

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed

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ARBITRAL TRIBUNALS' POWER TO GRANT ANTI-SUIT RELIEF: LIMITS OF TRIBUNAL AUTHORITY IN INTERNATIONAL ARBITRATION

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Abstract

An arbitration clause carries an unstated promise that neither side will take the dispute to court. That promise is often broken. A party unhappy with the arbitral route may start a suit in its own country, sometimes to slow things down, sometimes to gain leverage, and sometimes because it expects a better hearing there. Earlier, the only real remedy was to approach a court for an injunction against the other party. Now the request is increasingly made to the arbitrators themselves, who are asked to direct the party in breach to withdraw from the court case.

The first part of this paper asks whether arbitrators can make such an order at all. Their authority is normally said to flow from three places: the agreement to arbitrate, the arbitration law of the seat, and whatever institutional rules the parties have adopted. The 2006 revision of the UNCITRAL Model Law gives tribunals an express power, in Article 17(2)(b), to stop a party from conduct that would harm the arbitration. Indian law reaches a similar position through Section 17 of the 1996 Act, and after the 2015 amendment an interim order of the tribunal can be enforced in the same way as a court's order. Two decisions are examined in some detail. In *Gazprom* (2015), the European Court of Justice found nothing in the Brussels I Regulation that prevented an arbitral award from restraining court proceedings. In *Amazon v. Future Retail* (2021), the Supreme Court of India held that an emergency arbitrator's order could be enforced under the Act.

The second part deals with the limits on this power, which are significant. Arbitrators act only because the parties have consented to their authority. They cannot direct a court, they cannot bind outsiders to the arbitration agreement, and they have no machinery of their own to make a party obey. Respect for the jurisdiction of foreign courts adds a further restraint. The researcher concludes that relief of this kind from a tribunal is helpful but incomplete, and that it depends heavily on the support of national courts. Suggestions are offered for making the

power clearer in Indian legislation.

Keywords: Anti-Suit Injunction, Arbitral Tribunal, Interim Measures, Parallel Proceedings, Comity, International Arbitration, Section 17, Emergency Arbitrator, UNCITRAL Model Law.

1. INTRODUCTION

When two parties sign an arbitration clause, they agree on two things. The first is stated in the clause: disputes will go to arbitration. The second is not usually written down but follows from the first: neither party will take those disputes to a court. Courts in several countries now treat this second promise as a binding obligation.¹

In practice the promise is often broken. A party may file a suit in its own country on the very matters covered by the clause, sometimes to delay the arbitration, sometimes to put pressure on the other side, and sometimes because it believes the clause does not apply. The other party must then defend two cases at once and faces the risk of conflicting results. The traditional answer has been an anti-suit injunction from a court.² In recent years a different request has become common: the innocent party asks the arbitral tribunal itself to direct the other side to withdraw or stay the court case.

An arbitral tribunal, however, is a private body. It cannot punish for contempt and has no authority over persons who did not agree to arbitrate. Two questions therefore arise: whether the tribunal has the power to make such an order, and whether the order will have any real effect. Indian law gives only a partial answer. Section 17 of the Arbitration and Conciliation Act, 1996 ("the Act") allows a tribunal to grant interim injunctions, which since 2015 are enforceable like court orders, but it does not expressly mention restraining a party from litigating. The Act also gives no direct route for enforcing interim orders of a tribunal seated outside India.³ The study is doctrinal and is confined to commercial arbitration.

2. OBJECTIVE OF THE STUDY

The present study seeks to examine whether an arbitral tribunal can direct a party to withdraw or stay court proceedings brought in breach of an arbitration agreement, and how far such a direction can be effective. It examines the arbitration agreement, the law of the seat,

¹ Aggeliki Charis Compania Maritima SA v. Pagnan SpA (The Angelic Grace), [1995] 1 Lloyd's Rep 87 (CA); AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC, [2013] UKSC 35.

² Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd., (2003) 4 SCC 341.

³ Arbitration and Conciliation Act, 1996, ss. 2(2) and 17.

institutional rules, the Act and the decisions of Indian and foreign courts, and suggests reforms. The study proceeds on the hypothesis that a tribunal does have this power against a party to the arbitration agreement, but that its effectiveness depends largely on national courts. The specific objectives are examined in the following parts.

3. To Examine the Concept of Anti-Suit Relief and its Development in Court Practice

The first objective is to understand what anti-suit relief means and how courts have dealt with it. An anti-suit injunction is an order directing a party not to start, or not to continue, proceedings in another forum. It is addressed to the party, not to the other court; the foreign court is not told what to do.⁴ Related orders have grown around the same idea. An anti-arbitration injunction restrains a party from pursuing an arbitration, and an anti-enforcement injunction restrains a party from enforcing a foreign judgment. In arbitration, however, the most common request is the plain anti-suit order against a party that has sued in breach of the clause. Such relief protects the innocent party from duplicate costs and from the risk of conflicting decisions.

English courts grant such injunctions where foreign proceedings are vexatious or oppressive, and use the power with caution.⁵ Where the foreign case breaches an arbitration agreement, they take a firmer line, since the party is simply being held to its own promise.⁶ The UK Supreme Court has granted such relief in support of an arbitration seated abroad.⁷ The European Union takes a different view. The European Court of Justice held that a court of one Member State cannot restrain proceedings in another, even to protect an arbitration agreement.⁸ This is one reason why parties in Europe began asking tribunals for such relief.

In India, Section 41(b) of the Specific Relief Act, 1963 bars an injunction restraining a person from prosecuting proceedings in a court not subordinate to the court granting it.⁹ The bar concerns Indian courts, so Indian courts continue to restrain parties from foreign litigation. In *Oil and Natural Gas Commission v. Western Company of North America*, the Supreme Court restrained a party from pursuing proceedings in a United States court to enforce an award while

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

⁵ *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak*, [1987] AC 871 (PC).

⁶ *The Angelic Grace*, [1995] 1 Lloyd's Rep 87 (CA).

⁷ *UniCredit Bank GmbH v. RusChemAlliance LLC*, [2024] UKSC 30.

⁸ *Case C-159/02, Turner v. Grovit*, [2004] ECR I-3565; *Case C-185/07, Allianz SpA v. West Tankers Inc.*, [2009] ECR I-663.

⁹ *Cotton Corporation of India Ltd. v. United Industrial Bank Ltd.*, (1983) 4 SCC 625.

its challenge was pending in India.¹⁰ In *Modi Entertainment*, the Court held that the defendant must be amenable to the court's jurisdiction, that refusal must defeat the ends of justice, and that comity must be kept in mind. By contrast, Indian courts are slow to restrain arbitrations. In *World Sport Group v. MSM Satellite*, the Supreme Court set aside an injunction against a foreign-seated arbitration and confined the court's inquiry to whether the arbitration agreement is null and void, inoperative or incapable of being performed under Section 45.¹¹ Earlier, in *Kvaerner Cementation India Ltd. v. Bajranglal Agarwal*, it had held that a civil court cannot decide a challenge to the tribunal's jurisdiction, since Section 16 leaves that question to the tribunal.¹² The general direction of Indian law is therefore supportive of arbitration.

4. To Identify the Sources of the Arbitral Tribunal's Power to Grant Anti-Suit Relief

The second objective is to identify where the tribunal's power comes from. It is normally traced to three sources: the arbitration agreement, the law of the seat and the institutional rules chosen by the parties.

Every power of a tribunal begins with the consent of the parties, and its jurisdiction is confined to the four corners of the agreement.¹³ If the agreement carries an implied promise not to sue, a dispute over its breach is itself a dispute under the agreement, and the tribunal is the natural forum to decide it. An order to withdraw a suit is then simply an order to perform a contractual obligation.

The UNCITRAL Model Law, as adopted in 1985, allowed interim measures only "in respect of the subject-matter of the dispute", which did not easily cover a restraint on foreign litigation. The 2006 revision changed this. Article 17(2)(b) now allows the tribunal to order a party to refrain from action likely to cause harm or prejudice to the arbitral process itself.¹⁴ Court proceedings in breach of the arbitration agreement are an obvious example. The revision also lays down conditions for granting interim measures in Article 17A, namely that damages would not be an adequate remedy, that the harm to the applicant substantially outweighs the harm to the other party, and that the applicant has a reasonable possibility of success. It further provides for recognition and enforcement of interim measures by courts in Articles 17H and 17I. The

¹⁰ *Oil and Natural Gas Commission v. Western Company of North America*, (1987) 1 SCC 496.

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

¹² *Kvaerner Cementation India Ltd. v. Bajranglal Agarwal*, (2012) 5 SCC 214.

¹³ *M.D., Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.*, (2004) 9 SCC 619.

¹⁴ UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006, art. 17(2)(b).

English Arbitration Act, 1996 similarly lets the tribunal order a party to do or refrain from doing anything, and Swiss law lets the tribunal seek a State court's help where a party does not comply.¹⁵ In each case compliance depends in the end on a court.

Institutional rules give similar powers. The ICC, LCIA and SIAC Rules allow the tribunal to order any interim measure it considers appropriate, and the UNCITRAL Arbitration Rules use the same wording as Article 17(2)(b).¹⁶ By choosing these rules, parties also choose the powers they confer. The relief may be an interim order, an award directing the party to withdraw its court claims, or damages for the cost of defending the court case. The tribunal in Gazprom used the form of an award. The form matters, since an award may be enforceable under the New York Convention while an interim order may not.

5. To Analyse the Indian Legal Framework under the Arbitration and Conciliation Act, 1996

The third objective is to analyse how far Indian law allows such relief. As originally enacted, Section 17 permitted interim measures only in respect of the subject matter of the dispute and gave no means of enforcement. The Supreme Court held that such orders could not be enforced as court orders,¹⁷ and that a tribunal is not a court and has no power to enforce its orders.¹⁸ A partial route was later found in Section 27(5), under which disobedience of a tribunal's interim order may be referred to the court for punishment. The Delhi High Court first adopted this reading, and the Supreme Court later approved it.¹⁹ This route was, however, slow and indirect. Following the 246th Report of the Law Commission,²⁰ the 2015 amendment rewrote Section 17. Section 17(1) now gives the tribunal the same interim powers as a court under Section 9, including an interim injunction and any other measure that appears "just and convenient". Section 17(2) deems such an order to be an order of the court, enforceable under the Code of Civil Procedure, 1908. Disobedience of an injunction can therefore be dealt with under Order XXXIX Rule 2A of the Code. The amended Section 17 thus brings Indian law close to the Model Law on enforcement, though not on the express wording of the power. Section 9(3)

¹⁵ Arbitration Act, 1996, s. 48(5)(a) (England and Wales); Federal Act on Private International Law, 1987, art. 183 (Switzerland).

¹⁶ ICC Arbitration Rules, 2021, art. 28(1); LCIA Arbitration Rules, 2020, art. 25.1; SIAC Rules, 2016, r. 30.1; UNCITRAL Arbitration Rules, 2010, art. 26(2)(b).

¹⁷ Sundaram Finance Ltd. v. NEPC India Ltd., (1999) 2 SCC 479.

¹⁸ M.D., Army Welfare Housing Organisation v. Sumangal Services (P) Ltd., (2004) 9 SCC 619.

¹⁹ Sri Krishan v. Anand, (2009) 3 Arb LR 447 (Del); Alka Chandewar v. Shamshul Ishrar Khan, (2017) 16 SCC 119.

²⁰ Law Commission of India, Report No. 246: Amendments to the Arbitration and Conciliation Act, 1996 (August 2014).

makes the tribunal the first forum for interim relief once it is constituted, although a court may still decide an application it had already taken up before that stage.²¹ After the 2019 amendment, the tribunal's power under Section 17 operates only during the arbitral proceedings.

Section 17 does not use the words of Article 17(2)(b), but its power to grant an interim injunction and any "just and convenient" measure is wide enough to restrain a party from pursuing a suit in breach of the arbitration agreement. Within India such an order is rarely needed, because a party sued in an Indian court can seek reference to arbitration under Section 8 or Section 45. Its real value lies against foreign proceedings. Whether Section 41(b) of the Specific Relief Act would limit a tribunal's order deemed to be a court order has not been decided by the Supreme Court.

The position is weaker for foreign-seated arbitrations. Part I of the Act, including Section 17, applies only where the seat is in India,²² and the proviso to Section 2(2) extends Section 9, but not Section 17, to arbitrations seated abroad. The Delhi High Court has held that an emergency arbitrator's order in a Singapore-seated arbitration cannot be enforced under the Act, though the party may apply afresh under Section 9.²³ A party holding an anti-suit order from a foreign-seated tribunal must, in effect, start again before an Indian court. In *Ashwani Minda v. U-Shin Ltd.*, the Delhi High Court went further and refused relief under Section 9 where an emergency arbitrator under the chosen rules had already rejected the same request in a reasoned order.²⁴ If the anti-suit direction is contained in a foreign award rather than an interim order, it may be enforceable under Part II of the Act, subject to the grounds in Section 48, but this has not yet been tested in a reported decision.

6. To Study the Decisions in *Gazprom* and *Amazon v. Future Retail*

The fourth objective is to examine two decisions that bear directly on the subject. In *Gazprom OAO v. Lietuvos Respublika*, *Gazprom* and the Lithuanian State were shareholders in a gas company under an agreement providing for arbitration in Stockholm. The Lithuanian Ministry of Energy started court proceedings seeking an investigation into the company. The tribunal held that this partly breached the arbitration agreement and directed the Ministry to withdraw or limit some of its claims. The Supreme Court of Lithuania asked the Court of Justice of the

²¹ *Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd.*, (2022) 1 SCC 712.

²² *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552.

²³ *Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd.*, 2016 SCC OnLine Del 5521.

²⁴ *Ashwani Minda v. U-Shin Ltd.*, 2020 SCC OnLine Del 1648 (DB).

European Union whether the Brussels I Regulation required refusal of recognition of such an award.²⁵

The Court held that it did not. Arbitration is excluded from the Regulation, and the recognition of awards is governed by national law and the New York Convention. The principle of mutual trust on which *West Tankers* rested applies to courts, not to tribunals. The result is that a court in one Member State may not restrain proceedings in another, but a tribunal seated in the European Union may direct a party to withdraw them, and courts may give effect to that direction. Recognition was still left to national law, so an enforcing court may refuse it on grounds such as public policy. Advocate General Wathelet had suggested that the recast Regulation had overtaken *West Tankers*, but the Court did not decide that wider question.

In *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd.*, Amazon began an SIAC arbitration seated in New Delhi, alleging that the sale of the Future Group's retail business to the Reliance group breached its agreements. An emergency arbitrator restrained the Future parties from completing the transaction, and they treated the order as a nullity. A single judge of the Delhi High Court enforced the order under Section 17(2), but a Division Bench stayed that decision, and Amazon appealed. The Supreme Court held that an emergency arbitrator's order made under institutional rules chosen by the parties is an order under Section 17(1) in an India-seated arbitration and is enforceable under Section 17(2). It also held that no appeal lies under Section 37 against an order enforcing it.²⁶

The order in Amazon restrained a transaction rather than a court case, so it was not an anti-suit order in the strict sense. Its importance lies in confirming that a restraining order of an India-seated tribunal, including an emergency arbitrator, has the force of a court order, and that powers given by institutional rules form part of the tribunal's authority. By holding that no appeal lies against an enforcement order, it also reduces the scope for delay, and an India-seated tribunal that restrains a party from pursuing foreign proceedings would benefit from the same route. Its reasoning does not, however, extend to tribunals seated abroad.

7. To Examine the Limits on Anti-Suit Relief Granted by Arbitral Tribunals

The fifth objective is to examine the limits on the tribunal's power. First, the tribunal can act only within the arbitration agreement; it must be satisfied that the court claims fall within the clause and that the clause binds the party concerned. Second, its order binds the party, not the

²⁵ Case C-536/13, *Gazprom OAO v. Lietuvos Respublika*, judgment of 13 May 2015 (Grand Chamber).

²⁶ *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd.*, (2022) 1 SCC 209.

court. The foreign court may continue to hear the case and may decide the validity of the arbitration agreement for itself, as Article II(3) of the New York Convention expects.

Third, a tribunal cannot bind persons who are not parties to the agreement, although parallel cases often involve affiliates or directors who never signed it. A non-signatory is bound only where its conduct shows consent to the arbitration agreement.²⁷ Fourth, the tribunal has no coercive machinery. If its order is ignored, it can only draw adverse inferences, adjust costs under Section 31A or award damages; actual compulsion comes only from a court.

Fifth, cross-border enforcement is difficult. The New York Convention applies to awards, and many courts do not treat interim orders as awards. Articles 17H and 17I of the Model Law fill this gap only where adopted, and India has not adopted them. Sixth, comity remains relevant, and a foreign court may react to a tribunal's order by refusing to recognise a later award. A tribunal is not a State organ, so comity in the strict sense may not bind it, but a careful tribunal will consider whether the foreign proceedings clearly fall within the clause, whether the order is really needed, and whether a narrower direction, such as asking the party to seek a stay, would serve the purpose. Finally, the tribunal can act only after it is constituted, while court proceedings are often started earlier, sometimes precisely to get ahead of the arbitration. Emergency arbitrator provisions partly fill this gap, but where the seat is abroad or no emergency procedure is available, the party must still approach a court under Section 9. Since the order affects a party's access to a court, it should be granted only where a prima facie case, balance of convenience and irreparable harm are clearly shown.

Suggestions and Reforms

Based upon the examination, the study proposes the following reforms.

First, Section 17(1) should state expressly that the tribunal may restrain a party from conduct likely to harm the arbitral process, along the lines of Article 17(2)(b) of the Model Law.

Second, the Act should provide for recognition and enforcement in India of interim measures ordered by foreign-seated tribunals, with the leave of the court, following Articles 17H and 17I of the Model Law.

Third, the draft Arbitration and Conciliation (Amendment) Bill, 2024 proposed a new Section 9A for emergency arbitrators.²⁸ Any such provision should also cover emergency orders in foreign-seated arbitrations.

²⁷ Cox and Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1.

²⁸ Department of Legal Affairs, Ministry of Law and Justice, Government of India, Draft Arbitration and Conciliation (Amendment) Bill, 2024 (released for public consultation, October 2024).

Fourth, the legislature should clarify whether Section 41(b) of the Specific Relief Act, 1963 applies to tribunal orders deemed to be court orders under Section 17(2).

Fifth, Indian arbitral institutions should state expressly in their rules that the tribunal may order a party to refrain from pursuing proceedings brought in breach of the arbitration agreement.

Sixth, parties should include in their arbitration agreements an express covenant not to sue, an express acceptance of the tribunal's power to grant anti-suit relief, and a provision allowing recovery of costs incurred in defending proceedings brought in breach.

8. Conclusion

This study set out to answer whether an arbitral tribunal can grant anti-suit relief and how far that relief can be effective. The answer to the first part is yes. The power rests on the arbitration agreement and is supported by the law of the seat and the institutional rules chosen by the parties. In India, Section 17, as amended in 2015, is broad enough to cover such an order and makes it enforceable as a court order. *Gazprom* shows that the rules restricting courts in the European Union do not restrict tribunals in the same way, and *Amazon v. Future Retail* shows that Indian courts will give full effect to restraining orders of an India-seated tribunal.

The answer to the second part is less satisfactory. The tribunal cannot bind a foreign court or third parties, and it has no means of compelling obedience. In India, court support is available for India-seated tribunals but not for those seated abroad. The hypothesis is therefore proved: tribunal-ordered anti-suit relief is a real power, but its usefulness depends heavily on the support of national courts.

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