

# JUDICIAL RESPONSE TO INTERNATIONAL COMMERCIAL ARBITRATION WITH SPECIFIC REFERENCE TO VENUE OF ARBITRATION

## *Need for protection of investors' interest*

Dr. Leena Moudgil\*

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*“I realized that the true function of a lawyer is to unite the parties involved in a dispute. The lesson was so indelibly burnt into me that the large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing, there by not even money and certainly not my soul”*

Mahatma Gandhi<sup>1</sup>

In 1991, India decided for liberalization and globalization by providing its investors a market oriented economy. There was unprecedented growth that resulted in a surge in trade and investments.<sup>2</sup> It is believed that there is a close nexus between trade and development.<sup>3</sup> One of the inevitable consequences of these commercial activities is, of course, the growth of cross border disputes involving multinational corporations and sovereign states.<sup>4</sup> In international trade and commerce, parties come from different states having different legal and cultural background. So in order to avoid legal disputes, their every commercial activity is preceded by a contract fixing the obligations of the parties.<sup>5</sup>

The Indian judiciary is determined to keep a close watch on the practice of international arbitration in the country and perform its role of a guardian to promote and encourage speedy, neutral, effective arbitration proceedings and enforcement of award in the country. India is all set to take on the world arbitration market with its best

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1 Pallab Das, *Arbitration : An Alternate To Litigation* THE LIBERTATEM MAGAZINE (Dec. 27, 2016) <http://mylibertatem.com/arbitration-an-alternate-to-litigation-2/>

<sup>2</sup> Harisankar KS *Contemporary International Arbitration In Asia: A Stock Take* IJAL III(1) retrieved from [http://www.ijal.in/sites/default/files/IJAL%20Volume%203\\_Issue%201\\_Harisankar%20KS.pdf](http://www.ijal.in/sites/default/files/IJAL%20Volume%203_Issue%201_Harisankar%20KS.pdf)

<sup>3</sup> R. Usharani, *Recent Trends in International Commercial Arbitration*, 2007(5) KAR.LJ 33-39

<sup>4</sup> Harisankar KS, *supra* note 2

<sup>5</sup> Sabyasachi Chatterjee, *Law applicable to International Commercial Arbitration*, 2004(4) JSLC 109-116.

foot forward.<sup>6</sup> Since, national court of one party is foreign court to other party; it is preferred to have acceptance of arbitration as the most favourable method for resolving cross-border commercial disputes.<sup>7</sup> Arbitration provides a mechanism or process to the contracting parties by which disagreements are submitted to the arbitral tribunal which are appointed and trusted by the parties.<sup>8</sup> International Commercial Arbitration is termed as 'international' not because sovereign nations participate, but because the parties, the facts, or the legal effects of the dispute extend beyond a single jurisdiction.<sup>9</sup> Courts should be cautious of intervening during a foreign arbitration proceeding is that the benefits in efficiency, cost, confidentiality, and reduced complexity of the arbitration process diminish.<sup>10</sup> In order, to protect the foreign investors the Arbitration and Conciliation Act, 1996 (herein after 1996 Act) provides for international perspective, based on UNCITRAL Model Law, 1985. This Act is later amended in 2015.

The author looks into

- development of international arbitration in India, in New York and Geneva Convention, and in UNCITRAL rules;
- Judicial Response to International Commercial Arbitration;
- Problems faced by the parties and how far are the interest of parties secured.

## **DEVELOPMENT OF INTERNATIONAL ARBITRATION IN INDIA**

International Commercial Arbitration, which is a sprout of arbitration<sup>11</sup>, has evolved as private transnational system of dispute resolution comprising of bilateral treaties, multilateral conventions, national arbitration laws, and norms of arbitral institutions. In India, three Acts that governed the law of Arbitration are-

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<sup>6</sup> Yogesh Pratap Singh, Nachiketa Mittal, *Making Indian Arbitration Popular*, THE STATESMAN, (December 29, 2016) retrieved from <http://www.thestatesman.com/features/making-indian-arbitration-popular-1482974325.html>

<sup>7</sup> MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 1 (Cambridge University Press, 2008).

<sup>8</sup> Neeraj Tiwari, *Critical issues in International Commercial Arbitration*, 2012(4) Arb. LR 18-24(JS).

<sup>9</sup> Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 ICLQ 747, 1985 (referred from Jeevan Krishna, Law of Choice in International Commercial Arbitration, 20(1&2) Academy Law Review 61-78).

<sup>10</sup> Sandeep S. Sood, Finding Harmony with Uncitral Model Law: Contemporary Issues in International Commercial Arbitration in India after the Arbitration And Conciliation Act of 1996 available at [http://works.bepress.com/sandeep\\_sood/2/](http://works.bepress.com/sandeep_sood/2/)

<sup>11</sup> P.T.Kamala Priya and S.Karpaga Priya, International Commercial Arbitration – A New Dimension ( Mad.LJ Vol. 203 13)

- The Arbitration (Protocol and Convention) Act, 1937, which gave effect to the Geneva Convention;
- The Arbitration Act, 1940, which dealt with domestic awards,
- The Foreign Awards (Recognition and Enforcement) Act, 1961 which gave effect to the New York Convention of 1958.

After Independence, the mandate under Article 51, Constitution of India, 1950 provides that “the State shall encourage settlement of international disputes by arbitration”. The 1996 Act is drafted in line with the Model Law on International Commercial Arbitration. It has been adopted by United Nations Commission on International Trade Law (UNCITRAL) in 1985 to establish a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations. The Act seeks not only to consolidate but also to unify Indian law both on domestic and international arbitration.<sup>12</sup> The Act is divided in four parts: Part I deals with domestic arbitration including International Commercial Arbitration conducted in India, Part II deals with enforcement of foreign awards governed under New York and Geneva Convention, Part III and IV deals with conciliation and supplementary rules. The paper will focus on Part I and II.

Also, Indian Council of Arbitration was established in 1965. It keeps contact with important arbitral associations, experts and distinguished persons of different countries. The Council collects information about rules of Indian and foreign arbitral institutions and circulates the journal worldwide. It also organizes a program for the exchange of panels with other arbitral institutions.<sup>13</sup>

### **INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA**

Section 2(1)(f) defines “international commercial arbitration” as an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

- (i) an individual who is a national of, or habitually resident in, any country other than India; or
- (ii) a body corporate which is incorporated in any country other than India; or

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<sup>12</sup> A. Jayagovind, International Commercial Arbitration under the Arbitration and Conciliation Act, 1996 (IJIL 1997 VOL. 37 658-672).

<sup>13</sup> Ernest J. Cohn & Martin Domke(et.al) Handbook Of Institutional Arbitration ( North Holland Publishing Company Amsterdam 1977 pg.99)

- (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or
- (iv) the Government of a foreign country.

This definition develops consonance with Model Law<sup>14</sup>. Article 1 (3) broadens the notion of internationality and covers cases where the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated outside the State where the parties have their place of business, or cases where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.<sup>15</sup> UNCITRAL focus upon place of business, whereas 1996 Act is about nationality.

Also, in 1996 Act the word ‘commercial’ covers legal relations whether contractual or not. UNCITRAL defines ‘commercial’ and both take similar approaches but are slightly divergent in practicality.<sup>16</sup> This empowers the Court to broaden or narrow the definition. In civil law countries, business and commercial have different meanings but not in other countries.<sup>17</sup> The territorial criterion is of considerable practical importance in Articles 11, 13, 14, 16, 27 and 34 which entrust State courts at the place of arbitration with functions of supervision and assistance to arbitration.<sup>18</sup>

## **NEW YORK CONVENTION**

New York Convention, also known as the Recognition and Enforcement of Foreign Arbitral Awards, is one of the most important and successful United Nations treaties in the area of international trade law.<sup>19</sup> Till date 156 States are signatory to this

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<sup>14</sup> Article 1 (3), Model Law defines an arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, arbitration agreement;

(ii) any place where a substantial part of the obligations of commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of arbitration agreement relates to more than one country.

<sup>15</sup> UNCITRAL Model Law on International Commercial Arbitration, 1985 with amendments as adopted in 2006, UNITED NATIONS, Vienna, 2008

<sup>16</sup> Harsh Sethi and Arpan Kr Gupta International Commercial Arbitration & its Indian Perspective ( Universal Law Publishing, New Delhi pg 20 2011)

<sup>17</sup> Nigel Blackaby and Constatine Partasides(et.al), Rederfn and Hunter on International Arbitration Oxford University Press 14 2015

<sup>18</sup> UNCITRAL,1985

<sup>19</sup> [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016\\_Guide\\_on\\_the\\_Convention.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf)

Convention.<sup>20</sup> Its application requires firstly, one of the party must be from signatory country; secondly transaction is 'commercial' in nature. The word 'commercial' is defined in Model Law<sup>21</sup> but not in New York and Geneva Convention. It is left to national courts to define it.<sup>22</sup>

Also, to see whether the prospective forum recognizes and enforces awards rendered at the place of arbitration. The jurisdiction of court to refer to arbitration arises when it is seized of an action unless agreement is null and void, inoperative or incapable of being performed.<sup>23</sup> The party must recognize where the defaulting party has the assets in different countries and to go for 'forum shopping'. It requires understanding of other factors also like adherence of that country to this Convention or attitude of Courts or the law of that State.

New York Convention does not provide any time limit for refusal to recognition and enforcement. However, Part I, 1996 Act provides three months period to set aside the award and further, thirty days maximum on sufficient cause only.<sup>24</sup>

In New York convention, recognition and enforcement are used interchangeably and interlinked but not in Geneva Convention. 'Recognition' is to demand remedy on previous arbitral proceedings, whereas, 'enforcement' means to recognise legal force and effect the award and to ensure that it is carried out by using such legal sanctions.<sup>25</sup>

It deals with challenges made on foreign awards.<sup>26</sup> It is developed to provide uniformity in recognition and enforcement. UNCITRAL is closely modelled on this Convention, though similar points are included for recognition and enforcement<sup>27</sup> but are differently interpreted in Courts.<sup>28</sup>

New York convention gives discretion to the judges to decline the enforcement of foreign award on grounds, such as award has been set aside in the country where it made whether the cause of annulment is also recognised by the law of the enforcement

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<sup>20</sup> [www.newyorkconvention/countries](http://www.newyorkconvention/countries) as on January 6,2017

<sup>21</sup> Srishti Jha, Implications of the Term 'Commercial' in International Commercial Arbitration (2001) 40 CLA 36.

<sup>22</sup> Julian D M Lew QC and Loukas A Minstelis (et.al) Comparative International Commercial Arbitration ( Wolters Kluwer 2007 1st edn. Indian reprint 55)

<sup>23</sup> Article II(3)

<sup>24</sup> Section 34.

<sup>25</sup> See Nigel Blackaby, *supra* note 17.

<sup>26</sup> *Union of India Vs. Reliance Industries Limited* (2015(10) SCALE149).

<sup>27</sup> Article 36, UNCITRAL Model Law and Article V, New York Convention.

<sup>28</sup> See Nigel Blackaby, *supra* note 17.

forum or not.<sup>29</sup> Article V (1) (e) allows court to exercise jurisdiction on enforcement but it can not set aside the award; whereas, domestic award can be set aside.

### **GENEVA CONVENTION**

Geneva Convention, 1927 requires that both or all the parties must belong to two different signatory states.<sup>30</sup> Article II provides exhaustive list of refusal and obliges courts to enforce foreign awards unless it is proven that they comport at least one of the limited number of refusal.<sup>31</sup> As there is limited applicability of the Convention and understandable reluctance of judges to enforce awards that have been rejected in their countries of origin, the practical rule is to give due consideration to the Arbitration laws of the contracting parties.<sup>32</sup>

The Convention will be called foreign award whenever it is 'commercial' under 1996 Act and both the parties are from signatory states. However, the Convention will not be applicable in cases the award is made in India.<sup>33</sup> Also, this convention is replaced by New York Convention when both the States are signatory to both the Conventions.<sup>34</sup>

### **UNCITRAL 1985**

According to Model Law 1985, place of arbitration is the place of contract performance, or the place of the subject-matter of the dispute is situated outside the State where the parties have their place of business, or cases where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. The applicable law and the applicable procedure have different meanings; the former implies the law chosen to regulate the contract and the latter is the law in the arbitration agreement.<sup>35</sup>

- Article 1 recognizes extensively the freedom of the parties to submit a dispute to the legal regime established pursuant to the Model Law.
- Article 19 and 28 provides about applicable law
- Article 15 and 33 discusses rules of procedure.

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<sup>29</sup> Ronald Bernstein, Handbook of Arbitration Practice (Sweet & Maxwell with The Chartered Institute of Arbitrators, London 1993 446)

<sup>30</sup> C. R. DATTA, LAW RELATING TO COMMERCIAL & DOMESTIC ARBITRATION (1st ed., Wadhwa & Co', Nagpur., 2008).

<sup>31</sup> See the contra view to Article II in Ronald Bernstein (*supra* note 29 ), (an award does not become defective because it has been rendered defective by their court itself).

<sup>32</sup> See Ronald Bernstein, *supra* note 29 .

<sup>33</sup> See C. R. Datta, *supra* note 30 .

<sup>34</sup> Renuagar Power Co' Ltd. v. General Electric Co', AIR 1994 SC 860.

<sup>35</sup> MINABERE TOM- GEORGE, INTERNATIONAL COMMERCIAL ARBITRATION (38 Sheriden Book Co. New Delhi 1996).

## 64<sup>th</sup> Session, UNCITRAL, 2016

The Commission<sup>36</sup> agreed to clarify that the “determination of the place” of arbitration had legal consequences<sup>37</sup>. Also, it should include that it will lead to determination of the court competent with respect to the arbitral proceedings.

The Commission also suggested that it is the need of the hour for the parties and arbitral tribunal to expand their knowledge and familiarize themselves with not only the “law” on arbitration and any other relevant procedural law but also “practice” and “enforcement” law that did not receive support.<sup>38</sup>

In para 31, it is agreed that the parties and the arbitral tribunal should consider that holding all hearings outside of the place of arbitration might have an impact at the stage of judicial review, setting aside or enforcement of the arbitral award in certain jurisdictions.<sup>39</sup>

### CHOICE OF PLACE

There is a freedom of choice in the law governing international arbitration.<sup>40</sup> When the contract is governed by the law of place then contract is subject to the jurisdiction; When the parties choose arbitral institution then their rules will apply; When the parties choose national arbitration law of a place of then applicable law and procedural law will be of arbitration of that place; When the parties choose venue for arbitration then arbitration is subject to law of arbitration of that place (*lex loci arbitri*).<sup>41</sup> The geographical location is of great importance and affects more mundane matters including logical functioning in arbitration.<sup>42</sup>

When express agreement doesn't exist, presumption is that the parties intend the curial law (procedural law or *lex fori*)<sup>43</sup> to be the law of the ‘seat of arbitration’.<sup>44</sup> The

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<sup>36</sup> Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session (New York, 1-5 February 2016), United Nations Commission on International Trade Law Forty-ninth session, New York, 27 June-15 July 2016, General Assembly, United Nations

<sup>37</sup> Para 28, UNCITRAL.

<sup>38</sup> Third sentence of paragraph 28.

<sup>39</sup> Forty-eighth session of the Commission (A/70/17, para. 41)

<sup>40</sup> Sabyasachi, *supra* note 5 .

<sup>41</sup> See MINABERE TOM- GEORGE, *supra* note 35, at 39.

<sup>42</sup> Gary B. Born International Commercial Arbitration in the United States ( Kluwer Law and Taxation Publishers Deventer 1994 71). However, contra view in L.M. Sharma, International Commercial Arbitration (1994(3) Comp. L.J J-56) that provides if an arbitration agreement is to be classified as domestic agreement only on the basis of arbitration taking place in India then many foreign parties would hesitate to choose India as venue.

<sup>43</sup> It includes procedural powers and duties, procedure for evidence and manner of reference.

<sup>44</sup> Sabyasachi , *supra* note 5.

‘proper law’ implies law by which parties intended to be governed and when intention is not express or implied or inferred from circumstances then law with which there is closest and most real connection.<sup>45</sup>

### **IMPORTANCE OF SEAT**

The seat of arbitration (also called place of arbitration) refers to the legal rather than physical location of the arbitration, whereas ‘venue’ is where the hearing physically takes place.<sup>46</sup>

While choosing the place, the parties must understand the consonance between “seat of arbitration” and the “Forum where arbitration is sought” and look at:-

- whether there are any reciprocal treaties or conventions;
- if there are no reciprocal treaties or conventions, then earlier decisions on enforcement of the court are seen;
- if the unsuccessful party is a State or State entity the laws of that country in relation to State immunity.<sup>47</sup>

Section 28 (1)(b), 1996 Act in international arbitration provides

- the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
- any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
- failing any designation of the law under section 28(1)(a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

### **JUDICIAL RESPONSE**

The Supreme Court of India has adopted path-breaking rulings that bespeak the judicial independence courts enjoy in India to freely interpret the law in keeping with international standards and future of global trade.<sup>48</sup> The choice of the place of

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<sup>45</sup> DICEY AND MORRIS, *THE CONFLICT OF LAW* (1161 11th ed. vol.II Sweet & Maxwell 2012) (referred from SABYASCHI, *supra* note 5 ). Also, see Rodney D. Ryder Contracts, *The Choice of Law and International Commercial Arbitration* 2 COMP L.J. J-10 (1999); Jeevan Krishna, *Law of Choice in International Commercial Arbitration*, 20(1&2) ACADEMY LAW REVIEW 61-78.

<sup>46</sup> Clayton Utz A Guide to International Arbitration 2nd edn.

<https://www.claytonutz.com/ArticleDocuments/178/Clayton-Utz-Guide-to-International-Arbitration-2012.pdf.aspx?Embed=Y> .

<sup>47</sup> HARSH SETHI, *supra* note 16, at 258 .

<sup>48</sup> Yogesh Pratap, *supra* note 6.



arbitration is important, keeping in view, the serious consequences of the arbitration process and it is important that parties consider this issue seriously. The factors to consider when choosing the place of arbitration are (1) the law that the parties wish to have governing the arbitration; (2) the application of the New York Convention and the UNCITRAL Model Law; (3) restrictions on appeal and nationality; (4) language; (5) practical considerations; (6) jurisdiction-specific issues.<sup>49</sup>

In international commercial arbitration, the judicial perspective is touching new heights each day like the 'venue of arbitration'. In 1992, in the case of *National Thermal Power Corporation v. Singer Co.*<sup>50</sup> the arbitration clause provided that in case of foreign contractor, the arbitration shall be conducted by three arbitrators, two by parties themselves and third by the President of the International Chamber of Commerce, Paris. ICC rules of conciliation and arbitration shall apply. The place shall be as determined by the arbitrators. The question in issue was whether the mere fact that the venue chosen by the ICC Court for the conduct of the arbitration proceeding was London excludes the operation of the Act which dealt with domestic awards i.e. the Act of 1940. In a significant sentence, the Court went on to hold:

*"Notwithstanding that award was a foreign award, since the substantive law of the contract was Indian law and since the arbitration clause was part of the contract, the arbitration clause would be governed...the jurisdiction exercisable by the English courts and the applicability of the laws of that country in procedural matters must be viewed as concurrent and consistent with the jurisdiction of the competent Indian courts and the operation of Indian laws in all matters concerning arbitration insofar as the main contract as well as that which is contained in the arbitration clause are governed by the laws of India."*

In the case of *Sumitomo Heavy Industries Limited vs. ONGC Limited*<sup>51</sup> the Court observed that the party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract-(1) proper law of contract, (2) proper law of arbitration agreement and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as curial law. Where the contract is governed by Indian law and the seat of the

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<sup>49</sup> Houthoff Buruma, *International Commercial Arbitration : An Introduction* ( January 7, 2017 )

[http://www.houthoff.com/uploads/tx\\_hhpublications/International\\_Commercial\\_Arbitration\\_2013.pdf](http://www.houthoff.com/uploads/tx_hhpublications/International_Commercial_Arbitration_2013.pdf)

<sup>50</sup> (1992) 3 SCC 551.

<sup>51</sup> 1998) 1 SCC 305.

arbitration is elsewhere, wherein arbitrability of the dispute is established, procedural law of the country of seat of arbitration governs the conduct of the arbitration proceedings till the award is delivered.

In 2002, in *Bhatia International v. Bulk Trading S.A. and Anr.*<sup>52</sup>, an application was made under section 9, 1996 Act to safeguard the assets of the Indian company in case a foreign award was to be executed in India against it. The Court revived the doctrine of concurrent jurisdiction by holding “*even where arbitrations are held outside India, unless the parties agree to exclude the application of Part-I of the Arbitration Act, 1996, either expressly or by necessary implication, the courts in India will exercise concurrent jurisdiction with the court in the country in which the foreign award was made*”.<sup>53</sup>

Here, the lacunae in legislative provisions, section 2<sup>54</sup> does not have exceptions of application of Articles 8,9, 35 and 36, justified the implementation of Model Law.<sup>55</sup> Also, the aim of this Act led the Court to give preference to intention of parties than to law of any country. However, it had adverse impact on foreign direct investment and insist of coverage of legal risk. It makes transactions commercially impractical. Consequently, the Supreme Court decisions are disincentives to any long-term investment transaction and to entrepreneurial cooperation.<sup>56</sup>

In 2005, *Shin- Etsu Chemicals Co' Ltd. vs. Akash Optifibres Ltd.*<sup>57</sup> the Court held that proper of arbitral agreement is the substantive law governing the contract because it has the closest and most real connection with the transaction.

In 2008, *Venture Global Engineering vs. Satyam Computer Services Ltd.*<sup>58</sup> the Supreme Court held that foreign award would also be considered as domestic award and the challenge procedure under Section 34, 1996 Act is allowed. This led to a situation where the foreign award could be challenged in the country in which it is

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<sup>52</sup> (2002) 4 SCC 105.

<sup>53</sup> Paragraph 32 of Bhatia case(2002).

<sup>54</sup> Section 2(2) reads, “this part shall apply where the place of arbitration is in India.”

<sup>55</sup> Nidhi Gupta, *Enforcement of Foreign Awards under The Arbitration and Conciliation Act, 1996 : A Review of the Supreme Court Judgment in Venture Global Engineering Case 257 49(2) IJIL 2009.*

<sup>56</sup> Karan Singh Tyagi, *A second look at international arbitration*, THE HINDU

<http://www.thehindu.com/opinion/lead/a-second-look-at-international-arbitration/article2735659.ece>

as on December 22, 2011

<sup>57</sup> (2005) 7 SCC 234.

<sup>58</sup> (2008) 4 SCC 190. Here, the contract is between venture global and satyam computers that they will be governed by laws of Michigan (state in USA), here the principal office is also established, and in case of impossibility to resolve then the matter will be as per LCIA. The LCIA passed an award on which Satyam computer filed for recognition and enforcement in US. Venture filed cross petition and objected its violation in India. Later, matter came before courts in India.

made; it could also be challenged under Part-I of 1996 Act in India; and could be refused to be recognised and enforced in Section 48 contained in Part II of 1996 Act. This case is divergent from the basic scheme of Act and has brought uncertainty in the mind of parties. This case is overruled.

*In Dozco India Pvt. Ltd vs. DOOSAN Infracore Company Ltd*<sup>59</sup> the governing laws of the Contract were the laws of South Korea and in arbitration matters, all disputes arising in connection with the agreement, shall be finally settled by arbitration in Seoul, Korea or such other place as the parties may agree in writing, pursuant to the Rules of the Agreement then in force of the ICC. The Court held that there is no application of Part-I, 1996 Act.

*In Yograj Infrastructure Ltd. v. Ssang Yong Engg. and Construction Co. Ltd.*<sup>60</sup> the distinction between the "proper law" of the contract and the "curial law" determines the law which will govern the arbitration. The proper law is the law which governs the agreement itself. In the absence of any other stipulation in the arbitration, it will be the law governing the contract which would also be the law applicable to the Arbitral Tribunal itself. The curial law regulates the procedure to be adopted in conducting the arbitration would be the SIAC Rules.

In 2012, *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*<sup>61</sup> the parties agreed that i) disputes arising out of the Contract between the parties are to be resolved by arbitration under the ICC Rules; ii) the seat of arbitration is Paris; iii) the substantive law to be applied in the arbitration shall be English Law (Article 22). The matter is earlier referred to two judge bench which disagreed with Bhatia case, so case is heard by Constitutional bench. The Court held that Part-I will not apply to international arbitration outside India. Also, 'seat theory' is developed to decide the applicable law of arbitration and have power to annul the award. The Court stated that the seat of arbitration as the 'centre of gravity' of an arbitration particularly to determine jurisdiction of courts in relation to that arbitration. *"Where the parties have failed to choose the law governing the arbitration proceedings, those proceedings must be considered, at any rate prima facie, as being governed by the law of the country in*

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<sup>59</sup> (2011) 6 SCC 179. similar judgment is delivered in *Videocon Industries Ltd. v. Union of India & Anr.*, (2011) 6 SCC 161 where the parties agreed that the arbitration agreement would be governed by the laws of England, while the seat of arbitration was at Kuala Lumpur, and the governing law of the contract was Indian law.

<sup>60</sup> (2011) 9 SCC 735.

<sup>61</sup> (2012) 9 SCC 552.

which the arbitration is held, on the ground that it is the country most closely connected with the proceedings". Also, Interim measures under Section 9 can not be granted in arbitrations taking place outside India.

If an international arbitration takes place, irrespective of the seat, and the subject matter of that arbitration would otherwise be within the jurisdiction of an Indian Court, such Indian Court would have 'supervisory jurisdiction'. Therefore, if "the closest connection" of the arbitration is with India, and if the Indian Courts would normally have jurisdiction over the dispute, the Indian Courts will play a supervisory role in the arbitration.

This case has prospective effect that is agreements after 6.9.2012 which resulted in no application in the present times. The 'seat theory' influences the law that will govern arbitration; decides which court will have supervisory power and determines the nationality of award.<sup>62</sup> Also, non-convention awards are not covered.<sup>63</sup>

In 2014, *Enercon India Ltd vs. Enercon GmbH*<sup>64</sup> the parties agreed to have "seat" of arbitration in India and London to be the "venue" to hold the proceedings of arbitration. Law governing the Contract, arbitration agreement and Curial law are Indian laws. In the present case, the Supreme Court held that even though the venue of proceedings is London, it cannot be presumed that the parties have intended the seat to be London. Venue is often different from the seat of arbitration and should not be confused because of convenient geographical location. The hearing of the arbitration will be conducted at the venue fixed by the parties, but this would not bring about a change in the seat of the arbitration.

If the "seat" of arbitration is in India; the 1996 Act being the curial law, recourse to Indian Courts as per Part I of the 1996 Act, including Section 9 is available to the parties. The "seat" of arbitration thus, would be the country whose law is chosen as the curial law by the parties.<sup>65</sup> Applying the "*closest and intimate connection test*" to arbitration, parties had agreed for arbitration proceedings under 1996 Act.

In the case of *Union of India (UOI) vs. Reliance Industries Limited(Reliance) and Ors.*<sup>66</sup> there is a contract of Production Sharing between Reliance, UOI, Enron Oil

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<sup>62</sup> JULIAN, *supra* note 22, at 172.

<sup>63</sup> Sumbhav Nagory and Ananya Kapoor *International Commercial Arbitration – A Critique of Balco V. Kaiser Aluminium*, (2013) 1 MLJ 92.

<sup>64</sup> (2014) 5 SCC 1.

<sup>65</sup> Shivam Goel, *International Commercial Arbitration - India* ( January 4, 2017)

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2585435](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2585435)

<sup>66</sup> 2015(10) SCALE149.

and Gas India Limited and the ONGC. In 2005, Enron Oil and Gas India Limited are substituted with BG Exploration and Production India Limited. In 2010, disputes arose between the Union of India and Reliance. The arbitrators are appointed.<sup>67</sup> In 2011, the UOI, Reliance Industries and BG Exploration and Production India, agreed to change the seat of arbitration to London, England and a final partial consent award was made and duly signed by the parties to this effect. In 2012, the tribunal passed an award. UOI filed a petition before Delhi High Court to set aside the arbitral award under Section 34, which was allowed. However, the Supreme Court reversed the judgment in 2014.<sup>68</sup> In the meantime, in 2014 special leave petition was filed before the High Court and has been dismissed. The petition was made under Section 14<sup>69</sup>. The Supreme Court observed that the proper law of the contract is Indian law and proper law of the *arbitration agreement* is the law of England. In order, to understand whether parties intended to exclude jurisdiction of India can be understood from the arbitration agreement and referred Bhatia case, 2002. The court also noted that BALCO case because of prospective application can not be referred.

Secondly, the ‘doctrine of concurrent jurisdiction’ can not be allowed as the ‘juridical seat’ of the arbitration is at London and that the arbitration agreement is governed by English law. Allowing this doctrine to prevail, will result in concurrent jurisdiction at two places is incorrect. The Supreme Court dismissed the petition and held,

*“Where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.”*

*The ground of ‘public policy’ can not be applied as jurisdiction before English Court is open.* In Singer case (1992) the Court did not give effect to the difference between substantive law of contract and the law that governed the arbitration on basis

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<sup>67</sup>The Union of India appointed Mr. Peter Leaver, QC as Arbitrator and Reliance Industries appointed Justice B.P. Jeevan Reddy as Arbitrator and Mr. Christopher Lau SC was appointed as Chairman of the Tribunal.

<sup>68</sup> Reliance Industries Limited and Anr. v. Union of India, (2014) 7 SCC 603.

<sup>69</sup> Section 14 is on **Failure or impossibility to act**

of section 9, Foreign Awards (Recognition And Enforcement) Act, 1961<sup>70</sup>. This later led to omission of the word in section 9(b), 1961 while enacting Section 51, 1996 Act<sup>71</sup>. Also, concurrent jurisdiction was done away with.

In 2013, Court paved a way for referring non-signatories to an arbitration agreement to settle disputes through arbitration in the case of *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. & Ors.*<sup>72</sup> in the expression ‘*person claiming through or under*’ as provided under Section 45 of the Arbitration Act would mean and include multiple and multi-party agreements. This judgment will have far-reaching positive effect especially in the cases of international commercial arbitrations involving composite transactions and multiple parties. In the case of *World Sport Group (Mauritius) Ltd. vs MSM Satellite (Singapore) Pte. Ltd.*<sup>73</sup> the Supreme Court has eased the arbitrability of cases involving allegations of fraud for referring such matters and parties to foreign seated arbitrations to meet legal requirements.

In *Harmony Innovation Shipping Ltd.*<sup>74</sup> the Court observed that the law governing the substantive contract; the law governing the agreement to arbitrate and the performance of that agreement; the law governing the conduct of the arbitration.

In the case of *ROHM and HAAS Electronic Materials Holding UK Limited vs. R.B. Business Promotions Pvt. Ltd.*<sup>75</sup> contract provided the arbitration agreement to be governed by Indian Law and seat of arbitration is mentioned as U.K. However, before the commencement of the arbitration proceeding, the parties agree that though the physical seat of arbitration is in U.K., for all purposes the seat of arbitration shall be deemed to be India and the arbitral proceedings shall be conducted under the curial law of India. In this situation, though all the conditions under section 44 were satisfied the award by the arbitrator cannot be said to be a foreign award.

In 2016, *Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services Inc*<sup>76</sup>. the Court held that Part I applies only to arbitration held in India. This case cover

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<sup>70</sup> Nothing in this Act shall-(a) prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Act had not been passed; or (b) apply to any award made on an arbitration agreement governed by the law of India. Retrieved from <https://indiankanoon.org/doc/882364/> as on December 26,2016.

<sup>71</sup> **51. Saving.** –Nothing in this Chapter shall prejudice any rights, which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter had not been enacted.

<sup>72</sup> 2013(1)SCC641.

<sup>73</sup> (2014)11SCC639.

<sup>74</sup> AIR2015SC1504.

<sup>75</sup> 222(2015)DLT224.

<sup>76</sup> 2016(2)SCALE60.

the residue of BALCO, 2012 and discusses the agreement by parties to be governed by the prevailing law of India and in case of Arbitration, the English Law shall apply (article 22). The Court held that the proper law of contract is Indian law. Looking at article 17 noted it is solely on arbitration. Therefore, the intention of the parties to apply English Law to the arbitration agreement also and not limit it to the conduct of the arbitration is fairly clear from Article 22.

### CONCLUSION AND SUGGESTIONS

In international arbitration, the vigilant attitude of parties while choosing seat of arbitration and law to be made applicable to said arbitration is the utmost requirement. In foreign seated arbitration governed by foreign law, there is implied exclusion of Sections 9, 27 and 37, 1996 Act. When a foreign seated international arbitration is governed by Indian law, Part I will apply.

- Problem of conflicting awards as each award stands on its own and there is no binding effect.
- Preference to International Law.
- International Arbitration to be delocalised. It is completely separated from the law of the place of arbitration for enforcement purposes like sports arbitration. Also, it is not extra-legal arbitration. However, drawbacks like threat to fairness; no supervisory intervention of courts; limiting scope of public policy.<sup>77</sup> It can not operate in legal vacuum.<sup>78</sup>
- Setting up a common legal system for international arbitration.
- Minimising the supervisory role played by different nations.
- More application of general principles of law (*lex mercatoria*)
- Need to develop rules for arbitration awards rendered in a non convention country as it might not be enforceable in other countries.

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<sup>77</sup> Suharsh Sinha *Issues of Arbitrability in International Commercial Arbitration : The Present Position* (2007(4) Arb.L.R. J 9-16).

<sup>78</sup> JULIAN, *supra* note 22, at 67.