenz* seems to be taking hold. However, the repeated specific affirmations of the power to enjoin arbitrations[109] to lead to the conclusion that Judicial bodies do not, largely, recognise negative *kompetenz-kompetenz*.

A key takeaway from this discussion is that there is no internationally consistent position taken by national courts regarding the negative obligation arising from *kompetenz-kompetenz*. While French courts have accepted the authority of the tribunal to rule on its jurisdiction in the first instance, common law courts in England and India have affirmed the discretion of the court to adjudge infirmities in the arbitration agreement which appear apparent to them. In a middle path, US courts have recently affirmed the complete authority of the tribunal to rule on matters relating to the arbitration agreement and arbitrability. However, this is subject to the parties' agreement. Absent such an agreement, US Courts have the full power to determine the validity of the agreement.

This shows that while the positive obligation of *kompetenz-kompetenz* is almost universally settled, the negative obligation arising from it is far from it.

Given this, and the contours drawn out by national courts while deciding issues of *kompetenz*, this principle by itself seems insufficient to stand in the way of anti-arbitration injunctions. This is because, following the opinion in *Dallah* v. *Pakistan*, the power of the arbitrator is one of convenience and not one which weighs on a reviewing court.[110] Further, Prof. Gary Born has opined that it would be

[106] A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386 (India) (the court has specifically affirmed the passage pointed out in note 99).
[107] NALCO Ltd. v. Subhash Infra Engineers (P) Ltd., (2020) 15 SCC 557 (India).
[108] Booz Allen v. SBI Home Finance Ltd., (2011) 5 SCC 532 (India).
[109] *See* discussion in the previous part.
[110] Dallah v. Pakistan, [2010] UKSC 46.

difficult to consider a situation where it would be illegitimate for a court to enjoin an arbitration over which it has jurisdiction, where it can see apparent legal deficiencies.[111]

It must also be considered that neither the Model Law nor the New York Convention, actually mention any negative *kompetenz-kompetenz* principle. Lastly, Brekoulakis has argued, which the author considers an appropriate view in light of the present jurisprudence, that the negative obligation itself should be controlled. This is because consent is the bedrock of commercial arbitration, and compelling the parties to move to arbitration for the determination of jurisdiction (which is again reviewable) where it does not exist undermines that requirement.[112] Therefore, where the arbitration agreement itself is improper, void, impossible, or not in existence, negative *kompetenz-kompetenz* cannot be used to restrict the courts' power.

V. Obligations of Comity: The Structure of the New York Convention

It has been previously argued that anti-arbitration injunctions to foreign arbitrations should be allowed since the law governing the arbitration agreement may differ from the law of the seat.[113] Further, Article II of the New York Convention does not place a seat requirement on the recognition of arbitration agreements, which would prevent the unnecessary exercise of this authority.[114]

As regards the first argument, the law of the arbitration agreement may be different from that of the seat.[115] However, this does not take away the jurisdiction of the seat of arbitration. Merely because an international arbitration involves different laws, does not mean that different courts would exercise jurisdiction of the same proceedings.[116]

The second argument, on the other hand, requires further analysis. Contrary to what the argument claims, where the power to enjoin arbitrations has been derived from the inherent powers of a court, such a power may not be restricted by the determination of whether the court is the natural forum for the resolution of the dispute.[117] Further, the general structure of the New York Convention would prevent a national court from interfering with other courts from fulfilling their obligations under the Convention.

Prof. Born argues that the New York Convention places an implicit obligation on States to not interfere with other States' fulfilment of their own obligations under the Convention.[118] This also finds

111 BORN, *supra* note 11.
112 Stavros Brekoulakis, *supra* note 81.
113 Bansal & Agarwal, *supra* note 52.
114 *Ibid.* ("the safeguard against such a situation is present in Article II(3) itself. Article II(3) refers to a Court 'seized of an action' which may be the subject matter of an arbitration agreement. A determination on whether a court is 'seized of an action' would be made under the domestic law of the concerned court, which would preclude such court from exercising jurisdiction over mattes wholly unconnected with the country of such court.").
115 *See* Kabab-Ji SAL v. Kout Food Group, [2021] UKSC 48.
116 *See* Union of India v. McDonnel Douglas Corporation, [1993] 2 Lloyd's Rep. 48; *see also* Shashoua & Ors. v. Sharma, [2009] EWHC 957 (Comm), [2009] 1 C.L.C. 716 (An English Court was held to have sole supervisory jurisdiction where contract was governed by Indian law. This was because the seat of arbitration was London).
117 *See* Sabbagh v. Khoury, [2019] EWCA Civ 1219.
118 BORN, *supra* note 11, at 1415-1419.

support in Swanson's arguments against extra-territorial anti-suit injunctions. According to him, considerations of comity obligate the national court to pay deference to other states' laws, and the international legal system.[119] The New York Convention does not provide for the extra-territorial application of any state laws. The opinion of the United States District Court for the Southern District of New York in *URS* v. *Development & Reconstruction of Beirut* illustrates that comity can serve as a tool to restrict anti-arbitration injunctions that arise from a foreign seat. The Court observed that the only time a "court of secondary jurisdiction" could interfere with the arbitral process was at the stage of enforcement.[120]

This is also in line with the general proposition of the Seat Theory. Certain national courts, including those of England[121] and India,[122] have affirmed that the seat is the juridical centre of the arbitration. A seat provides exclusive supervisory jurisdiction over the arbitration to the courts situated therein. While the seat is a reference to a geographical place, it is a term that denotes a legal meaning that is unconnected with the physical place where the proceedings are held.[123] It is treated as an exclusive jurisdiction clause.[124] Therefore, when an English Court enjoins an arbitration (suppose it is seated in New Delhi), it violates the basic principle that only the court at the seat must decide.

Even the non-existence of an arbitration agreement would not be a ground to enjoin a foreign arbitration. This, again, must be left to the courts at the seat. International comity demands deference to the legal system of other states. By stepping over its own jurisdictional limit, an enjoining court is likely to step over the authority of other national courts. Further, the laws relating to the existence and enforceability of arbitration agreements may differ across jurisdictions. A subject matter considered arbitrable in England may not be so considered in India, and vice versa.

As an illustration, English Courts[125] have refused to apply the 'group of companies' doctrine, laid out initially in *Dow Chemicals* v. *Sant Gobain*.[126] However, Indian Courts have wholeheartedly accepted it.[127] Therefore, if three entities, X, A, and B (who is a subsidiary of B) enter into a composite transaction within the meaning of the group of companies doctrine.[128] However, X only has a Mumbai-seated arbitration agreement with A. An English Court would understand that no arbitration agreement exists between A and C, while an Indian Court may reach a different conclusion.

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119 Steven R Swanson, *Antisuit Injunctions in Support of International Arbitration*, 81 TUL L. REV. 395 (2006).

120 URS Corp. v. Lebanese Co., 512 F. Supp. 2d 199 (D. Del. 2007); *see also* Richard Garnett, *Anti-arbitration injunctions: walking the tightrope*, 36 ARB. INT'L 349 (2020).

121 *See* Star Shipping AS v. China National Foreign Trade Transp. Corp [1993] 2 Lloyd's Rep. 445.

122 *See* BALCO v Kaiser Aluminium, (2012) 9 SCC 552 (India).

123 PT Garuda Indonesia v Birgen Air [2002] SGCA 12; Union of India v. McDonnell Douglas Corporation [1993] 2 Lloyd's Rep 48.

124 *Ibid.*

125 Peterson Farms Inc v. C & M Farming Ltd [2004] EWHC 121 (Comm); Sarita Patil Woolhouse, *Group of Companies Doctrine and English Arbitration Law*, 20(4) ARB. INT'L 435 (2004).

126 Dow Chemical and others v. Isover Saint Gobain, ICC Award No. 4131, YCA 1984, 131.

127 Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc, (2013) 1 SCC 641 (India); Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678 (India); MTNL v. Canara Bank, (2020) 12 SCC 767 (India).

128 Please assume, for the purpose of this example, that whatever the exact characteristics of the transaction, it qualifies under the Group of Companies Doctrine such that an arbitration agreement between A and B can also compel C to arbitrate.

In the case above, one of two situations can take place where B approaches the English courts seeking an anti-arbitration injunction against X. First, the Court grants it, ruling that compelling arbitration where no valid agreement exists would be vexatious. Second, the Court refuses to grant it, reasoning either that the law at the seat recognises such arbitration agreements, or that the agreement passes an *ex facie* analysis considering the Indian position.

Both these conclusions are contrary to international comity and the seat theory. At the First, the Court would simply ignore the purported choice of the parties to arbitrate in India, and ignore the Indian courts' jurisdiction over the dispute. Enjoining the proceedings, would hinder Indian courts' ability to meet their obligation to enforce arbitration agreements. The second conclusion would also be undesirable because then the English Court would effectively rule over principles of Indian law, effectively acting like a court for that duration.

Therefore, especially considering the Seat theory, the authority to enjoin foreign arbitrations should not exist, since even the exercise of denying such injunctions would amount to overstepping the boundaries of the seat.

Certain jurisdictions have been reticent to adopt the Seat theory. However, even "delocalisation" does not provide authority to enjoin foreign proceedings. On the contrary, this principle restricts curial authority to interfere before the stage of enforcement. For instance, the Paris Cour D'appel in *Gotaverken Arendal AB* v. *Libyan General National Maritime Transport Co,* held that international arbitration is not integrated into the legal system of any state, and should be controlled by the jurisdiction through which enforcement is sought.[129] Similarly, the Cour de Cassation affirmed that an arbitral award would remain in existence even if it has been set aside, and should be reviewed independently by the enforcing court.[130]

Therefore, it is argued that the restriction on curial authority in a delocalised system is so high that a question of enjoining arbitrations, even those at the "seat" of arbitration, would not arise. The same is reflected in French Courts' subservience to negative *kompetenz-kompetenz* (discussed above). It is argued this stems from the understanding that curial intervention should not even be considered, except by an enforcing court.

VI. Resisting Anti-Arbitration Injunctions

Thus far, the article has discussed the validity of anti-arbitration injunctions issued on foreign seated arbitration. Despite the case made out against the validity of anti-arbitration injunctions, both in this article and by earlier works, national courts have attempted to injunct arbitral proceedings. A natural consequence of such injunctions is that they create tension between arbitral tribunals and national

[129] Gotaverken Arendal AB v. Libyan General National Maritime Transport Co, Cour d'Appel de Paris, F 9224 of 1980, Revue critique de droit international privé 1980, 763.

[130] Hilmarton Ltd v, Omnium de Traitement et de Valorisation, Cour de Cassation 1997; Putrabali v. Rena, Cour de Cassation, June 29, 2007; *See* Masood Ahmed, *The Influence of the Delocalisation and Seat Theories upon Judicial Attitudes Towards International Commercial Arbitration*, 77(4) INT'L J. ARB. MED. DISP. MGMT. 406 (2011).

courts.[131] Arbitral tribunals, on their part, have resisted such injunctions and have continued proceedings regardless.[132]

A key argument raised by an ICC tribunal, which sought to resist an anti-arbitration injunction issued by the Supreme Court at the seat of arbitration was that an international arbitration tribunal is not akin to a state organ.[133] Rather, the tribunal's authority comes from the agreement of the parties, which it is bound to enforce. Further, accepting a court injunction would have, according to the tribunal, amounted to dereliction of its contractual duty to resolve the dispute before it.[134] This is also shown in the International Convention on the Settlement of Disputes Between States and Nationals of Other States ["**ICSID**"] Award in *Saipem* v. *Bangladesh*, ["**Saipen**"] where the Tribunal approved an earlier ICC tribunal's decision in refusing to accede to an anti-arbitration injunction issued by the High Court of Dhaka on the same grounds.[135] The Saipem tribunal took matters one step further. It declared that if Saipem, who was aggrieved by the injunction, could establish that the anti-arbitration injunction had caused damages, the injunction would be considered expropriation under the ICSID.[136]

Another strand of resistance is visible in *Himpurna* v. *Indonesia*, where the tribunal resisted an anti-arbitration injunction issued by Seat Courts. The Supreme Court of Indonesia, which was the court at the seat, attempted to enjoin the arbitral proceedings. The tribunal simply responded by shifting the arbitral seat from Kuala Lumpur to London and continued proceedings.[137] It should be noted that this approach, is in line with the arguments made in the article against enjoining foreign arbitrations. This is because the move from Indonesia to England could only have been considered effective by the tribunal if it thought that a London seated arbitration did not have to obey Indonesian courts.

From this section, it is clear that arbitral tribunals have not always acceded to injunctions. However, such resistance may ultimately prove futile. The reneging party, as discussed earlier, also has the option to resist the enforcement of the arbitral award.

Per the New York Convention, an arbitral award can be refused enforced if it conflicts with the public policy of the enforcing state.[138] The same, of course, is mirrored in a number of national arbitration laws.[139]

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131 Tying- Wei Chiang, *Anti-Arbitration Injunctions in Investment Arbitration: Lessons Learnt from the India v. Vodafone Case*, 11 CONTEMP. ASIA ARB. J. 251 (2018).

132 BORN, *supra* note 11, at 1420-1421.

133 S v. State X, Award (Dec. 7, 2001), ICC Case No. 10623.

134 *Ibid.*

135 Saipem S. Pa v. People's Republic of Bangladesh, Award on Jurisdiction and Recommendation on Provisional Measures, ICSID Case No. ARB/05/07.

136 *Id.*, ¶¶ 132-134.

137 Himpurna Cal. Energy Ltd v. Indonesia, Interim Award & Final Award in Ad Hoc Case of Sept. 26, 1999 & Oct. 16, 1999, XXV Y.B. COMM. ARB. 109, 110 (2000).

138 New York Convention, art. V(2)(b).

139 *See* Arbitration & Conciliation Act, No. 26 of 1996 (India), §§ 34(2)(b)(ii), 48(2)(b); English Arbitration Act, 1996, cl. 23, § 68(2)(g); French Code of Civil Procedure, art. 1514; *see* Admart AG v. Stephen & Mary Birch Found., Inc., 457 F.3d 302, 307 (3d Cir. 2006); interestingly, even while the US FAA does not contain an explicit public policy exception, the US has acceded to the New York Convention and US Courts have interpreted and "strictly enforced" Article V.

In the Indian context, the Supreme Court in *Renusagar Power* v. *General Electric*[140] ["**Renusagar**"] affirmed the public policy ground for the enforcement of foreign awards. The Court gave a restrictive definition to public policy, which must be interpreted as "*fundamental policy of Indian law*"[141] This is retained in current jurisprudence and is reflected in the current form of section 48(2)(b) of the ACA.[142] According to the Court in Renusagar, any award rendered in violation of court orders would violate the fundamental policy of Indian law.

Therefore, if an arbitral tribunal continues with the proceedings despite the imposition of an anti-arbitration injunction, it would face the risk of being rendered unenforceable at the post-award stage. However, this dictum has not been universally followed in practice. Notably, the Calcutta High Court in *Devi Resources* v. *Ambo International* ["**Devi Resources**"] enforced an arbitral award made in violation of an interim arbitration injunction.[143] In furtherance of its jurisdiction the Court had restrained the Indian party from pursuing a foreign seated arbitration.[144] However, the Tribunal continued the arbitration nonetheless. Further, the award was issued while the injunction was still operating. However, the Calcutta High Court did not stop the enforcement of the award because it reasoned that the order for injunction was not against the Tribunal, but against the Indian party personally. This case, it is argued, reveals the unnecessarily adverse impact of anti-arbitration injunctions against foreign seated tribunals. First, the court, as in Devi Resources, would not be able to restrain the tribunal, but only the party from proceeding with the arbitration. Second, it shows that the effect of anti-arbitration injunctions is hollow – so much so that arbitrations tribunals can effectively resist an interim injunction, carry out proceedings to the prejudice of one party, and still get the award enforced.[145]

VII. Conclusion

The article has, thus far, analysed the validity of anti-arbitration injunctions issued to enjoin a foreign international commercial arbitration. It stands to reason that courts are within their powers to injunct arbitrations taking place in their jurisdictions, provided the purported arbitration agreement does not meet the standards of Article II of the Convention. While a tribunal has the power to judge its validity, the consensus is absent as to whether this authority prevents a court from doing the same. On the other hand, a limited curial power of "first-look" has emerged as the standard.

Therefore, while anti-arbitration injunctions are not themselves invalid, they certainly cannot carry an extra-national application. Attempting to enjoin foreign-seated tribunals interferes with the

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140 Renusagar Power Co Ltd v. General Electric Co, 1994 Supp (1) SCC 644 (India).

141 *Id.* ¶ 85.

142 Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1 (India); *see also* Arbitration & Conciliation Act, No. 26 of 1996 (India), § 48(2)(b) (Proviso).

143 Devi Resources Limited v. Ambo Exports Limited, 2019 SCC Online Cal 7774 (India).

144 *See* Modi Entertainment Network v. WSG Cricket Pte Ltd, (2003) 4 SCC 341 (India); here, the court had utilised principles which arise from anti-suit injunctions, which empower an Indian Court restrain only persons over which the court has personal jurisdiction from pursuing litigation before foreign courts.

145 See Saarthak Jain and Kashish Makkar, *The dilution of interim anti-arbitration injunctions in Devi Resources: pro-enforcement approach gone too far?*, 36(2) ARB. INT'L 297 (2020).

jurisdiction of national courts and prevents other states from fulfilling their obligations under the New York Convention.

Lastly, this article has also briefly discussed how anti-arbitration injunctions against foreign/international arbitrations may not be effective. Such injunctions may be resisted successfully, may qualify as expropriation under international law (ICSID), and may also prove to be extremely difficult to enforce.

Therefore, such injunctions, it has been argued, are needlessly disruptive and *sans* jurisdiction to the parties' intent and the basic principles of international arbitration. This makes it incompatible with the modern system of international commercial arbitration.