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International commercial arbitration: India

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Abstract
With the advent of globalisation, the world has become a global village. Business organisations have expanded themselves beyond borders and hence, there has been a real time increase in cross-border transactions. Agreements and contracts executed between commercial organisations many a times go ugly, thus, giving rise to disputes which are not within the confines of municipal law of a particular country, because the transactions are 'cross-border' in nature. Adjudication of cross-border business disputes demand expertise of a different sort, especially when the organisations in dispute hail from nations following different legal systems, as for example common law system and civil law system. In situations like these, redressal of disputes qua 'arbitration' is the most plausible and non-arbitrary solution.

If India is to progress in the area of International Commercial Arbitration, the law as laid down by the Parliament and the interpretation given to it by the Apex Court, must coincide. If such a thing doesn't happen, cross-border investments (FDI) in India will continue to decline, with the countries world over doubting our international integrity, finding India, not "fine-tuning" but rather "musical-chairing" with the 'interpretative skills' in regards to legislation enacted; to arbitrarily promote what suits best to its national entities. That said, what else needs to be seen is that, there is no re-circulation back to the days of the 1940 Act, in regards to which the Supreme Court once observed, 'let not arbitral proceedings be done in a way that will make the lawyers laugh and legal philosophers weep'.

Keywords: International commercial arbitration, 'seat' of arbitration, 'venue' of arbitration, Bhatia international case, BALCO case, public policy qua section 34 and 48 of the 1996 act

Introduction
With the advent of globalisation, the world has become a global village. Business organisations have expanded themselves beyond borders and hence, there has been a real time increase in cross-border transactions. Agreements and contracts executed between the commercial organisations many times go ugly, thus, giving rise to disputes which are not within the confines of municipal law of a particular country, because the transactions are 'cross-border' in nature. Adjudication of cross-border business disputes demand expertise of a different sort, especially when the organisations in dispute hail from nations following different legal systems, as for example common law system and civil law system. Usually, as a matter of practise, all agreements executed between corporations inter-se, to bring to fore a common purpose, have three covenants, worth stressing, in particular; one is that of the 'governing law', second is the 'jurisdiction clause', and third is the 'arbitration clause'. The 'governing law' stipulation states, as to law of which country shall be taken recourse to, if and when deals between the international corporations go sour. The 'jurisdiction clause' states, as to courts of which country shall have the 'say' in the matter in dispute, at hand. The 'arbitration clause' states, how the disputes are to be resolved between the corporations before they are formally brought before the court of law for adjudication; arbitration clause speaks of mechanisms which are in the nature of 'out-of-the-court-settlement-of-disputes', such as: mediation, conciliation and arbitration.

Sir Michael John in his famous work, Transnational Arbitration in English Law, stated- "The essence of the theory of 'transnational arbitration' is that the institution of international commercial arbitration is an autonomous juristic entity which is independent of all national courts and all national systems of law. One of the primary purposes of trans-nationalist movement is to break the links between the arbitral process and the courts of the country in which the arbitration takes place.

International Commercial Arbitration vis-à-vis India

Arbitration law in India is governed by the Arbitration and Conciliation Act of 1996.3 The 1996 Act is based on the UNCITRAL4 Model Law. The 1996 Act, broadly speaking, is divided into two parts- 'Part I' and 'Part II'. Part I of the 1996 Act relates to domestic arbitrations while Part II relates to International Commercial Arbitrations. Section 2(1)(f) of the 1996 Act defines 'international commercial arbitration' as an arbitration relating to disputes arising out of legal relationship, whether contractual or not, which are considered as commercial under the law in force in India; where one or more of the parties are entities (personal or impersonal) which reside outside India.6 'Commercial': The term 'commercial' finds no definition in the 1996 Act7; however, this term finds explanation in a footnote of the UNCITRAL Model Law on International Commercial Arbitration and since, the Model Law finds mention in the Preamble annexed to the 1996 Act, the same can very well be used for guidance.8 The Supreme Court of India in the case of R.M. Investment & Trading Co. (P) Ltd. v. Boeing Co., (1999) 5 SCC 108, held that the word 'commercial' should be interpreted in the widest terms possible, so far as the law in regards to concerned. Seat of Arbitration': Comprehensive study of Part II of the 1996 Act, speaks in volumes, that even where the seat of arbitration is in India, international commercial arbitration shall subsist. Putting all legal speculations to rest, the Supreme Court of India held in the case of BALCO9 that, if the seat of arbitration in an international commercial arbitration is outside India, then Part I of the 1996 Act shall have no applicability.

Implied Exclusion of Indian Laws

Recently, in a critiquing case, Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd.13, the Supreme Court of India dealt with the anomaly of implied exclusion of Indian laws under an arbitration agreement. In this case the agreement in subject stated that, the contract executed shall be governed by (and will be construed as per) the English law qua the arbitration clause. Though there wasn't express
exclusion of Indian laws (the Arbitration and Conciliation Act, 1996), there seemed ample indication as to this through the express inclusion of various phrases such as: 'arbitration in London to apply', 'arbitrators are to be the members of the London Arbitration Association' and 'contract is to be governed and is to be construed in accordance with English law'. The agreement provided that, in case a dispute arose with amount involving less than US $50,000, then arbitration is to be conducted in accordance with small claims procedure of the London Maritime Arbitration Association. The Supreme Court critiquing on the fact analogy stated that, in this case the ratio of Bhatia International was applicable (Para 48 of the 'Harmony Innovation' Judgment). To derive this conclusion, the court gave emphasis upon: the commercial background; the context of the contract; the circumstances of the parties qua which the parties acted; and the background qua which the contact was entered into. The Apex Court thus held that, the applicable law could not be denied only because it would put one of the disputing parties in a position advantageous.

Seat of Arbitration qua Venue of Arbitration- Anomaly

The Supreme Court of India in the case of Enercon (India) Ltd. & Ors v. Enercon GmbH & Anr, (2014) 5 SCC 1, held that the "venue" of an arbitration, which is geographical location chosen based on the convenience of the parties is not the same as the "seat" of arbitration, which decides the appropriate jurisdiction.14 The Apex Court in this case held that, it is an accepted proposition of law that the 'juridical seat' or 'seat of arbitration' normally carries with it the choice of the respective country's arbitration or curial law. But this would arise only if the curial law is not specifically selected by the parties. The court further opined that: (a) It is necessary not to confuse the legal seat of arbitration with the geographically convenient place or places for holding hearings; (b) 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 thereof 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; (c) Sections 8, 10, 11 and 45 of the Arbitration and Conciliation Act, 1996 are mere machinery provisions for the court to support and aid arbitration; (d) An arbitration agreement is valid so far as the intention of the parties to resolve the dispute by arbitration is clear; any allegation of non-conclusiveness of the main contract is immaterial; (e) If the intention to arbitrate is clear, the court can make good an omission to make the arbitration agreement workable.

Public Policy Conundrum

There is no conclusive definition of the term "public policy" qua the Arbitration and Conciliation Act, 1996. However, in regard to the same can be found in Section 34(2) (b) (ii); Section 48(2) (b) and Section 57(1) (e) of the 1996 Act.15 It is worth noting that, enforcement of foreign awards qua the meaning of 'public policy'obtaining in India, by virtue of the judgment rendered by the Supreme Court of India in the case of Shri Lal Mahal Ltd. v. Progeto Grano Spa16, in regards to the meaning of the term "patent illegality" culling out of the term "public policy" has been severely narrowed down. While a domestic award can be assailed on the ground that it is patently illegal, in so much so, it violates a statutory provision of an enacted statute (under the laws in force in India), this ground remains unavailable to assail foreign awards. Also, where an arbitration agreement is in place for the resolution of disputes, the fact that fraud (or cheating) is alleged is no longer a tensile ground available to impede the court's power to refer the parties to arbitration. This was made much clear by the Apex Court in the case of World Sports Group (Mauritius) Ltd. v. MSN Satellite (Singapore) Pte Ltd. It is necessary to keep in mind that, unlike Section 8 of the 1996 Act, the power of the court under Section 45 is brought to fore only if the following matters obtain, that the agreement is, null and void; inoperative and incapable of being performed.18 It is important to note that, if a court were to refer parties to arbitration under Section 45 of the 1996 Act, the party-aggrieved by this, can only file a petition under Article 136 of the Constitution of India, 1950, as the remedy of an intra-court appeal under Section 50 of the 1996 Act is available only where the court refuses to make reference to arbitration under Section 45 of the Act.19 This too is important to note that, if the court refuses to enforce a foreign award under Section 48, an intra-court appeal under Section 50 of the Act would lie.

Foreign Awards- Constitution, Enforcement & Refusal

To see, what constitutes a foreign award analysis of Section

44 of the 1996 Act is of paramount importance. The necessary ingredients are as follows: the decision should be an arbitral award; it should arise out of a legal relationship obtaining between parties which may or may not emanate from a contract; the legal relationship must have commercial considerations (or connotations); the award should be made in pursuance of an agreement in writing, for arbitration, to which the convention set forth in Schedule I of the 1996 Act applies; and, the foreign award should be made in one of the 47 countries duly notified by the Government of India, officially. The primary purpose of Section 48 is to ensure that at some stage- whether, pre-award, post-award or both, the judicial authority can be called upon to decide upon the validity, operation, capability of performance of the arbitration agreement.26 Section 48(1) and (2) of the 1996 Act, hold that a foreign award can be refused, at the behest of the party against whom it is invoked if- (a) proof is furnished by the party in respect of any of the grounds specified in clauses (a) to (e) of Sub-section (1); or, (b) the court finds either that the subject-matter of dispute cannot be arbitrated or that enforcement of award would end up being against the public policy of India.

Enforcement of a foreign award can be refused only on the basis of the grounds mentioned in Sub-section (1) and (2) of Section 48, these grounds are as follows:

1. Parties to the agreement, under the law applicable to them, were under some incapacity.27
2. The agreement was not valid under the law applicable to which the parties have subjected themselves to.
3. Failing any indication of the law applicable to the agreement, the agreement was not valid under the law of the country where the award was made.
4. The party against whom the award is enforced, had no notice of the appointment of the arbitrator or arbitral proceedings, or was otherwise unable to present its case.
5. The award deals with differences not contemplated by or falling within the terms of submission, or contains decisions on matters beyond the scope of arbitration.28
6. The composition of the arbitral tribunal or the arbitral procedure followed was not in accordance with the agreement obtaining between the parties.
7. If there is no agreement in regards to the above, the composition or the procedure followed was not in accordance with the law of the country, in which the arbitration took place.
8. The award has not yet become binding or was set aside or suspended in the country or under the law in which the award was made.
9. The subject matter of dispute is incapable of settlement by arbitration under the laws of India.
10. The award is contrary to public policy obtaining in India, and one such ground which would attract public policy is an award which is induced or affected by fraud or corruption.

Conclusive Remarks

If India is to progress in the area of International Commercial Arbitration, the law as laid down by the Parliament and the interpretation given to it by the Apex Court, must coincide. If such a thing doesn't happen, cross-border investments (FDI) in India will continue to decline, with the countries world over doubting our international integrity, finding India, not "fine-tuning" but rather "musical-chairing" with the 'interpretative skills' in regards to legislation enacted; to arbitrarily promote what suits best to its national entities. That said, what else needs to be seen is that, there is no re-circulation back to the days of the 1940 Act, in regards to which the Supreme Court once observed, 'let not arbitral proceedings be done in a way that will make the lawyers laugh and legal philosophers weep'

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