ANTI-ARBITRATION INJUNCTION IN INTERNATIONAL ARBITRATIONS IN INDIA- A HINDRANCE TO DISPUTE RESOLUTION?

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Introduction to Anti-Arbitration Injunction

Alternative Dispute Resolution mechanisms, especially arbitration have become one of the most sought-after and steadily debated mechanisms of dispute resolution not only because it has added benefits but also because it is a new-to-be-explored field which jurists would like to travel to establish it as a successful method of dispute resolution.

This growing preference towards arbitration has been quite vividly visible in the Indian legal diaspora, and it is needlessly reiterated that it has become quite acclaimed that the main driving factor for this change of attitude was due to the BALCO judgment[1]. Besides, even the amendment to Section 12 of the Commercial Division and Commercial Appellate Division of High Courts Act, 2015[2] is indicative of this growing streak by introducing a pre-litigation mandatory ADR step for dispute resolution. The increase in the number of arbitration clauses in contracts, especially those of commercial nature nails down the assertion that arbitration is the new vogue of the century.

However, the popularity of the mechanism has also grown especially among jurists because it has opened Pandora's box of new and novel questions of law. It is especially so as it not only defies the age-old concepts of jurisdiction but also with the increasing amount of flexibility in the mechanism challenges the concepts of the finality of judgment (if any). A perfect example of these issues is the complex yet engrossing concept of the anti-arbitration injunction. It has challenged the very routes and mechanisms of the jurisdiction of any judicial tribunal or any tribunal with the powers of settling a dispute. The status of arbitration tribunals has been fluctuating between a judicial body and just a tribunal, according to jurisdictions. In most of the places they get the status

[1] *Bharat Aluminum Company Limited ("BALCO") v Kaiser Aluminum Technical Service, Inc* [2012] 9 SCC 648.
[2] Commercial Division and Commercial Appellate Division of High Courts Act 2015, s 12.

of an administrative tribunal thereby being subordinate to the overview of courts of law[3], and in a few other places, they function as a judicial tribunal having the competence to rule on their jurisdiction[4]. It is this swinging status and the uncertainty with respect to the source of the jurisdiction of the tribunals that have arisen the jurisprudential dilemma concerning anti-arbitration injunctions (AAI).

This research paper intends to explore the complex and multidisciplinary approach towards decoding the status of granting AAIs in India against international arbitrations, both International Commercial Arbitration (ICA) and International Investment Arbitration (IIA). The analysis done in this paper focuses on the effect of AAI on the concerns about sources of the jurisdiction in an arbitration, the status of arbitration, the efficiency of dispute resolution in India internationally, and finally its tacit effect on the commercial market development of India in terms of its ease of doing business rank.

Status of an Arbitral Tribunal in India

(i) Legislative History

A perusal of the general provisions such as Sections 11, 12, 13 and specific ones such as s. 16 to s. 19 of the *Arbitration Act of 1940*[5] indicates that an arbitral tribunal is subordinate to a civil court in terms of judicial status. The independence of an arbitral proceeding has never been unlimited. Multiple examples are: the validity of an arbitral proceeding can be assessed by a court[6], the appointment of arbitrators by the Chief Justice or such appointed institution is final[7], the arbitral tribunal determining its jurisdiction or admissibility of issues, or the validity of a contract is not final[8].

A bare reading of S.16 (1) with S. 42 of the Act would suggest that the jurisdiction of a court concerning its power over an arbitration agreement is inherent whereas that of an arbitral tribunal is not since the word used in S. 16(1) is "**may**".

Even the Apex court has shed light on this point distinguishing between the languages used in S. 16 of the 1996 Act and Article 21 of the *UNCITRAL Rules on Arbitration* which says that the "Arbitral Tribunal shall determine its jurisdiction"[9]. The court clarified the stance that "S. 16 does

[3] UK, India, Singapore
[4] France, Kazakstan, Sweden
[5] Arbitration Act 1940, s 16-19.
[6] ibid at s 31(2).
[7] ibid at s 8(2).
[8] ibid at s 16(6).
[9] *Wellington Associates Ltd. v Kirit Mehta* [2000] 4 SCC 272.

not declare that except the Arbitral Tribunal, none else can determine such a question"[10]. This shows the clear departure from the *kompetenz-kompetenz* principle by the Indian Legislative system.[11]

Further, the Apex court has acknowledged the legislative approach to prevent the granting of exclusive jurisdiction under the *kompetenz-kompetenz* principle to arbitral tribunals. The apex court in the *SBP case*[12] also reiterated that the finality of determination of an issue is given to a court in India and such issues cannot be reviewed or challenged or discussed before an arbitral tribunal. Therefore, one can easily conclude that the international principle of *kompetenz-kompetenz* is not exclusively or dominantly applicable.

(ii) Current Position of Law

However, India has come a long way from the 1940 Act whereby the judicial intervention has been limited by the legislation and the S. 5 of the 1996 Act stands as clear testimony to that fact. The use of Anti-Arbitration Injunction however carves out an exception to this clause whereby among many other courts, the Calcutta High Court[13] while devising the grounds for granting AAI has formulated grounds going beyond the strict formulation of the Act. This is proved by including the third ground for granting AAI being that the arbitration proceeding is "*oppressive or vexatious or unconscionable*"[14], which are vague grounds not defined within the Act.

This paper seeks to analyze whether the same stance applies to international arbitrations taking place inside and outside of India or not.

The status of the arbitral tribunal in India is determined by Part I of the Arbitration Act, which as per s. 2(2) of the 1996 Act[15] applies to all international arbitrations with their *place of arbitration* in India. Further, this part applies to all arbitrations as long as it is not in contravention with any other foreign law, which is the *lex arbitri* or any international agreement.[16]

But the term "*place*" used in the aforementioned section has created confusion because the place of arbitration can be in multiple places and it is a broad term that can be decided by the parties apart from "*venue*" which is decided by the arbitration agreement and which determines the curial law. This confusion was clarified by the apex court in the landmark BALCO judgment[17], whereby

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[10] ibid [15].
[11] *Chloro Controls India (P) India Ltd. v Severn Trent Water Purification Inc.* [2013] 1 SCC 641.
[12] *S.B.P. & Co v Patel Engineering Ltd. & Another* [2008] 5 SCC 681.
[13] *Board of Trustees of the Port of Kolkata v Louis Dreyfus Armatures SAS* [2014] SCC OnLine Cal 17695.
[14] ibid.
[15] Arbitration and Conciliation Act 1996, s 2(2).
[16] ibid at s 2(4), (5).
[17] *Bharat Aluminum Company Limited ("BALCO") v Kaiser Aluminum Technical Service, Inc* [2012] 9 SCC 648.

it held that the Arbitration Act, especially Part I of it, will act as the curial law only when the venue of the arbitration is chosen to be India and not when the arbitration merely takes place in India.

But this judgment has had bigger ramifications in terms of the source of the jurisdiction of the arbitration. This is especially so when the source of judicial intervention is as broadly defined as under S. 42 of the 1996 Act as that will determine the status of an international arbitral tribunal with its venue in India. Further, this in turn will determine the viability and legality of an AAI being granted against such a tribunal by an Indian Court. In this background, there can be three possible scenarios:

1) The first case can be where the venue for international arbitration is outside India. In such a scenario, Part I of the Act is not applicable hence the foreign tribunal gains the status of a judicial tribunal, whose award is treated as a foreign award[18], like any other award given by a foreign court. Therefore, there is no distinction between the status of an arbitral tribunal and a court, and thus the normal comity obligations become applicable.
2) The second case can be one where the venue of the international arbitration is inside India. According to S. 2(2) of the Act, Part I of the 1996 Act becomes applicable making the award given by such a tribunal as a domestic award under S. 2(7) of the Act and subjected to the repeated judicial interventions as shown above.

This in turn shows the difference in the status of an arbitral tribunal which will be further explained in this article under two broad categories of international arbitration- International Commercial Arbitration (ICA) and International Investment Arbitration (IIA).

It is because of these differences in the two scenarios which not only, hampers the growth of international arbitration in India but also, the problem arising out of AAI. As it has been held that AAI can be given in the second scenario but not in the first.[19] This in turn raises the question as to what is the source for granting an AAI, the inherent jurisdiction of a civil court under the Civil Procedure Code[20] or under the S. 9 of the Arbitration Act, 1996? Herein the former allows the introduction of the *forum non-conveniens* principle under private international law while the latter does not because of its strict construction and because of S. 42 of the 1996 Act.

International Commercial Arbitration in India

[18] Arbitration and Conciliation Act 1996, s 44.
[19] *BALCO* (n 17).
[20] Civil Procedure Code 1908, s 9.

The Indian Arbitration Act as portrayed above lays down the law that in cases of the second scenario, with the venue or seat of the arbitration being in India, the Indian Law will be applicable as the arbitration law and the Indian Court will have jurisdiction the moment a party applies to the court for granting any interim measures, wherein we focus on AAI only.[21]

This proposition that the substantive law of arbitration is of the same nation as the one which has the seat of the arbitration, is taken as a customary practice.[22] Even international arbitral procedures like the Geneva Protocol states that "The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by **the will of the parties and by the law of the country in whose territory the arbitration takes place.**"[23] The Indian Apex Court[24] has also accepted this proposition based on prior Indian authorities that if the juridical seat of an arbitration is given to be in India by a consensus of the parties through the arbitration agreement, then automatically the *lex arbitri* applicable is the Indian arbitration law.[25] This practice in turn respects these two following basic principles of law:

1. The source of jurisdiction in an arbitration is the arbitration agreement and hence the consensus ad idem of the parties, which determines the *lex arbitri* and the curial law.
2. Secondly that "*Ignorantia juris non-excusat or ignorantia legis neminem excusat*". The moment the parties by consensus choose to have the seat of arbitration in India, it is expected that they will know what law will apply to them.[26]

Hence, the logical conclusion which follows and which has been reinstated by the BALCO judgment is that Part I of the Act is applicable only when the seat of arbitration is in India and otherwise not.

But this conclusion in turn raises questions as to the validity of an anti-arbitration injunction given by a domestic court in international commercial arbitration, with its seat in India. Though, at the outset, it is much required to appreciate that the Indian courts have been cautious enough to deny anti-arbitration injunctions in ICAs, the best example being the case of *McDonald's India Pvt Ltd v Mr. Vikram Bakshi*[27]. The Apex Court expressed the word of caution clearly as follows:

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[21] Arbitration and Conciliation Act 1996, s 42.
[22] Alan Redfern & Martin Hunter, et. al., *Redfern and Hunter on International Arbitration* (3rd ed, 2009) para 3.51.
[23] Geneva Protocol on Arbitration Clauses 1923 (League of Nations, Sept 24, 1923), art 2.
[24] *Sumitomo Heavy Industries Ltd. v ONGC Ltd. and Others* [2010] 11 SCC 296; *Union of India v Reliance Industries Limited and Others* [2015] 10 SCC 213.
[25] *Union of India v Hardy Exploration and Production Industries Inc.* [2018] 7 SCC 374.
[26] ibid [34].
[27] *McDonald's India Pvt Ltd v Mr Vikram Bakshi* FAO (OS) 9/2015 and CM No. 326/2015 (Del HC, July 21, 2016).

> "*While courts in India may have the power to injunct arbitration proceedings, they must exercise that power rarely and only on principles analogous to those found in sections 8 and 45, as the case may be, of the 1996 Act.*"

This approach has been uniformly followed in other cases by the High Courts too.[28] This is due to the pro-arbitration approach taken by the Indian legislative and the judiciary. The shift from the 1940 Act to the 1996 Act and the approach in the Reliance Industries (II) case[29] and SBP Case[30], to the BALCO judgment[31], is testimony to that extent. However, despite this clarity of approach towards determining the source of the jurisdiction of an Indian Court in ICAs, the source of jurisdiction for AAIs in ICAs is still undetermined. It is this point that will be further elaborated henceforth.

An analysis of Indian Cases which have discussed the concept of AAIs in ICAs would reveal that there are broadly two grounds based on which the Indian courts assert their right to issue an AAI in an ICA with its seat in India:

- **Inherent Jurisdiction of the court under the CPC**

It has been a well-debated issue in Indian courts as to what is their source of jurisdiction in the case of ICAs. The prevalent view had been that the inherent jurisdiction of the court is invoked because the cause of action arose in India itself.[32] This cause of action can be any act substantive to arbitration or it can be the arbitration agreement itself. But this argument was finally overturned by the Apex Court[33] itself acknowledging the fact that such an argument would not apply when the agreement has been entered outside India and the performance of the contract was also outside India, but the seat of arbitration was chosen to be India. This is because the courts have had to abide by the thumb rule principle that the *lex arbitri* follows the seat. So, the moment the seat of arbitration is chosen to be India Part I of the 1996 Act becomes applicable *ipso jure*.

Hence, the question then arises, as to what do we mean by *lex arbitri*? Does it include the Arbitration Act of 1996 only? Or does it include the entire legal regime of India including the

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[28] *The Board of Trustees of the Port of Kolkata v Louis Dreyfus Armatures SAS* [2014] SCC OnLine Cal 17695; *Enercon (India) Pvt. Ltd. v Enrecon (GmBH)* [2014] 5 SCC 1.
[29] *Union of India v Reliance Industries* [2015] 10 SCC 213.
[30] *SBP & Co. v Patel Engineering Ltd. & Anr.* [2005] 8 SCC 618.
[31] *BALCO* (n 17).
[32] *Oxygen Ltd. v National Oxygen Ltd.* [1990] (I) Calcutta Law Times 275; *Mikuni Corporation v UCAL Fuel Systems Limited, Carburettors Limited & Siemens VDO Automotive* [2008] (I) Arbitration Law Reporter 503 (Delhi); *Tractoroexport, Moscow v Tarapore & Company* [1969] 3 SCC 562; *Oil and National Gas Commission v Western Company of North America* [1987] 1 SCC 496; *Modi Entertainment Network v W.S.G. Cricket Pte Ltd.* [2003] 4 SCC 341.
[33] *BALCO* (n 17) [95]; *Gujarat NRE Coke v Gregarious Estate* [2013] SCC OnLine Cal 1177.

inherent powers of a civil court guaranteed under S. 9 and Order 39 of the Civil Procedure Code, 1908?

This, in turn, brings us back to the classic case of *Smith Ltd v H International*[34], where the English Court explained the content and nature of lex arbitri, which is "*a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration.*"[35] Redfern and Hunter in their book further elaborate on this definition and list down what are the contents of lex arbitri according to general judicial conduct globally. In both situations, it has been agreed that issuing interim measures and determining the arbitrability of substantive issues in dispute are part of lex arbitri.[36] Further, Redfern and Hunter clearly distinguish that the lex arbitri may be and can be completely different from the law governing the substantive issues in arbitration.[37]

This discussion, therefore, clarifies the point that the Arbitration Act of 1996 falls within the definition of lex arbitri, and all other substantive laws including the CPC, 1908 fall under the definition of law governing the substantive issues in dispute. The parties to arbitrate have the liberty to decide the applicability of both of these laws. In the former case, this liberty is exercised by choosing the seat of arbitration and in the latter case by defining the Applicable Law in the arbitration agreement.[38] This proposition can also be substantiated by the "*real and closest connection*" test often applied by English Courts wherein, it makes more legal sense to abide by that law where the cause of action arose or where the performance of an act was carried out rather than a foreign lex arbitri which is determined only by a seat of the arbitration often because it is neutral.[39]

Therefore, if the Indian Courts are to deliver an anti-arbitration injunction, then the same has to be under the Arbitration Act, which is the *lex arbitri*. This position has been settled by the Apex Court[40] by clearly defining that the power to grant an AAI or any other interim measure cannot flow from S. 9 of the CPC, 1908. Again, the Calcutta High Court[41] reiterated that in the case of an ICA, the inherent civil court jurisdiction can only determine the factual existence of an arbitration agreement, not any issues of legality and disputes contained in it.

Therefore, it is undeniably true that the source of AAI in an ICA is the Arbitration Act of 1996, and hence the consensus of the parties is that the venue of an ICA will be India. But then comes

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[34] *Smith Ltd v H International* [1991] 2 Lloyd's Rep 127 [130].
[35] Alan Redfern (n 22) p 3.46.
[36] ibid; *Smith Ltd v H International* [1991] 2 Lloyd's Rep 127 [130].
[37] *Compagnie Tunisienne de Navigation SA v Compagnie d'Armament Maritime SA* [1971] AC 572, 604; Alan Redfern (n 22) p 3.38.
[38] Arbitration and Conciliation Act 1996, s 28(1)(b).
[39] [2012] EWCA Civ 638 at [52] per Lord Neuberger of Abbotsbury MR.
[40] *Antrix v Devas* [2018] SCC OnLine Del 9338.
[41] *Nicco Corporation Ltd. v Prysmian Cavie Systemi Energia* GA No. 678 of 2009, CS No. 69 of 2009 (Cal HC 2009).

the question as to whether the 1996 Act provides such powers or defines the scope of such powers? Can the court determine the test and scope of an AAI under the Arbitration Act? All of these are sought to be answered in the following sub-topic.

- **Power to grant an AAI under the Arbitration Act, 1996**

A logical conclusion of the above discussion has been that the powers of an Indian Court in granting interim measures should be defined by the 1996 Act. But it has been the deviant approach of the Indian courts from this point that has raised issues as to the power of a court to determine the scope or test for granting an AAI. An example of the issue can be the following approach of the Calcutta High Court:[42]

> *"This Court should exercise its inherent jurisdiction to prevent abuse of process and grant an anti-arbitration injunction restraining Defendants from continuing with the arbitration proceedings*".

This brings us back to the question that, does the 1996 Act grant the power to an Indian Court to grant an injunction?

The fact that the source of the power to grant an AAI has to be derived from the act itself, is further reinstated by the wording of S. 5 of the Act, which clearly states that "*no judicial authority shall intervene except where so provided in this Part [Part I]*". The exclusivity of this section is guaranteed by the non-obstante clause used in the section, which in turn takes away the inherent powers under Sections 151and 9 of CPC, 1908, which is often cited as the source of the jurisdiction of Indian Courts in cases involving foreign individuals.[43]

Here it must be clarified that such a statement may invoke questions as to how can a legislation take away the inherent jurisdiction of any civil court including the High Courts and Supreme Court. This can be answered in two ways.

Firstly S. 9 of CPC, itself provides that the jurisdiction of civil courts can be barred expressly by law, which is done by S. 5 of the 1996 Act.

Secondly, the inherent constitutional powers under s. 151 can be barred when the court lacks jurisdiction, to begin with as it has been time and again reiterated that lack of jurisdiction strikes at the root of the justice delivery system. A general private international law would say that forum non-conveniens principle is the gateway for Indian Courts to use S. 151 jurisdiction even in foreign cases with the seat being in India. But the *lex arbitri* approach restricts the application of laws only

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[42] *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS* [2014] SCC OnLine Cal 17695.
[43] *World Sport Group (Mauritius) Limited v. MSM Satellite (Singapore) Pte Limited* [2014] 11 SCC 639.

to the 1996 Act and since a special law prevails over the general law, it is better to find the jurisdiction of courts under the 1996 Act.

Hence, now one may refer to S. 9 of the 1996 Act which provides the power to courts to grant interim measures like an AAI. A close look at S. 9(d) and especially S. 9(e) of the 1996 Act would suggest that the act itself provides wide powers to an Indian civil court to provide an anti-arbitration injunction based on justice and convenience. This in turn refutes the argument made in the case of *Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures* that: *"the Indian Arbitration Act does not confer any power on the Civil Court unlike the English Courts to interfere with foreign arbitration bypassing anti-arbitration injunction. It is submitted that Section 72 of the English Arbitration Act, 1996 empowers the Civil Court to decide whether an arbitration agreement is valid."* [44]

It is rather the Act itself that provides that the Indian Courts can provide any interim measure of protection that is just and convenient and for that matter make orders for any such proceeding before it. This subsection itself reinstates the S. 151 power residing with courts under CPC or the S. 9 power for lower civil courts. But one has to also confer special attention towards the words used in S. 9(e) of the 1996 Act, which says that such interim measures should be for the "*protection*" of the arbitration and therefore should be a decision that works favourably towards the arbitration keeping in mind its legality. This approach has been laid down in the Enrecon Case:[45]

> *"It is a well-recognized principle of arbitration jurisprudence in almost all the jurisdictions, especially those following the UNCITRAL Model Law that the courts play a supportive role in encouraging the arbitration to proceed rather than letting it come to a grinding halt. Another equally important principle recognized in almost all jurisdictions is the least intervention by the courts."*

However, it has been the third ground for issuing an injunction, which has been formulated by the Calcutta High Court[46] which calls for speculation of the term "interim measure of protection" used in S. 9(e) of the 1996 Act. The Court has stated that an AAI can be granted in an ICA if the proceeding is found to be "oppressive or vexatious or unconscionable". This ground stems from the public policy point of view, which is exerted by courts in an ICA. The fact that all of these must be considered in an ICA too with its venue in India, stems from the fact that such an ICA award is considered a domestic award for India[47] and it can be invalidated if it goes against the public policy of India.[48] However, in such cases, the Act defines the ambit of public policy which

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[44] *The Board of Trustees* (n 42).
[45] *Enercon (India) Pvt. Ltd. v Enrecon (GmBH)* [2014] 5 SCC 1.
[46] *The Board of Trustees* (n 42).
[47] Arbitration and Conciliation Act 1996, s 2(7).
[48] Arbitration and Conciliation Act 1996, s 34(2)(b)(ii).

is not so in the case of an AAI. Hence, it may be argued that the determination of what is oppressive or unconscionable based on public policy is way beyond the scope entailed in S. 9 of the 1996 Act, but the justification of this approach is way beyond the 1996 Act itself.

This point has been explained by Redfern and Hunter in the following words: "*In practice, every state reserves for itself, as a matter of public policy, what might perhaps be called a 'state monopoly' over certain types of dispute.*"[49] Therefore, it is the inherent sovereignty of a state from which this state monopoly of assertion of public policy arises, which has to be given its due. This is also due to the inherent principle of sovereign equality which is ingrained in any international transaction and is as well characterized as a basic principle of international law[50]. So, when parties choose India to be the seat of arbitration, it is expected that they submit to this sovereignty of the nation, which cannot be neglected or denied by the parties.

It is therefore only fitting that such an approach has been developed by the Indian Courts towards ICAs happening under Part I of the 1996 Act. However, the courts, as reiterated by the Apex Court time and again, have to be cautious while granting such AAIs in ICAs happening in India under Part I of the Act, and this caution should be exercised keeping in mind that the purpose of the supervisory jurisdiction of the courts over an arbitral tribunal is to protect the arbitration proceedings and ensure its smooth functioning.[51]

International Investment Arbitration in India

With India being within the top 10 countries for inbound FDI and amongst the first 20 for outbound flow of FDI[52], Indian courts are sure to face many cases on international investment arbitrations, and the case of *Union of India v. Vodafone Group Plc*[53]is the tip of the iceberg. The dilemma concerning the source of jurisdiction arises from the difference between international investment and commercial arbitrations, wherein the former is based on the state's reassurances and guarantees to a foreign investor based on a BIT and not on commercial contracts.[54]

A combined reading of sections 44 and 45 of the Arbitration Act 1996, that a domestic court has the power to issue a pre-arbitration injunction only if the dispute satisfies the definition of a

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[49] Alan Redfern (n 22) p 3.47.
[50] United Nations Charter, 1945, art 2.
[51] *McDonald's* (n 27).
[52] OECD, *FDI in Figures* (April 2020) <https://www.oecd.org/investment/FDI-in-Figures-April-2020.pdf/>.
[53] *Union of India v Vodafone Group Plc* [2017] SCC OnLine Del 9930.
[54] ibid [91].

commercial dispute[55] and the 'null-void-vexatious' test[56]. The term commercial dispute is inclusively defined under the Commercial Courts Act 2015 and the Government is empowered to notify what is meant by a commercial dispute[57], but it does not include an investment treaty that covers international obligations and protection of minimum standard of treatment of aliens over mere commercial arrangements.

Then the query arises that if jurisdiction can neither be found under Part I nor Part II of the 1996 Act, then does equity hold the key to this answer?

An injunction has always been viewed as an equitable remedy against proceedings that are oppressive, vexatious, or like abuse of process, and from there the courts derive their inherent jurisdiction.[58] In this regard, as argued in the Vodafone Group case, the reliance can be found in section 9 read with section 20 of CPC, 1908.[59] S. 9 places the power of equity in the hand of civil courts to try all such matters except those which are expressly barred.[60] This bar to civil court jurisdiction lies under s. 8 and 45 of the 1996 Act but with investment arbitration falling under neither of the parts, arguably the equity jurisdiction under CPC, 1908 is evoked.

But another side to the question is the landmark case of *Saipem v Bangladesh,* which established that judicial hurdles to access international tribunals under a BIT can lead to violation of investment protection and can be reviewable by the tribunal.[61] The Indian Courts have to be mindful of this international obligation under the BITs. But the counter-argument lies that Investment Tribunals have to rely on domestic courts for enforcement of awards, which are not covered under the New York Convention[62] because of the reservation made by India under Art. 1(3) that the Convention only applies to foreign commercial arbitrations. In such cases, Indian Courts can have leeway in granting injunctions indeed. But such leeway can be a double-edged sword as it will deter foreign investors from investing in India as well as invoke state responsibility claims by the investor-state against the host-state under diplomatic protection principles[63] as non-enforcement of such a foreign award can lead to strict violation of the BIT. Hence, as a whole, it is safe to conclude that the expanse of AAI in investment arbitrations based out of India is uncertain to date.

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[55] Commercial Courts Act 2015, s 2(1)(c).
[56] *Vidya Drolia v Durga Trading Corporation* [2021] 2 SCC 1.
[57] Commercial Courts Act 2015, s 2(1)(c).
[58] *British Carribean Bank Ltd v Attorney General of Belize* [2013] CCJ 4 (AJ).
[59] *Union of India v Vodafone Group Plc* [2017] SCC OnLine Del 9930 [66].
[60] Civil Procedure Code 1908, s 9.
[61] *Saipem S.p.A. v The People's Republic of Bangladesh* ICSID Case No. ARB/05/07.
[62] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, art 1(3).
[63] International Law Commission, Draft Articles on Diplomatic Protection (UNGA, Supp No. 10 (A/61/10)).

Conclusion

The concept and source of jurisdiction for issuing AAIs in India, to date remain an enigma among the High courts and various judgments of the Supreme Court. As long as this dilemma will remain the growth of India as a seat of arbitration will continue to be hindered. The development of law till the BALCO Judgment has helped in changing the approach towards a pro-arbitration approach wherein apart from extreme circumstances such injunctions should not be granted. Even though the expansive jurisdiction based on the power of equity is commonly observed in common law countries as against civil law countries, such power should be sparingly exercised to avoid frivolous litigation. The practice of filing for an injunction the moment a party issues a notice of arbitration should be discouraged by following the prima facie test wherein the balance of convenience test should be strictly followed. In this regard even if the court does not derive its power under s. 9 of the 1996 Act and the scheme of the 1996 Act then also once the tribunal is constituted the *kompetenz-kompetenz* principle should be observed and the powers under s. 17 of the 1996 Act should be respected. Accumulatively, a restrictive approach in granting AAI would favour the growth of India as a seat of international arbitration and even non-commercial arbitration.