SEAT OF ARBITRATION AND INDIAN ARBITRATION LAW

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International arbitration is a well-established mechanism for the settlement of cross-border commercial disputes. In many jurisdictions, such as the United States, it is also an important mechanism for the settlement of specialist commercial disputes. In both domestic and international arbitration, the disputing parties wish to avoid national court adjudication either for reasons of ensuring a neutral and specialist international tribunal (international cases) or a forum which is more efficient or a subject-matter expert (domestic cases). In both instances, essential considerations for arbitrants are confidentiality (or at least a high level of privacy), the right to select an arbitrator with specialist knowledge, and the easier enforcement of arbitral awards.

I. Seat of Arbitration: A Theoretical Debate with Practical Consequences

Many major cities and jurisdictions are competing to attract arbitration cases in their territory as it appears that arbitration contributes to the local economy: Singapore, Mauritius, London, Paris, New York and other cities are promoting themselves as arbitral seats with concerted marketing efforts. According to surveys[1] conducted by the School of International Arbitration, the seat of arbitration is quite an important consideration amongst the various choices parties to arbitration agreements have to make. This is a choice corporate lawyers have to make, often in consultation with outside counsel.[2] However, the most important choice is that of the law governing the contract: parties choose a law to make sure that their contract works but also have to plan for an escape

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[1] QMUL School of International Arbitration and White and Case, *2010 International Arbitration Survey: Choices in International Arbitration, available at* http://www.arbitration.qmul.ac.uk/docs/123290.pdf; QMUL School of International Arbitration and PwC, *2006 International Arbitration Survey: Corporate Attitudes and Practices*, *available at* http://www.arbitration.qmul.ac.uk/docs/123295.pdf. *See also*, Loukas Mistelis, *Arbitral Seats: Choices and Competition,* KLUWER ARBITRATION BLOG (Nov. 26, 2010), *available at* http://kluwerarbitrationblog.com/2010/11/26/arbitral-seats-choices-and-competition/.

[2] QMUL School of International Arbitration and White and Case, *2010 International Arbitration Survey: Choices in International Arbitration,* at p. 9, 14, *available at* http://www.arbitration.qmul.ac.uk/docs/123290.pdf.

route in case things go wrong (a sort of "pre-nuptial agreement"). It is no surprise that the choice of seat (and the choice of arbitration institution) captures the interest of lawyers. The most important factor influencing the choice of seat is the legal infrastructure at the seat (62%), which includes the national arbitration law, the track record in enforcing agreements to arbitrate and arbitral awards in that jurisdiction, and its neutrality and impartiality. The law governing the substance of the dispute (46%) came second. Convenience is also an important factor (45%) including location, industry specific usage, prior use by the organisation, established contacts with lawyers in the jurisdiction, language and culture, and the efficiency of court proceedings. As with the choice of governing law, corporations are also focusing on practical issues – such as access and convenience – while the location of the relevant people involved in the arbitration and the recommendations of external counsel are the least important factors.[3]Cost is the most important aspect of general infrastructure that influences that choice of seat (42%), followed by good transport connections (26%) and hearing facilities (including translators, interpreters and court reporters) (21%). Respondents also listed safety and the absence of bribery as important factors. Efficiency and promptness of court proceedings are the most important aspects of the convenience of a seat (20%), followed by language (16%), good contacts with specialised lawyers operating at the seat (15%) and the location of the parties (11%). Cultural familiarity is also a factor (10%). Interestingly, previous experience of the seat is not a particularly important factor (7%), nor is the location of the arbitrators (6%).[4]

In the list of popular seats, London, Paris and Switzerland always feature very highly. What is particularly intriguing about these three popular seats is that none of them have adopted the UNCITRAL Model Law as their local arbitration law, but have consciously developed positive law with its own distinct features. The English Arbitration Act of 1996[5] is based on the residual jurisdiction of the English courts to support arbitral proceedings, respects party autonomy and also classifies its own

[3] *Id.*, at p. 17.
[4] *Id.*
[5] Arbitration Act, 1996, c. 23, (U.K.), *available a*t http://www.legislation.gov.uk/ukpga/1996/23/contents ["UKAA, 1996"]; Audley Sheppard, *English Arbitration Act 1966, in* CONCISE INTERNATIONAL ARBITRATION 977 (Loukas Mistelis ed. 2nd ed. Kluwer Law International, 2015).

provisions as mandatory or non-mandatory.[6] The French law of 2011[7] and the Swiss Private International Law Act of 1987[8] distinguish between domestic and international arbitration and adopt a "hands-off" approach in relation to the role of the national courts. Those courts' jurisdiction is activated only when the parties so wish or there is a risk of denial of justice. However, they largely wait for arbitral tribunals to make a determination at the first instance. Both the French and Swiss Law provide full support for party autonomy.

Although it is commonplace that the UNCITRAL Arbitration Model Law, in its 1985 and 2006 versions[9] represents best international standards, in that it provides a clear and predictable system for court support and fully respects party autonomy, it appears that two thirds of arbitration cases are seated in non-Model Law countries. The UNCITRAL Model Law operates on the basis of territoriality: that the jurisdiction of courts is activated using the seat of arbitration as the only connecting factor. It is the view of this author that this is a rather unintended consequence of the Model Law drafting; the drafters wanted to have a clear provision of the (territorial) scope of application of the Law rather than intended to localize arbitration supervision and support. In particular, Article 1 of the Model Law clearly intended to provide for the instances in which the Law applies and in doing so, it is a unilateral conflict of laws rule, i.e. a self-limiting rule setting out the scope of application of the law. However, it may

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[6] United Kingdom Arbitration Act, 1996, *Id.* § 4, Schedule 1.

[7] French Code of Civil Procedure, 1806, [Law 2011-48 of Jan. 13, 2011 on Reforming the Law Governing Arbitration], *available at* http://www.iaiparis.com/pdf/FRENCH_LAW_ON_ARBITRATION.pdf; Denis Bensaude, *French Code of Civil Procedure, in* CONCISE INTERNATIONAL ARBITRATION, 1133 (Loukas Mistelis ed. 2nd ed. Kluwer Law International, 2015).

[8] Federal Statute on Private International Law Act, 1987 (c. 12) (Switz.), [hereinafter Swiss PIL] *available at* https://www.swissarbitration.org/sa/download/IPRG_english.pdf; von Segesser & Anya George, *Swiss Private International Law Act, in* CONCISE INTERNATIONAL ARBITRATION, 1189 (Loukas Mistelis ed. 2nd ed. Kluwer Law International, 2015).

[9] Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), available *at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html; Stavros Brekoulakis, et al., *UNCITRAL Model Law on International Commercial Arbitration (1985/2006), in* CONCISE INTERNATIONAL ARBITRATION 835 (Loukas Mistelis ed. 2nd ed. Kluwer Law International, 2015).

well be argued that the drafters did not intend to denounce the concept of delocalization.[10]

At the same time, it is undisputed that they also wished to achieve a high level of legal certainty as to the applicable law and this has been achieved.[11] Presently, 72 States and 102 jurisdictions have adopted the UNCITRAL Model Law.[12] However, it seems that the Model Law alone is not sufficient to establish a jurisdiction as a desirable seat of arbitration.[13] One cannot underestimate the importance of the local judiciary, legal and ancillary professions, and general infrastructure such as hotels, transport links and hearing rooms. In addition, sustained marketing through conferences, tax incentives and promotion through arbitration institutions also appear to be of significant value. And the competition is rather fierce!

One particular aspect of localization of arbitration relates to the exclusive jurisdiction of courts at the seat of arbitration to review arbitral awards. In this respect, parties to arbitration proceedings can typically only challenge an award before the courts at the place[14] of arbitration, assuming the courts at the place of arbitration consider the award "made" or "deemed to be have been made" in its territorial jurisdiction. National arbitration systems consider awards either domestic or foreign, with few systems offering

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[10] HOWARD HOLTZMANN & JOSEPH NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 1, 592-593, 826 (Kluwer Law International 1989). It appears that the delocalization debate did not play a major role in the UNCITRAL Model Law drafting. Quite to the contrary, the commentary clearly states that the seat of arbitration ("place" in the terminology of the Model Law) determines: whether the Model Law applies, whether courts of the place will supervise and/or assist the arbitration, whether the arbitration is international or not and also determines where the award is being made.

[11] The scope of application is well established in Article 1 of the Model Law and this is confirmed largely by the relevant case law. *See*, UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 7, et. seq., *available at* http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf ["UNCITRAL Digest 2012"].

[12] *See* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (Jan. 28, 2016).

[13] The surveys cited in supra note 1 confirm that the three most important arbitral seats (London. Paris, Geneva and Zurich) are in jurisdictions which have not adopted the UNCITRAL Model Law.

[14] We use the terms (legal) seat and (legal) place of arbitration interchangeably to denote the connection of arbitration with the local law and the jurisdiction of local courts. The English Arbitration Act refers to set or juridical seat (section 3) while the UNCITRAL Model Law refers to place of arbitration.

the option of 'international awards', i.e. domestic awards unconnected to the place of arbitration and not subject to the law of the place of arbitration.[15] In this context, the seat of arbitration provides the absolute and exclusive connecting factor.

In the opposing camp, the delocalization supporters challenge the importance of the seat of arbitration and the relevance of the law and the courts over arbitral proceedings within their territorial jurisdiction. The supporters of delocalization challenge the importance of the seat on several grounds. In particular, the choice of seat is often a matter of convenience; the choice of seat is often determined not by the parties but by the arbitral institution they have selected; the choice of seat is often governed by the desire for neutrality; and the role of the arbitral tribunal is transitory and the seat has no necessary connection with the dispute.[16]

The main argument against delocalized arbitration is that arbitration cannot operate in a legal vacuum and review of awards at the place of arbitration is a fair price to pay for predictability and certainty. At the very least, ultimately, the parties will expect the law to recognize and give effect to the tribunal's award. There are other areas where the support of the courts may be needed, e.g. to uphold and enforce the agreement to arbitrate, to appoint or remove arbitrators, and for interim relief in support of the arbitration process. National courts are often asked to support or intervene for these purposes. This is why arbitration cannot be fully delocalized from the national law.[17]

In fact, delocalized arbitration is self-regulatory arbitration. However, it must also be noted that delocalization relates usually either to the arbitration process or to the award, or both.[18] While the emancipation from the procedural law of the place of

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[15] *See* the distinction in the French Arbitration Law 2011: actions against domestic awards pursuant Articles 1494 et seq.; actions against awards made in France in international arbitration pursuant Articles 1518 et seq.; actions against awards made abroad pursuant Articles 1525 et seq.

[16] Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration,* 17 ARB. INT'L. 19 (2001), at 13. For a comprehensive summary. Loukas Mistelis, *Delocalization and its Relevance in Post-Award Review,* Queen Mary School of Law Legal Studies Research Paper No. 144/2013 (May 8, 2013), *available at* SSRN: http://ssrn.com/abstract=2262257 ["Mistelis-Delocalization"].

[17] William Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 I.C.L.Q. 21 (1983); Stewart Boyd*, The Role of National Law and the National Courts of England, in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 149 (Julian Lew ed. Kluwer Law International, 1986).

[18] Mistelis-Delocalization, *supra* note 16.

arbitration is now accepted[19] and most systems have very limited mandatory provisions relating to arbitral procedure, the enforcement of delocalized awards appears to be problematic- ultimately, the enforcement is controlled by national courts. However, at least French and US courts[20] (but also Austrian, Dutch and a few other courts) have enforced delocalized awards.[21] Switzerland has given foreign parties the option to contract out of any judicial review in limited circumstances.[22]

In most jurisdictions, delocalization in terms of review of awards at the seat of arbitration after the award has been rendered seems to be quite rare, if not even an endangered species. English law, US law, French law and Swiss law all provide for applications to set aside, annul, or vacate an award at the place where it was made. National systems may have different standards on the grounds for review and the ability of disputing parties to modify or exclude review.[23]

In respect of review of awards, the Model Law – and India is a Model Law jurisdiction – *fully and unequivocally* embraces territoriality. Application to set aside an award may only be brought at the courts of the place of arbitration (noting that the Model Law uses "place" rather than "seat"). It is widely accepted that the current system is satisfactory, certain and efficient.[24] It is clear that pursuant to Articles 1(2), 6 and 34(2)

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[19] Loukas Mistelis, *Reality Test: Current State of Affairs in Theory and Practice Relating to "Lex Arbitri,* 17(2) AM. REV. INT'L ARB. 155 (2006).

[20] Société Hilmarton Ltd v Société Omnium de traitement et de valorisation, Cour de cassation [Cass.] [Supreme Court for judicial matters], *(OTV)*, 121 Clunet 701 (1994) (Fr.); In re Chromalloy Aeroservices Inc and The Arab Republic of Egypt, 939 F Supp 907 (DDC 1996), XXII YBCA 1001 (1997) 1004; République arabe d'Egypte v Chromalloy Aeroservices Cour d'appel de P [CA] [Court of Appeal], Paris,, XXII YBCA 691 (1997) (Fr.).

[21] Ministry of Defense of the Islamic Republic of Iran v. Gould, 887 F.2d 1357, (9th Cir. 1989) (certificate denied); Iran Aircraft Industries and Iran Helicopter and Renewal Company v. AVCO Corporation, 980 F.2d 141 (2nd Cir. 1992).

[22] Swiss PIL*, supra* note 8 at Art. 192; Swiss Tribunal Fédéral, Dec. 21, 1992, GROUPEMENT D'ENTREPRISES FOUGEROLLE ET CONSORTS, BGE 118 I b, 562, 568 (Switz.).

[23] CHRISTOPH LIEBSCHER, THE HEALTHY AWARD, (Kluwer Law International 2003).

[24] William W. Park, *Why Courts Review Arbitral Awards in* FESTSCHRIFT FÜR KARL HEINZ BÖCKSTIEGEL, 591; Hans Smit, *Annulment and Enforcement of International Arbitral Awards: A Practical Perspective, in* LEADING ARBITRATORS GUIDE TO INTERNATIONAL ARBITRATION 591 (Lawrence Newman & Richard Hill eds., Juris 2008). *See* also, different approach, no need to challenge anywhere, is taken by Philippe Fouchard, *La portee international de l'annulation de la sentence arbitrale dans son pays d'origin*, (1997) REV. ARB. 329.

of the Model Law, an award may only be set aside at the place of arbitration, irrespective of where the hearings took place.[25] This sounds reasonable and certain, especially where the place of arbitration was agreed upon by the parties. If, however, there is no party agreement as to the seat, this will have to be determined or implied by various indicators, such as the place of hearings.[26] The UNCITRAL Model Law Case Digest provides an excellent summary of court decisions on these matters.[27]

The arguments given in support of exclusive review of awards at the place of arbitration are largely technical: the place of arbitration is certain and a certain place of challenge promotes efficiency. Proponents also submit that the seat of arbitration can best assess all these procedural matters, irrespective of whether or not the parties or the proceedings have an association with the seat. It is further suggested that a challenge at the place of arbitration with a rather tight deadline after the award has been rendered ultimately promotes finality, while at the same time leaving ample windows for fairness controls.

II. The Problems with the Review of Arbitral Awards in India

The vast majority of cases before national courts assume that only courts at the seat of arbitration have jurisdiction for setting aside proceedings. However, one can find few cases of national courts prepared to discuss or even assume jurisdiction for the review of awards, even if the arbitral award was not made within the jurisdiction. This has occasionally been the case in India, where it is possible to challenge an award even if it was not made in the jurisdiction but the law of the merits was Indian Law. In *National Thermal Power Corporation v. The Singer Company*,[28] there was an application in India to set aside an award made in London. The Supreme Court assumed jurisdiction for the challenge on the grounds that the contract was governed by Indian law. This case was decided under the (now much) older Indian Arbitration Act. It held:

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[25] *See, e.g.,* Court of Appeal of Singapore, PT Garuda Indonesia v Birgen Air, Mar. 6, 2002, [2002] S.L.R. 393, also at http://www.maldb.org/hpjlaw-275.html.
[26] Oberlandesgericht Düsseldorf [OLG] [provincial court of appeal], Mar. 23, 2000, CLOUT case no 374, 6 Sch 02/99 (Ger.).
[27] UNCITRAL Digest 2012, *supra* note 11 at Art. 34.
[28] National Thermal Power Corporation v. The Singer Company (1992) 3 S.C.C. 551 (India).

"The choice of the place of arbitration was […] merely accidental in so far as […] the choice was made by the ICC Court for reasons totally unconnected with either party to the contract.

On the other hand, the contract itself is [full] of India and Indian matters. The disputes between the parties under the contract have no connection with anything English, and they have the closest connection with Indian laws, rules and regulations. Any attempt to exclude the jurisdiction of the competent courts and the laws in force in India is totally inconsistent with the agreement between the parties."[29]

There are similar decisions under the former Indian Arbitration Act, e.g. in *Venture Global Eng'g v. Satyam Computer Serv. Ltd.*[30] Two more recent Indian cases manifest confusion as to the relevance of the seat and when arbitral awards are deemed domestic. While *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc.*[31] propounds that both the court located at the chosen seat and the court that has subject matter jurisdiction under the Arbitration and Conciliation Act 1996 (a rather "third way" quite controversial view) can review the award, a subsequent decision of the Bombay High Court in *Videocon Industries Ltd v JMC Projects (India) Ltd*[32] has revived the controversy again to the forefront by refusing to exercise jurisdiction (to support the arbitration in an application for provisional measures) in a case with seat in Bombay. Though the decision, being *per in curiam,* cannot be regarded as a shift in the position of law, it does serve to add to the uncertainty among parties to arbitration.

Interestingly, in India parties cannot by agreement confer jurisdiction upon a court that would not otherwise have jurisdiction under the Code of Civil Procedure of 1908.[33] These norms also apply to arbitration matters. Pursuant to the Arbitration and Conciliation Act, the courts of the seat (more precisely, in an arbitration covered by Part I of the Act) have exclusive jurisdiction for setting aside of the award (and the text is

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[29] *Id.*

[30] Venture Global Engineering v. Satyam Computer Serv. Ltd. (2008) 4 S.C.C. 190 (India) ["Venture Global"]; Alok Jain, *Yet Another Misad-Venture by Indian Courts in the Satyam Judgment?*, 26(2) ARB. INT'L, 251-280 (2010).

[31] Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc., (2012) 9 S.C.C. 552 (India). ["BALCO"].

[32] Videocon Industries Limited v. Union of India, A.I.R. 2011 S.C. 2040 (India) ["Videocon"].

[33] Modi Entertainment Network v WSG Cricket Ptr Ltd. (2003) 4 S.C.C. 341, at 351 (India).

identical to that of the UNCITRAL Model Law). The relevant court as per the Act section 2(1)(e) is as follows:

> *"court means the principal civil court of original jurisdiction in a district, an includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court or any Court of Small Causes."*

In other words, there is scope for interpretation of which courts are relevant and there is scope for confusion. *BALCO* is supposed to have settled any controversy as to this interpretation by looking into whether Part I of the Act is based on seat or based on subject matter. The Court wanted to strengthen the importance of the seat and of party autonomy, and noted that even in a case of a neutral seat the courts of the seat will have supervisory jurisdiction over the arbitration. But it seems that the High Court of Bombay in *JMC*[34] has taken a step backwards. Moderate commentators would take the view that the Indian Act has a *lacuna* (as to definition of court) that has to be addressed.

In the second case *Aargus Global Logistics v NNR Global Logistics,*[35] the background included an ICC clause without a specified seat. The ICC fixed Kuala Lumpur as a seat despite a disagreement between the parties. The Indian courts assumed jurisdiction to hear a petition from the successful party in the arbitration to have the award enforced, and the unsuccessful party filed an application under section 34 to have the award set aside. The Court admitted the setting aside application by relying on *Bhatia International*[36] and *Venture Global*.[37] It also stated that the application would not have been admitted if the award was foreign and that this would only be relevant if the agreement was executed after 6 September 2012. Admittedly, a bizarre argument, that *Balco* made law of inter-temporal application, i.e. modified the Act! This strange proposition, however, originates not in the second judgment but in *BALCO* itself.

It is my considerate view that, unless these two cases can be seen as "teething problems" while the lower courts appreciate the consequences of the Supreme Court

[34] Videocon, *supra* note 32.
[35] Aargus Global Logistics v NNR Global Logistics, 2012 VIII A.D. (Delhi)125 (India).
[36] Bhatia International v. Bulk Trading, (2002) 4 S.C.C. 105 (India).
[37] Venture Global, *supra* note 30.

decisions, we have a serious problem about national courts and arbitration in India as well as in some of its neighbouring jurisdiction.

Of course, on the other end of the spectrum we have cases from other jurisdictions (not UNCITRAL Model Law inspired) like *Putrabali v Rena*:[38]

> *"An international arbitral award, which does not belong to any state legal system, is an international decision of justice and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought."*

As a matter of fact, forum shopping is then easier when an award has multiple nationalities.[39] This would be the case if the parties choose a particular seat but subject the arbitration to a different law, and possibly the subject matter of the dispute to yet another law. While party autonomy is paramount in arbitration, excessive creativity in the drafting of clauses may lead to unintended consequences.

Finally, if one is to consider the view suggested by Paulsson that review of awards at the place of arbitration only matters if the awards is challenged for internationally accepted grounds, i.e. grounds listed in Article V(1)(a) to V(1)(d) of the New York Convention, and any setting aside of awards on purely domestic grounds should be irrelevant,[40] it is also important to appreciate potential for forum shopping around or even after the challenge of awards.

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[38] Cour de cassation[Cass.] [Supreme Court for judicial matters], Jun. 29, 2007.

[39] Hans van Houtte, *International Arbitration and National Adjudication*, in HAGUE-ZAGREB ESSAYS ON THE LAW OF INTERNATIONAL TRADE 325 (Voskuil & Wade eds. Kluwer Law International 1983). See also Petar Šarčević, *The Setting Aside and Enforcement of Arbitral Awards under the UNCITRAL Model Law*, in ESSAYS 176, 180-1 (Šarčević ed).

[40] Jan Paulsson, *The Case for Disregarding LSAs (Local Standard Annulments) under the New York Convention*, 7(2) AM. REV. INT'L ARB. 107-114 (1996); Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9(1) *ICC* INT'L CT. ARB. BULL., 14, 19 (1998); Coutelier, Loic E.*, Annulment and Court Intervention in International Commercial Arbitration* (August 15, 2011); *available at* SSRN: http://ssrn.com/abstract=1957278 or http://dx.doi.org/10.2139/ssrn.1957278. *See also,* Direction Generale de l' Aviation Civile de l'Emirat de Dubai v. Internationale Bechtel, Paris Court of Appeal Paris Court of Appeals, 29 September 2005.

III. The 2015 Arbitration (Amendment) Act: The Way Forward?

On 23 October 2015, India adopted the Arbitration and Conciliation (Amendment) Ordinance 2015[41] (the "Ordinance") by exercise of an extraordinary power granted to the President. The Ordinance very clearly attempts to limit or even restraint judicial intervention in arbitration as well as deal with the major issue of delays in actions relating to arbitration. A Bill based on this Ordinance was approved by both houses in the Indian Parliament and received the President's assent on 31 December 2015. After this, it was notified in the Gazette of India and the Arbitration and Conciliation (Amendment) Act, 2015 came into force immediately. There are many points one could make in relation to this new text from its applicability and the distinction between domestic and international arbitrations. Here, the focus will be on issues of seat and review of awards.[42]

At first glance, some clarifications and improvements brought about by the Act in delimiting the role of national courts are very welcome:

- The Act requires the courts to refer parties to arbitration if an arbitration agreement is found to exist. This is a *prima facie* test in clear support of *kompetenz-kompetenz*.

- The Act also defines the power to appoint arbitrators: the Supreme Court or the High Court can delegate this task to any person or institution, thereby officially recognising and supporting institutional arbitration. The appointment process is to be completed by the courts within 60 days.

- Courts may grant interim relief in support of arbitration prior to the commencement of the arbitration, provided the parties actually initiate arbitration within 90 days from the date of obtaining interim relief from the court. This power is available if the arbitration tribunal cannot grant effective protection.

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[41] The Arbitration and Conciliation (Amendment) Ordinance, No. 9 of 2015, INDIA CODE (2015).

[42] Already some comments have been published in relation to the new Ordinance. See, e.g., Vikas Mahendra, *Arbitration in India: A new beginning,* KLUWER ARBITRATION BLOG (Nov. 6, 2015), *available at* http://kluwerarbitrationblog.com/2015/11/06/arbitration-in-india-a-new-beginning/ (last accessed on 14 November 2015); Lacey Yong, *India amends arbitration statute*, KLUWER ARBITRATION BLOG (Oct. 26, 2015), *available at* http://globalarbitrationreview.com/news/article/34253/india-amends-arbitration-statute/ (last accessed on 14 November 2015).

- Interim relief granted by arbitration tribunals is enforceable by the courts in India.

The Act also takes account of the Supreme Court decision in *BALCO*;[43] now, the Act expressly recognises that parties to foreign arbitration proceedings can seek the assistance of Indian courts for interim measures and for the taking of evidence, unless they specifically exclude the jurisdiction of the Indian courts to provide such assistance.[44] There is, however, a reciprocity requirement: Indian courts will provide support if the arbitration is seated in a country or territory officially recognised by India (for the purposes of the Act).

Moreover, in further support of the principle established in *BALCO*, the Act makes it clear that Indian courts cannot review and set aside awards made outside India and awards that are deemed to be foreign.[45]

It seems that the Act is making a genuine and mostly successful attempt to modernise the Indian arbitration law by realigning fully with the Model Law. In order to achieve this objective of modernisation and clarification, the Ordinance works in two directions. *First*, it makes the text of the legislation clearer and less ambiguous. *Second*, it clarifies and limits the role of national courts in relation to domestic and foreign arbitral proceedings. It is the clear objective of the Ordinance that the courts will have to contribute to the efficiency of the arbitration process and their overall role is of a supporting nature.

Most importantly, the Act also takes a largely territorial approach. It establishes that the jurisdiction of the Indian courts is activated when the arbitration is seated in India and some jurisdiction is also available to support foreign arbitration proceedings dealing with the problems generated from the *Marriott v Ansal* case. In addition to territorial jurisdiction, some supportive jurisdiction is now available subject to specified

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[43] BALCO, *supra* note 31.

[44] In this way the Ordinance deals with problems relating to Marriott International Inc. v Ansal Hotels Limited, A.I.R. 2000 Delhi 337 (India).

[45] The Ordinance also limits public policy as a ground to set aside awards and resist enforcement. What is needed now for public policy to be activated is that the making of an award is vitiated by fraud or corruption; the award violates the fundamental policy of India and; the award is opposed to basic notions of justice or morality. The Ordinance further clarifies that the court cannot review an award on merits while considering whether the award is opposed to the fundamental policy of India.

limitations. The Act is perhaps not the most daring law reform but it is undoubtedly a significant legal development in support of arbitration. What remains now is to have the courts applying the Act in the way it has been envisaged by the drafters.