FOREIGN ARBITRATION AWARDS & ATTITUDE OF INDIAN LEGAL REGIME: THE SAGA OF CONSTANT FLIP-FLOP

Mr. Deepankar Sharma[1]

ABSTRACT

Globalization and liberalizations of trade and economy resulted in to boom in international commercial transaction resulted in to growth in commercial disputes. International commercial arbitration is one of globally acceptable mode of resolving the dispute especially at international level. With the advent of liberalization in India in 1990's, attracting international business has supported domestic economy a lot. Though corporate houses are adopting the arbitration to facilitate international business and to minimize the judicial interference, but still settlement of dispute is just winning the half of battle as procedural issues relating to the recognition and enforcement of foreign arbitral awards is still problematic in India. These judicial interventions may have serious consequences on international commercial transactions and on foreign arbitration awards passed by international commercial experts. Last three decades has witnessed a series of suits against foreign award, but recent judicial pronouncement in Bharat Aluminium Company Limited ("BALCO") V/s. Kaiser Aluminium Technical Service, Inc. ("Kaiser") [2] *has provided a lifeline for settlement of future disputes by arbitration and ultimately improved the confidence in Indian Judicial system. The second obstacle for the enforcement of foreign awards in India is the varied interpretation of the term "public policy". The paper is drafted to critically examine the enforceability of foreign arbitral awards in India.*

INTRODUCTION

Rule of law[3], a key principle provides that Courts are there to protect the rights and interests of the people, giving citizens reassurance and confidence that their voices would be heard. The role of Court is important the delivery of justice in the democratic countries grounded in the rule of Law. Courts follow the procedural technicalities and are normally costly and

[1] Assistant Professor of Law, National Law University Jodhpur, Rajasthan. He is the Coordinator in Centre for Competition Law & Policy (CCLP). He is Visiting Scholar at City University London (UK) and Visiting Research Associate at University of Hong Kong. He is also working as an Editor at NLUJ Law Review.
[2] C.A. No. 7019/2005; Supreme Court judgment on 6 September 2012
[3] Marbury vs. Madison, 5 US 137 (1803).

slower, which is against the interest of the litigants.[4] These are the main factors which has paved motivational for alternate mode of adjudication and in the achievement of 'justice for all'. ADR bought a lifeline for the never-ending litigation based on the subjective and procedural law of formal adjudication. ADR enables 'access to justice' when adjudication fails, by removing the barriers to formal adjudication, offering a forum tailored to fit the case.

The utilization of ADR to resolve dispute in a confidential settings is seen as one of the major advantage over litigation. Furthermore ADR enjoys significant flexibility. Arbitration is one of the most commonly used alternative to litigation where parties can agree to the procedural rules to regulate the enforcement of the contract and is now commonly used to resolve a dispute out of Court providing cost and time effectiveness.

Arbitration is a process used by the agreement of the parties to resolve the dispute. In arbitrations, disputes are resolved, with binding effect, by a person or persons acting in the judicial manner in private , rather than by a national Court of law that would have jurisdiction but for the parties to exclude it[5]. The decision of arbitral tribunal is known as award.[6] ADR mechanism for resolving disputes in India has contributed in justice delivery system. The contribution of Lok Adalat is a form of ADR which has significantly performed to remove backlog of cases. Though the arbitration regime seems to be newly flourished, but the seed of arbitration has sown in early as in 1772. Even Article 51 of Indian constitution encourages arbitrations, and presently Arbitration and conciliation Act, 1996 (hereinafter 1996 Act) provides legal framework for the enforcement of foreign arbitral awards in India under Part II of the Act.

NEW YORK CONVENTION

A. BIRTH OF THE NEW YORK CONVENTION

The ICC in 1953 bought first draft focusing exclusively on the enforcement of international arbitration awards. This draft was bought as per the observation that the Convention though was a considerable step, is no longer meets modern economics requirements. Thus there is need of new international regime for the enforcement of international arbitration awards. This

[4] As it is commonly said that 'justice delayed is justice denied'
[5] The industrial dispute arbitrations, for example, are not always in sense of arbitration, but there may be a form of mediation and conciliation where the third person assists the parties on an agreement.
[6] Halsbury law of England; Butterworths India 2008, vol. 2, p 911

ICC draft was transmitted to United Nations' Economic and social council, later on the council produced a revised draft. Finally the compromise draft was created, including some significant new elements which were not contemplated by the earlier proposal. The contribution of Dutch delegation was important to extend the proposed treaty from only the recognition of arbitration award and arbitration agreement to the recognition and enforcement of international arb, agreements.[7]

B. LEGAL FRAMEWORK OF NEW YORK CONVENTION

As stated above the prime objective of New York Convention was to make the enforcement of international arbitration agreements easier consistent with this objective, Art II.1 of the Convention establishes a basic rule of formal and substantive validity for international arbitration agreements:

" Each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitrations all or any differences which has arisen or which may arise between hem in respect of a definite legal relationship, whether contractual or not, concerning the subject matter capable of settlement by arbitration"

This rule is further elaborated in Art II.3 of the Convention, which requires the contracting states to refer parties to international arbitration agreement to arbitration unless it is said to be null and void. The other requirements are provided in Art II.

C. FIELD OF APPLICATION

Meaning of foreign Award

Part II of 1996 Act deals with enforcement of foreign awards. Under sec 44 an award is a foreign award if-

(a) It is made in pursuance of an agreement to which NYC applies; and

(b) It is made in the territory to which NYC applies on reciprocity basis**.**

The application and scope of NYC is determined by Art 1 of the NYC, which states:

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.

[7] A. Ven den berg, *The New York Convention of 1958*,12-13(1981), available at: http://www.arbitrationicca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf

It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

This article is one of the most important pillars upon which whole of the NYC rests. It specifies the field of application of NYC- those awards made in the territory of the state other than the state where enforcement is sought and excludes domestic awards. The convention is silent on the interpretation of word "made" for the purpose of Art 1. How should one determine ' where the award is made', is it the place of arbitration which is agreed by the parties, or the place of hearing, or the place where the arbitrator actually wrote and signed the award. This problem is illustrated in *Hiscox v. Outhwaite*[8], where the arbitration clause named London as the place of arbitration, but the arbitrator resided in Paris at the time where the award was rendered. . The arbitrator's signature line in the award read "dated at Paris, France." At the time of enforcement the English High Court determined London as a place where the award is "made" as the place of signing the award is not decisive. The court of Appeal reversed the decision this decision and considered Paris as the place where the award is "made".

An award, whilst it is no doubt the final culmination of a continuing process, is not in itself a continuing process. It is simply a written instrument and I can see no context for departing from what I apprehend to be the ordinary, common and natural construction of the word "made." A document is made when and where it is perfected. An award is perfected when it is signed. This decision was subsequently criticized, and was reversed by sec 53 of English Arbitration Act 1996 which states: Unless otherwise agreed by the parties, where the seat of the arbitration is in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, dispatched or delivered to any of the parties.[9]

ENFORCEMENT OF FOREIGN AWARD - INDIAN REGIME

[8] *Hiscox v. Outhwaite*, [1991] 1 W.L.R. 545 (decided 1991) (Court of Appeal, England).
[9] This section was deliberately inserted into the 1996 Act in order to reverse the effect of *Hiscox v. Outhwaite.*

THE PRE-1996 POSITION

In *National Thermal Power Corporation Ltd v. Singer Co.*[10] where the law which governs the contract was law in force in India and the courts of Delhi have the jurisdiction in all the matters arising under the Contract. The question for determinatio1n is "whether or not an award made in London by the arbitrator appointed by ICC is domestic or foreign Award" as there is no expressed statement as regard the law governing the arbitration agreement. The council for the respondent contended that ' the arbitration being a collateral contract and procedural in nature, it is not necessarily bound by the proper law of the contract, but the law applicable to it must be determined with reference to others factors. The respondent referred *to Dicey & Morris* in *"The Conflict of Laws". 11th edn., Vol.11 ('Dicey') , Rule 180.*[11] The court stated that there is no need to draw any inference about the intention of the parties or to impute any intention to them, for they have clearly and categorically stipulated that their contract, made in India to be performed in India, is to be governed by the 'laws in force in India' and the courts in Delhi are to 'have exclusive jurisdiction in all matters arising under this contract' (Clause 7).

Replying on the question of "Conflict of laws", court reasoned that in an arbitration agreement where the parties had agreed that matters of procedure should be governed by a different system of law, the court would give effect to the choice of a procedural law other than the proper law of the contract, but if there is no expressed statement as regard the law governing the arbitration agreement, and Indian Law governs the contract the laws of India would undoubtedly govern the validity, interpretation and effect of all clauses including the arbitration clause in the contract as well as the scope of the arbitrators' jurisdiction. The cardinal test suggested by Dicey in Rule 180 is thus fully satisfied.[12] The Apex court held that an award made on an arbitration agreement governed by law of India, though rendered outside India, was attracted by the saving clause (b) in sec 9 of 1961 [13]Act, and was therefore not considered in India as "Foreign Award".

[10] (1992) 2 Arb LR 154: AIR 1993 SC 998: (1992) 3 SCC 511.

[11] Rule 180 - The term 'proper law of a contract' means the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection. (Pages 1161-62).

[12] See para 19 of *National Thermal Power Corporation Ltd v. Singer Co.*

[13] Section 9 in The Foreign Awards (Recognition and enforcement) Act, 1961 - Saving. 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.

The relevant presumption which laid down in NTPC v. Singer in this regard is:

- In most of the cases the proper law of arbitration agreement shall be the same as the proper law of contract (presumption 1)
- The proper law of the contract and the proper law of arbitration agreement shall presumed to be that of the law of the seat of arbitration, if the parties has merely chosen the seat of arbitration and failed to designate the proper law of contract and arbitration agreement. (presumption 2)

Following the decision in *Sumitomo Heavy Industries Ltd. V. ONGC*[14] it was head that an award under an agreement governed by the laws of India was not a foreign award even if it was made in foreign country.

In *Gas Authority of India V. SPIE CAPAG SA*[15] the court added that the 1961 Act will be applicable if contract with foreign enterprise includes the arbitration clause. In a subsequent litigation between the same parties, reference to arbitration was not allowed to be claimed in respect to matters not covered by the arbitration clause. The court stated that in such condition Indian law will be applicable and that the arbitration was a domestic one and not the foreign Award (Recognition and Enforcement) act 1961 and that the court could stay judicial proceedings in the foreign country on the matter.

POSITION UNDER 1996 ACT

When 1996 Act came in to force it appears that the absence of provision corresponding to Sec 9(b) of the foreign Award (recognition and enforcement) act, 1961 under the new 1996 Act, the enforcement of the foreign Award will become less problematic. As now only condition applicable in Part II is:

(1) The award must be rendered in foreign country, or

(2) The award must not be considered as domestic award; and

(3) The award must be rendered in the country notified by Indian Government as one which has reciprocal provisions for the implementation of NYC.

[14] 1998 AIR 825, 1997(6)Suppl.SCR 186, 1998(1)SCC 305, 1997(7) SCALE338 , 1997(9)JT 666
[15] AIR 1994 Del 75: (1994) 1 Arb LR 429

APPLICABILITY OF PART 1 TO ARBITRATION DECIDED OUTSIDE INDIA

In *Bhatia international v Bulk Trading S.A.*[16]` , the seat of arbitration was Paris and following the rules of ICC. No proper law of the contract or the proper law of arbitration agreement was specified. The court concluded that Part I of 1996 Act is applicable to the arbitrations concluded outside India, unless Part I is specifically and impliedly excluded. The Supreme Court taken the view that the language of section 2(2) says that Part I will apply where the place of arbitration is India, Which does not mean that Part I is only applicable when the place of arbitration was in India. This was due to absence of "only" in sec 2(2) of 1996 Act. Court pointed to sec 2(7) which state "that award, made under part I shall be considered as domestic award". The court has also laid the law stating that unless the arbitration agreement expressly excludes, part I of the 1996 Act will be applicable Thus the final conclusion is, if any arbitration award made outside India in a country which is signatory of NYC and Part I is not excluded, then such award is considered as domestic award.

The conclusion from Bhatia International can be summed up in following three principles:

(1) Part 1 mandatorily applies to when the arbitration is held in India[17] [Principle 1];

(2) Part 1 applies to arbitration concluded outside India unless applicability of Part 1 is expressly and impliedly excluded [Principal 2];

(3) Part 1 applies when proper law of contract and proper law of arbitration agreement is not specified [Principle 3]. [18]

This ultimately has posed the more complex and unclear picture of Arbitration regime in India, as international award can be both a domestic award and a foreign award by virtue of sec 2(7) and sec 44 at one and the same time. Also the modes of enforcement are different as both section falls in different parts of the Act. In the case of enforcement of domestic award, it becomes automatically enforced [19]while in subsequent situation the award becomes enforceable when it comes to court. [20]

[16] Bhatia international v. Bulk Trading S.A. (2002) 1 Arb LR675: AIR 2002 SC 1432: (2002) 4 SCC 105: (2002) 1 RAJ 469.
[17] To understand the term "held in India", see supra 40.
[18] See para 32 of Bhatia International v. Bulk Trading SA (2002)
[19] See section 36 of 1996 act
[20] See section 47 of 1996 Act.

In ***Venture Global v. Satyam computer services Ltd.***[21] , the court has extended the scope of Principle 2, where the arbitration is concluded by London Court of International Arbitration, where the applicable law was law of the State of Michigan, United States. There was also a provision in agreement which states that parties shall at all times act in accordance with the companies act and other act and rules being in force in India at any time. The court held that the condition of implied exclusion is not satisfied, on the basis of this clause and the other surrounding circumstances like incorporation of company in India, the transfer of "ownership interest" shall be made in India under the laws of India. Pursuant to Venture Global, an Indian court can hear and decide on challenge to a foreign arbitration award under sec. 34, which is under Part 1.

Later in *Tamil Nadu electricity board v. Videocon power Ltd*[22], where the law governing the contract was Indian law and the law governing the arbitration agreement was English Law, here the court has not followed the criteria of Bhatia, the court interpreted the test for determination of an award as foreign award; (i) the relationship of the parties must be commercial; (ii) the award must be made in pursuance of agreement in writing; (iii) and award must be made in conventional country. By reconciling the both the judgments one can draw that the part I is applicable to foreign and domestic awards. Recently in *Bharat Aluminium Co.* v *Kaiser Aluminium Technical Service Inc*., the SC has put a full stop to this see-saw exercise by redefining the object and scope of Indian Courts in enforcement of foreign awards in India.

Bharat Aluminium Company Limited ("BALCO") V/s. Kaiser Aluminium Technical Service, Inc. ("Kaiser"): Redefining Arbitration and Conciliation 1996 Act

The Constitutional Bench of the Supreme Court delivered a landmark judgment on 6thSeptember 2012. This decision of the Supreme Court has come as a big relief to foreign parties doing business with their Indian counterparts. This ruling renders certainty to transactions which provide for the arbitration with a foreign seat and is likely to encourage arbitration to be the preferred mode of resolving disputes. The court has redefined the majority of provision playing crucial role in enforcement of foreign award. These issues are further discussed in below.

[21] *Venture Global v. Satyam computer services Ltd,* (2008) 1 Arb LR 137: AIR 2008 SC 1061.
[22] (2009) 4MLJ 633.

ADOPTION OF UNCITRAL MODEL LAW IN INDIAN LAW AND EXTENSION OF TERRITORIAL PRINCIPLE BY INDIAN COURTS

To consider the debate on comparison between the Article 1(2) of UNCITRAL and section 2(2), result in formation of question that Does the missing 'only' indicate a deviation from Article1 (2) of the Model Law?, the Court stated that the object and reason for enactment of Act has clearly considered the UNICITRAL model law, as noticed in objects and reasons for the enactment. The Law Commission has proposed the amendments in 1940 Act to make it more responsive to contemporary requirements, as the current law is not fully effective and out of tune of global acceptance and thus Model law was accepted in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration .practice. Thus the enactment of 1996 Act was to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral relating to conciliation, *taking into account the UNCITRAL Model Law and Rules.* Also the sec 2(2) is self sufficient in itself as "if the intention was to include the foreign awards under sec 2(2), it would has been specified exclusively. The reason for difference is due to exclusions of exceptions of Art 1(2) of the Model Law in Indian Act.[23] Also UNCITRAL Rules adopted strict territorial principle[24]. The Court has also considered the similar provisions from Swiss Private International Law Act, 1987[25] and U K law where "only" is missing but 'territorial principle is applicable'. These are the reasoning of non adoption of Bhatia and Venture Global interpretation of sec 2(2) at this place.

In respect to contradiction of sec 2(2) and sec 2(4) and 2(5), the interpretation in Bhatia on sec 2(4) and sec 2(5) which states applicability of Part I to all arbitrations irrespective of the seat of the arbitration has indirectly extended the jurisdiction of Part I to foreign arbitration .The bench opined that sub section 2(4) must be read as whole which makes Part I applicable

[23] Article 1(2) reads as under: - "Article 1(2): The provisions of this law, except Articles 8, 9, 17(H), 17(I), 17(J), 35 and 36 apply "*only*" if the place of arbitration is in the territories of this State"; currently it includes some new exceptions.; see paragraph 81 of the 18th session in Vienna, June 1985, which read as follows: *"81. The Commission agreed that a provision implementing that decision, which had to be included in article 1, should be formulated along the following lines: "The provisions of this Law, except articles 8, 9, 35 and 36 apply only if the place of arbitration is in the territory of this State."*

[24] The Report of the UNCITRAL in paragraphs 72 to 81 on the work of its 18th Session in Vienna between 3rd to 21st June, 1985. Some of the extracts are as follows: "*73, As regards the connecting factor which should determine the applicability of the (Model) Law in a given State, there was wide support for the so called strict territorial criterion, according to which the Law would apply where the place of arbitration was in that State……"*

[25] Swiss Private International Law Act, 1987 Chapter 12, Article 176 (1)(I) and Section 2(1) of the 1996 Act of U.K. has dropped "only"

to *"every arbitration under any other enactment for the time being in force" which in ordinary mean* 'to an Act made by Indian parliament' . Also sec 2(4) and 2(5) must be read in line with sec 2(2), thus 'all arbitration' should limit to domestic arbitration. The statutes which include the provision of arbitrations are telegraph Act, 1886; and other by-laws. If there is arbitration under any other Act, then provisions of part I of 1996 Act will govern such arbitration.

DO SEC 2 (7) INDICATE THAT PART 1 IS APPLICABLE TO ARBITRATION HELD OUTSIDE INDIA?

To define domestic award under sec 2 (7)[26], we have to consider different terminology viz. International award and foreign arbitration award, which are not similar. Foreign award mean any commercial award taking place outside India, while international arbitration award is any award between two and one of the parties is of nationality of/ resident of any country other than India or a body corporate incorporated outside India[27], irrespective of place of arbitration. Thus an international arbitration award can be domestic award if the seat of arbitration is in India. If we look at different way a foreign award may be domestic award in the country in which foreign award is rendered. The scope of sec 2 (7) is for domestically rendered award in a domestic arbitration or domestically rendered award in an international arbitration, the foreign award is covered in Part II. This indicates that there are no overlapping provisions among two and are exclusive. Section 53[28] makes it clear that part II is applicable on foreign award.

SEAT AS A CENTRE OF GRAVITY

One of the arguments which appellant pointed was that 1996 Act is *subject matter centric* and seat is not the centre of gravity. It was argued that sec 2(1)(e), sec 20, sec 28 ,makes it clear that the Part 1 is not limited only to arbitrations which take place in India. But the court stated that these sections must be interpreted in light of sec 2(2) which say that Part 1 shall apply where the seat of arbitration is in India.

[26] "An arbitral award made under this Part shall be considered as a domestic award."
[27] See sec 2.(1)(f) of 1996 Act
[28] Interpretation of foreign award.

Sec 2(1) (e) includes "***subject matter of the arbitration"*** to determine jurisdiction of the courts where arbitration take place. The importance of this phase can be understood with the point of jurisdiction of courts when the place of arbitration is neutral for the parties of the arbitrations. If arbitration is at neutral place in India, then the courts of such place will be having the jurisdiction. On the other hand sec 47 of part II deals with the enforcement of certain foreign awards, where the term *"court"* has been defined as the court having the "*jurisdiction over the subject matter of award"*. The court having jurisdiction over subject matter of the award is the court under whose jurisdiction the asset is located, against the enforcement is international arbitration is sought.

The sec 20 when read in light of sec 2(2) states that when the place of arbitration is in India the parties are free to select any place in India. Section 20(2) authorizes the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties. As the seat of arbitration plays a vital role, sec 20 supports that under 1996 Act the centre of gravity is the seat and extraterritorial principle is not applicable under Part 1.

IS THERE ANY OVERLAPPING AMONG PART 1 AND PART 2?

The court has stated that both parts are mutually exclusive to each other and there is no overlapping among two, as the regulation of arbitration consists of four steps: (a) the *commencement* of arbitration; (b) the *conduct* of arbitration; (c) the *challenge* to the award; and (d) the *recognition or enforcement* of the award. In our opinion, the aforesaid delineation is self evident in Part I and Part II of the Arbitration Act, 1996. Part I of the Arbitration Act, 1996 regulates arbitrations at all the four stages. Part II, however, regulates arbitration only in respect of commencement and recognition or enforcement of the award.

In Part I, Section 8 regulate the *commencement* of arbitration in India, Sections *3, 4, 5, 6, 10 to 26, 28 to 33* regulate the *conduct* of arbitration, Section 34 regulates the *challenge* to the award, Sections 35 and 36 regulate the *recognition* and *enforcement* of the award. Sections 1, 2, 7, 9, 27, 37, 38 to 43 are ancillary provisions that either support the arbitral process or are structurally necessary. Thus, it can be seen that Part I deals with all stages of the arbitrations which take place in India. In Part II, on the other hand, there are *no* provisions regulating the *conduct* of neither arbitration nor the *challenge* to the award. Section 45 only empowers the

judicial authority to refer the parties to arbitration outside India in pending civil action. *Sections* 46 to 49 regulate the *recognition* and *enforcement* of the award. Sections 44, 50 to 52 are structurally necessary.

REVERSING THE VENTURE CAPITAL & BHATIA INTERNATIONAL

The court has completely denied the jurisdiction of Indian courts to annul a foreign award, falling under part II. Sec 48 provides the limited powers to refuse the enforcement of foreign award under NYC. Sec 48(1) (e) which is similar to Art V (1) (e) of NYC, which read as follows:

The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Article V (1) (e) [Section 48 (1) (e)] makes it clear that only the courts in the country "in which the award was made" and the courts "under the law of which the award was made" (hereinafter referred to as the "first alternative" and the "second alternative" respectively) would be competent to suspend/annul the New York Convention awards. It is clarified that Section 48(1) (e) is only one of the defences on the basis of which recognition and enforcement of the award may be refused. It has no relevance to the determination of the issue as to whether the national law of a country confers upon its courts, the jurisdiction to annul the awards made outside the country. The word "suspended/set aside" in Section 48(1) (e) cannot be interpreted to mean that, by necessary implication, the foreign awards sought to be enforced in India can also be challenged on merits in Indian Courts. Second alternative can be invoked only if the court of first alternative has no power to annul the award under the domestic legislation. The expression *under the law* is the reference only to the *procedural law/curial law* of the country in which the award was made and under the law of which the award was made. Thus in previous judgements of Venture Global and Bhatia where the court has annulled the award on the basis that the parties has chosen India Law to govern the substance of the dispute, such interpretation is against the spirit of NYC.

IMPLICATIONS

1. This judgement is applicable to all arbitration agreements executed after September 6, 2012.

2. Seat is the centre of gravity, thus seat of arbitration has now gained paramount importance for determining the applicability of Part I of the Act.
3. Scope of Part 1 does not extend to foreign awards or the arbitration proceedings held outside India
4. The territorial principle of UNCITRAL model law has been adopted in 1996 Arbitration Act.
5. No interim relief under sec 9 would be available where the seat of arbitration is outside India.
6. Public policy exception for non-enforcement of foreign arbitration awards can still be considered by Indian Courts.

PUBLIC POLICY – THREAT TO INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA

In 1824, in the case of Richardson v Mulish[29] , it was held that "Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you. It is never argued at all but when other points fail". It is a ground on which the Court may refuse the enforcement of a foreign award on its motion without any request of the party against whom the award is invoked.[30] In most of the international conventions public policy clause acts as a last resort to prevent unwanted effects. Though there is no precise definition of term "public policy", many international institutions.

LEGAL FRAMEWORK OF PUBLIC POLICY

Article 1 of the Geneva Convention contained a public policy clause as well, which reads as follows:

To obtain such recognition or enforcement, it shall, further, be necessary

That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

Section 7(1) of the 1937 Act

[29] *Richardson v. Melish*, (1824) 2 Bing. 228 (252) (Court of Common Pleas, England)
[30] Aswanie K. Bansal, *Arbitration Agreements & Awards, law of International and Domestic Arbitration*, second edition, Universal law publishing Co. Delhi.pp182.

In section 7(1) of the 1937 Act it is provided that in order that a foreign award may be enforceable under this Act it must have..... and the enforcement thereof must not be contrary to the public policy or the law of india.

SECTION 57 (1) (E) OF 1996 ACT

Section 57(1) (e) of 1996 Act provides-

In order that a foreign award may be enforceable under this Chapter, it shall be necessary that the enforcement of the award is not contrary to the public policy or the law of India.

Explanation - Without prejudice to the generality of clause (e), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

ARTICLE V (2) (B) OF NYC

Article V (2) (b) provides grounds for refusing to enforce an award:

(b) The recognition or enforcement of the award would be contrary to public policy.

Section 48(2) (b) of the 1996 Act provides:

Enforcement of an arbitral award may also be refused if the court finds that the enforcement of the award would be contrary to the public policy of India.

Explanation -Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

I. *RENUSAGAR*: - THE FAIR INTERPRETATION

In *Renusagar* Power Plant Ltd. v. General Electric Co.,[31] the question before the court was weather the enforcement of award would be contrary to public policy, which would result in:

(i) Contravention of the provision of FERA [foreign exchange Regulation act, 1937].

(ii) Recovery of compound interest on interest to GE.

[31] AIR 1994 SC 860.

(iii) Unjust enrichment by GE

(iv) Payment of damages on damages.

The hon'ble SC interpreted the term 'public policy' in sec 7(1)(b)(ii) of fare Act and held that an award would be contrary to public policy if such enforcement is (i) contrary to the fundamental policies of Indian Law; or (ii) the national Interest; or (iii) the basic principles of justice and morality. The court gave the interpretation of term public policy within the scope of international public policy (order public international) and stated that since the Act is calculated and designed to sub serve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration, any expression or phrase occurring therein should receive, consisting with its literal and grammatical sense, a liberal construction."[32]

The court relied on Mitsubishi Motors corporation v Soler Chrysler-Plymouth Inc,[33] where an international arbitral award was set aside due to recognition and execution of award was contrary to the international public policy. The court also stated that expression 'public policy' of sec 7(1) (b) (ii) of Foreign Award (Recognition and Enforcement) Act, 1961 has the same effect in the provision of sec 7(1) of the 1937 Act, Art V (2) (b) of the NYC, Art I(c) of the Geneva Convention of 1927, sec 7(1) of Protocol and Convention Act 1937. Thus the term was narrowly interpreted. The court also clarified that FARE act is concerned with the recognition and enforcement of foreign award which is governed by the principles of private international law , thus the term 'public policy' necessarily be construed as doctrine of public policy in the field of private international law.

ONGC: WIDENING THE SCOPE OF "PUBLIC POLICY OF INDIA"

In ONGC v SAW PIPES, the court has redefined the principle of "public policy", which has been highly criticised by the scholars across the globe. In this case respondent (Italian supplier) offered to supply casting pipes to appellant. The appellant accepted the offer with terms and conditions of supply on or before 14/11/1996. The contract deed provides the appellant to recover from respondent, liquidated damages and not in the way of penalty in the case of delivery the store or any instalments of aforesaid goods. The amount of damages is

[32] Albert Jan van den berg (ed.), yearbook commercial arbitration; vol XX-1995, para38 pp 701.
[33] 87 L.Ed. 2d444, this is a French case where the international arbitration agreement was set aside as the recognition and execution of award is contrary to the international public policy.

equivalent to 1% of the contract price per week, subject to maximum limit of 10%, the amount of damages to be adjusted from the payment of bill of material. In the condition of delay of payment beyond 60 days will attract the interest of 1% per month, except in case of disputed claims.

Later on in September 1996, the respondents were unable to supply the requisite raw material due to general strike of steel mill workers, thus requested to extend the supply duration by 45 days. The appellant accepted the request with a condition to recovery of liquidated damages from the respondents. Subsequently the appellant has deducted the amount viz. $ 3, 04,970.20 and Rs 15, 75,559 as liquidated damages. The respondent initiated the matter to arbitration proceedings. Thus the dispute is to be governed by the 1996 Act. The arbitration tribunal favoured the respondent on the grounds that the appellant has not suffered any losses out of such delay in supply of raw material. The arbitration tribunal held that the appellant has wrongly deducted the amount. The appellant approached the court against the award. The council for appellant stated that the award is contrary to sec 28(3) of 1996 Act, which provides the tribunal to decide the dispute in accordance with the terms of contract (as the contract provides penalty of 1% in the delay of delivery of goods beyond the scheduled time).

The court has set aside the award by considering the merits of the case and concluded that the award can be set aside the award if it is contradictory to the terms of the contract. Court opined that when the words of the contracts are clear, there is nothing that the court can do about it. If the parties had agreed upon a sum as being pre- estimated genuine liquidated damages there was no reason for the tribunal to ask the purchaser to prove his loss. The decision is highly criticised on various grounds:

1. The decision of the two judges Bench in ONGC has bypassed the ruling of the three judges Bench of Supreme Court in the *Renusagar* case. That shows both judicial indiscipline and violation of the binding precedent of a larger Bench. While the Bench in *Renusagar* case held that the term 'public policy of India' was to be interpreted in a narrow sense, the Division Bench went ahead unmindful of the prior precedent and expanded the same to such an extent that arbitral awards could now be reviewed on their merits. This is a huge step backwards in laws relating to alternate dispute resolution in the era of globalization.
2. The judge first went down to lay the law and then narrated the facts of the case which us unusual and rare

3. The judges referred to various judgements which are unrelated to the arbitration law like M.V. Elisabeth v. Harwan Investment and Co. Ltd[34], Dhannalal v. Kalawatibai[35], central Inland water Corp. Ltd. v. Brojo Nath Ganguly[36] which relates to public policy in respect to labour law in which the services of the employee were terminated without due process.

PHULCHAND EXPORTS: REPEATING THE PREVIOUS ERRORS

In Phulchand Exports v OOO patriot[37], the dispute was regarding the enforcement of award rendered by Chamber of Commerce and Industry of Russian Federation, Moscow in favour of the respondent is contrary to public policy of India under Section 48(2) (b) of the Arbitration and Conciliation Act, 1996.

There was a contract between Phulchand Exports Limited, Mumbai, India (`the sellers') and OOO Patriot, Moscow, Russia (`the buyers'), a transaction relating to sale of 1000 Metric Tons of Indian long grain rice. The price was fixed according to Incoterms-90 and included value of the goods, packing and marking, loading into hold, stowing of the cargo, fulfilling the customs formalities in the sellers' country, insurance, freight charges, berthing charges and unloading charges of the goods at the port of Novorossiysk. As per the terms of contract if the Goods do not arrive to the customs area of Russian Federation within 180 days from the date of payment the transferred amount is to be reimbursed to the Buyers' account.

The aforesaid goods were unable to reach the aforesaid destination due to failure of engine of the vessel in which the goods were loaded. Subsequently the buyer claims for recovery of the amount paid to supplied in lieu of goods to be supplied. The supplier refused to return the same and set up the defences that they have honoured all commitments under the contract; the risk in the goods and the property in the goods passed to the buyers upon shipment of the goods i.e. the date on which the goods were loaded on board the vessel being January 29, 1998 and in any event the property in the goods passed over to the buyers when their shipping documents were handed over through the banking channels upon negotiations of the letter of credit.

[34] 1993 Supp (2) SCC 433, a case dealing with admiralty jurisdiction
[35] (2002) 6 SCC 556.
[36] (1986) 3 SCC 556.
[37] 2011 STPL(Web) 885 SC

Buyer lodged the claim against the sellers for recovery of amount of USD 285,569.53 in the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation. The tribunal finalised the award in favour of the buyer. The buyer sought for the enforcement of award in Bombay high Court, which was subsequently appealed in SC.

Though the court finally held that the enforcement of the award is not against public policy, but while determining so the court went to the merits of the case considering sec 47 and sec 48of Indian Contract Act, on the question of unequal bargaining power and concluded that the award is not contrary to public policy of India.

CURRENT POSITION OF ENFORCEMENT OF FOREIGN AWARDS IN INDIA & ITS IMPACT

Enforcement of foreign arbitration awards has played important role in the economic development of the economy. With the changing scenario the arbitration agreement have extended its scope to investor- state arbitrations. The issue of enforcement of foreign awards in India has become important due to India's gigantic international investment treaty program where each treaty allows for investor-state treaty arbitration to settle disputes between investors and India. This issue has also become important in light of the growing commercial disputes in India. Recently, judicial pronouncements by Indian Courts affected the interests of foreign investors, the most recent pronouncement like cancellation of 2G spectrum licence, granting of compulsory licence and dismissal of patent protection of cancer drug "Glivec", has raised a great concern for the foreign Investment in India.

On one hand when India is facing the problem of fiscal deficit, to overcome the problem Government of India is trying to attract foreign investment. One of the steps initiated by the government includes a free trade pact with European Union, which includes investment chapter. In the event of any dispute between India and European Union, the mater is referred to the arbitration tribunal. Thus the *Balco* judgement can also support the foreign investment in India, and to designate India as Arbitration friendly destination.

CONCLUSION

India's adoption of the Arbitration and Conciliation Act of 1996 was based on the UNCITRAL Model law, with the intent to modernise arbitration and honour its commitments

to the international mercantile community, augment its reputation as a possible forum for the settlement of international commercial arbitration disputes. The present act of Supreme Court dismissing foreign awards under public policy of India has got criticism from various ends. The fact that international awards are no longer in danger of being set aside by the Indian courts brings much-needed certainty to parties involved in India-related transactions *Balco* is therefore to be welcomed. Finally, it remains to be seen whether the High Courts and subordinate judiciary in India put into practice the non-interventionist approach articulated by the Supreme Court. Nonetheless, the *Balco* judgment provides a welcome environment for investment in India. Some concerns remain as the ruling is prospective and will not apply to arbitration agreements entered into before 6 September 2012.

Further, the Court's decision that no interim relief is available from the Indian courts under any circumstances where the arbitration is seated outside India sets India apart from most arbitration-friendly jurisdictions, where some relief in support of foreign arbitrations is generally available. Parties should bear this in mind when selecting the seat and rules of arbitration for an India-related deal. Ideally, the law of the seat should grant its courts robust powers to award interim relief in support of arbitrations seated there (as is the case, for example, under English law for arbitrations seated in England).

In the light of Balco, there is need to make changes in Arbitration and Conciliation, Bill 2003 proposes to amend section 2(2) of the 1996 Act provides that sections 8, 9 and 27 of part 1 shall be applicable to international arbitrations where the place of arbitration is outside of India or where such place is not specified in the arbitration agreement. There is also need to reconsider section 2 (1)(f)(iii) of 1996 Act as the courts *in TDM Infrastructure Pvt v. U.E. development India Pvt. Ltd*[38]*,* where the court accepted the incorporation of Company the only criteria to determine the scope and applicability of International Commercial Arbitration

The global financial crisis of 2008-2009 did not leave any country unhampered. On the other hand the mounting current account deficit is a major concern for the Indian Economy; the Balco judgement is surely going to boost the investor confidence in a long run. In addition, the Indian courts still retain discretion to deny enforcement of awards rendered outside India if it they are contrary to Indian public policy, and the scope of "public policy" under Indian law remains broad. I sincerely hope that the interpretation of "public policy of India" will be

[38] [2008] (8) SCALE 576.

in future, optimistically addressed by the Indian Judiciary and will be strongly nailed in the upcoming legislation on arbitration by the Indian Parliament.