POST AMENDMENTS: WHAT PLAGUES ARBITRATION IN INDIA?

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Abstract

The amendment to the Arbitration and Conciliation Act, 1996 brought about a much needed change and was aimed at revolutionising the arbitration regime in India. Some of the important amendments will have a significant impact on the way arbitrations are conducted in India and will bring a positive change to India's reputation as a seat for international commercial arbitration. Despite these changes, certain areas of Indian arbitration are still uncertain and require clarification. We examine three such areas of concern; one area of confusion arises when parties have not specified the law governing the arbitration agreement, the lex arbitri, in their arbitration agreement. Indian courts have taken a differing stand from other jurisdictions as to how to determine what this law will be. The article also discusses whether two Indian parties can arbitrate outside India. The status of such an arbitration is unclear as it is neither a domestic arbitration nor an international commercial arbitration for the purposes of the Arbitration and Conciliation Act, 1996. Different High Courts have given varied judgments in this area and there is an urgent need for an authoritative Supreme Court ruling. Lastly, the article throws some light on the concept of emergency arbitrators and the status of their orders/awards in India. In the present scenario, under the Act, emergency arbitrators are not included in the definition of 'arbitral tribunal'. Therefore, any orders given by emergency arbitrators will not be enforceable. The article explores this lacunae and how it can be removed.

I. Introduction

There has been much discussion in the past year regarding the amendments to the Arbitration and Conciliation Act, 1996 [the "**Amendment**"]. Although it may be too early to determine its effects, the Amendment is aimed at bringing about a positive change in the arbitration regime by plugging loopholes and anomalies in India's arbitration law. It is hoped that it will promote the use of arbitration in India, as well as promote India as a venue for international arbitration. However, despite the legislative intervention, the Amendment may not be able to resolve certain issues.

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The authors discuss three such areas where judicial intervention is further required to resolve the discrepancies and ambiguities that have developed in arbitration law. One such area is the uncertainty surrounding the law governing the arbitration agreement in an international arbitration. Another area of which is surrounded by some ambiguity is the question whether two Indian parties can choose a foreign seated arbitration, and hence exclude Part I of the Arbitration and Conciliation Act, 1996 [the "**Act**"].[1] Finally, we examine whether an emergency arbitrator's awards can be enforced in India. Before examining these issues, we take a brief look at the evolution of arbitration law in India.

The Indian legislature introduced the Arbitration and Conciliation Act, 1996 as it was realised that the then existing arbitration law had become obsolete.[2] The Statement of Objects and Reasons of the Act recognises that arbitration law needed to be more responsive to contemporary requirements and that India's economic reforms will only become fully effective if its dispute resolution provisions are in tune with the international regime. Part I of the Act, which governs domestic arbitrations, is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985. Under the Act, arbitration emerged as a frequently used method of alternate dispute resolution. However, it has become synonymous with high costs and delays, plagued by the same ills as litigation, which it had intended to replace. As a result, foreign investors and corporates doing business in India became apprehensive of the risks associated with arbitrating in India. Once again, the Government of India recognised the urgent need to revise the country's arbitration law. After two failed attempts to inspire reform in 2001[3] and 2004,[4] the Law Commission of India took up the project to amend the Act in 2010 and gave its report in August 2014.[5] These recommendations were accepted by the Parliament and received presidential assent on December 31, 2015.[6]

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1 Arbitration and Conciliation Act, No. 26 of 1996 (India), § 2(2) ("[Part I] *shall apply where the place of arbitration is in India.*").

2 Prior to the enactment of the Act, the arbitration regime in India was governed by multiple legislations, which were often criticized for the extensive judicial intervention permitted thereunder. Domestic arbitrations were governed by the Arbitration Act, 1940 and recognition and enforcement of foreign awards was provided for under two separate legislations, the Arbitration (Protocol and Convention) Act, 1937 (for awards under the 1927 Geneva Convention) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (for awards under the 1958 New York Convention).

3 LAW COMMISSION OF INDIA, REPORT NO. 176 - THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2001 (2001) *available at*, http://lawcommissionofindia.nic.in/arb.pdf.

4 MINISTRY OF LAW AND JUSTICE, JUSTICE SARAF COMMITTEE REPORT ON IMPLICATIONS OF THE RECOMMENDATIONS OF THE LAW COMMISSION'S 176TH REPORT AND AMENDMENT BILL OF 2003 (2005).

5 LAW COMMISSION OF INDIA, REPORT NO. 246 – AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996 25 (2014), *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf.

6 Arbitration and Conciliation (Amendment) Act, No. 3 of 2015 (India).

The Amendment has brought about substantial changes to the arbitration machinery in India, and has addressed various concerns regarding delay and excessive intervention by the courts. Significant changes include the availability of interim relief in case of international commercial arbitrations seated outside India, which will protect foreign parties by securing the assets of the Indian party, if required.[7] The definition of 'Court' for international commercial arbitration is now specified to mean the High Court.[8] This provides comfort to foreign parties who have chosen India as the seat of arbitration or for enforcement of foreign awards in India, as they would no longer have to approach the district court and will be dealing with a higher court. The Amendment also incorporates provisions of the IBA Guidelines on Conflicts of Interests in International Arbitration, which determine neutrality of arbitrators and ensure independence and impartiality of arbitrators, introducing transparency in the entire process.[9] The interpretation of 'public policy' has been clarified and further limited in case of international commercial arbitration, to assist courts while determining a challenge to a domestic award or enforcement of a foreign award.[10] Another important amendment is the introduction of the 'cost' provisions. The Act now allows arbitrators to award costs based on whether, *inter alia,* the party made a frivolous counter claim or that it refused any reasonable offer to settle the dispute.[11]

These provisions will have a significant impact on the way arbitrations are conducted in India and it is hoped that the Amendment will bring a positive change to the way India is perceived as a seat for international commercial arbitration.

Despite the current legislative effort at tightening the provisions of the Act, there still remain certain areas which are ambiguous and require clarification. The Amendment does not resolve these issues and judicial intervention is required to resolve the discrepancies in the law and truly bring the Act at par with international standards. Discussed in the next part are three issues that need urgent resolution.

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7 Arbitration and Conciliation Act, No. 26 of 1996, § 2(2).
8 *Id.* § 2(1)(e)(ii).
9 This is provided in Section 12, read with Fifth Schedule and Seventh Schedule, Arbitration and Conciliation Act, 1996.
10 Arbitration and Conciliation Act, No. 26 of 1996, §34, §48.
11 *Id.* § 31A (3).

II. Ambiguous issues requiring determination

A. Determination of the Lex Arbitri

The law governing the arbitration agreement is one of the areas which is ambiguous and requires urgent clarification. It is also referred to as the 'proper law of the arbitration agreement' or '*lex arbitri*'[12] in an international arbitration.

It is largely agreed that there are broadly three sets of laws which apply to an arbitration:[13]

i. The proper law of the contract *i.e.*, the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen (Substantive law).
ii. The proper law of the arbitration agreement, *i.e.*, the law governing the obligation of the parties to submit the disputes to arbitration, and to honour the award. (*lex arbitri* or the law governing the arbitration agreement).
iii. The proper law of the conduct of the arbitration *i.e.*, the law governing the conduct of the individual reference. It is usually held to be the law of the seat of the arbitration. (*lex fori*/curial law).

The principle of party autonomy allows parties to choose different laws, for all the above, in their contracts. Ideally an arbitration clause would identify all three kinds of law, however, parties often fail to specify the *lex arbitri* leaving it to the courts to determine what the parties intended to be the proper law of the arbitration agreement.

In a large majority of cases the parties choose the same law for the *lex arbitri* as that of the seat, and the curial law. However, it is open to the parties to choose, either expressly or by implication, a different law for the conduct of the proceedings from the one governing the arbitration agreement. In such cases where the law chosen is different, the courts will look to the law of the arbitration agreement to see if the dispute is arbitrable, then to the curial law to see how the reference should be conducted.[14]

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12 It is noteworthy that the term *lex arbitri* is used differently by different authors. For eg. Russell uses *lex arbitri* while referring to the curial law; Even the Indian Supreme Court uses it in different ways- in Enercon (India) Ltd. and Ors.v. Enercon GMBH and Anr., (2014) 5 S.C.C 1 (India), *lex arbitri* is used to describe the procedural law governing arbitration, whereas in Reliance Industries v. Union of India, (2014) 7 S.C.C 603 (India), it is used to describe the proper law of the arbitration agreement. In this article, we have used *lex arbitri* to identify the proper law of the arbitration agreement.

13 LORD MUSTILL AND STEWART BOYD, APPLICABLE LAW AND JURISDICTION OF COURTS IN COMMERCIAL ARBITRATION, (2nd ed. 1989); Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Others, (1998) 1 S.C.C 305 (India); Reliance Industries Limited v. Union of India, (2014) 7 S.C.C 603 (India).

14 Sumitomo Heavy Industries Ltd v. ONGC Ltd. and Others, (1998) 1 S.C.C 305 (India).

There is no clear cut definition which determines the matters covered under the *lex arbitri.* A distinction has to be drawn between substantive matters relating to the arbitration agreement, which are governed by the law of the arbitration agreement and, procedural matters relating to a reference, which are governed by the curial law *i.e.* law governing the conduct of the arbitration. The law of the arbitration agreement has been stated to regulate substantive matters relating to that agreement, including the interpretation, validity, effect and discharge of the agreement to arbitrate; identification of the parties to the arbitration agreement; issues relating to reference and enforcement of the award; and issue as to whether a particular dispute falls within the scope of an arbitration agreement.[15]

Where the parties have not expressly chosen the *lex arbitri* in their dispute resolution clause, it falls on the courts to decide what the parties intended. The Supreme Court of India in *National Thermal Power Corporation v. Singer Company and Others* ["***NTPC***"], held that "*the proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where, however, there is no express choice of the law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But this is only a rebuttable presumption*."[16]

However, since the court did not clarify what the 'exceptional cases' were, it is unclear when *lex arbitri* would be the same as the proper law of the contract and when it would be an exception. In *Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Ors.* ["***Sumitomo***"], the Supreme Court upheld an early decision of an English court holding that the proper law of the contract was decisive of the *lex arbitri.*[17]

The decisions of the Supreme Court in *NTPC*/*Sumitomo* are contrary to the stand taken by most English courts on international arbitration, which say that in the absence of an express choice by the parties, the *lex arbitri* will be held to be the law of the country in which the arbitration is held, *i.e.*, seat of arbitration.[18] This line of reasoning is supported by the Convention on the Recognition and Enforcement of Awards, 1958 [the "**New York Convention**"], which provides that the recognition or enforcement of an award can be refused if the "*arbitration agreement was not*

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15 DAVID SUTTON ET AL., RUSSELL ON ARBITRATION 83 (23rd ed. 2007).

16 (1992) 3 S.C.C 551, ¶ 21 (India).

17 (1998) 1 S.C.C 305 (India) (Though this case reached the same decision as in *NTPC*, the court here did not refer to or discuss its own decision in *NTPC*).

18 Sulamerica v. Enesa, [2012] EWCA (Civ.) 638 (U.K.); Naviera Amazonica Naviera Amazonica Peruana S.A. v. Compania Internacional Compania Internacional De Seguros Del Peru, (1988) 1 Lloyd's Rep. 116 (CA) (U.S.).

valid under the law to which the parties subjected it to, or failing any indication thereon, under the law of the country where the award was made."[19] Therefore, the New York Convention envisaged that where the parties had not agreed to the *lex arbitri*, the proper law of the arbitration agreement, would be the law of the seat of the arbitration.

The principle laid down in *NTPC* and *Sumitomo* has been distinguished by Indian courts leading to uncertainty in this area. Recently, the Calcutta High Court in *Coal India Ltd. v. Canadian Commercial Corporation,*[20] distinguished *NTPC* to hold that the law of the seat of arbitration would be the law of the arbitration agreement. The Court distinguished *NTPC* on the grounds that in that case the seat was not chosen by the parties but by the arbitral institution, the ICC, whereas in the present case there was an express choice by the parties. A similar approach was taken by the Bombay High Court in *HSBC PI Holdings (Mauritius) Limited v. Avitel Post Studioz Limited* ["***HSBC***"],[21] where the court held that the agreement to arbitrate at Singapore "has a closer and real connection" with the seat chosen by the parties, *i.e.* Singapore. Therefore, arbitration agreement would be governed by the law of Singapore. The Court in *HSBC* tried to bring their case within the exceptional cases, stipulated in the rule laid down by *NTPC/Sumitomo.* Therefore, even though the proper law of the contract was expressly chosen by the parties in *HSBC* to be Indian law, the Court chose to decide the *lex arbitri* based on the seat of arbitration rather than the proper law of the contract.

These decisions of the Calcutta and Bombay High Courts try and carve out exceptions to the *NTPC* principle, but there is still ambiguity in identifying the *lex arbitri* when the seat as well as the substantive law have been identified by the parties. Supreme Court's decision in *NTPC* remains a binding precedent in this area. The courts in India lean towards holding that where such a determination is to be made, the substantive law of the contract bears the closest connection to the law of the arbitration agreement, while courts in England lean towards holding that the law of the seat bears the closest connection.

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19 Article V(1)(a), New York Convention; *See* also, Article 2, The Geneva Protocol on Arbitration Clause 1923- "*The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.*"; *See* also Article 1(2) of the United Nationals Commission on International Trade Law Model Law on International Commercial Arbitration 1985 which says it would be applicable "*if the place of arbitration is in the territory of this State".* (This model law was adopted by states, thereby applying it only if arbitration was held in that state); *See* also Alistair Henderson, *Lex Arbitri, Procedural Law and the Seat of Arbitration, Unravelling the laws of the arbitration process*, (2014) 26 SAcLJ 886.

20 A.I.R 2012 (Cal.) 92 (India).

21 Arb. P. 1062 of 2012 Jan 22 2014 (Bombay High Court) (India) This judgment has been challenged in the Supreme Court of India, though no stay has been granted yet by the Supreme Court.

This may prove to be a problem in an international commercial arbitration where, for instance, the substantive law of the contract is Indian law, but the arbitration is governed by institutional rules and the seat is outside India. In such a situation, an international tribunal comprising arbitrators from England and other jurisdictions with similar rules, would consider the law of the seat to be the *lex arbitri*. The Indian party may resist the enforcement of an award from such a tribunal on the grounds that the tribunal applied the wrong law and this is against the public policy of India.

B. Indian Parties Choosing A Seat Outside India

Another area which has been the cause of confusion amongst various Indian courts is whether two Indian parties can choose a foreign seat and exclude Part I of the Act. It is not uncommon to have a situation where the Indian subsidiary of a foreign entity has entered into an arbitration agreement with another Indian party providing for a foreign seat. This often happens when the arbitration agreement has either been incorporated from the contract with the principal company, which envisages an international commercial arbitration seated outside India, or the contract has been assigned to the Indian subsidiary.

Would such an arbitration be considered a domestic arbitration or an international commercial arbitration? Part I of the Act provides that it will only be applicable where the place of arbitration is India, therefore an arbitration seated abroad between two Indian parties would not be a domestic arbitration under Part I of the Act.[22] Section 2(f) of the Act defines 'International Commercial Arbitration' as arbitration relating to disputes that arise out of a legal relationship where one of the parties is not Indian.[23] An arbitration thus, does not become international just because it is seated outside India. Therefore, an arbitration between two Indian parties, seated outside India would not be considered an international commercial arbitration under the provisions of the Act.

The Supreme Court of India has repeatedly held that Part I of the Act does not apply to international commercial arbitrations seated outside India and if parties choose a foreign seat of arbitration and a foreign law as their law of arbitration, then the intention is to exclude Part I of

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22 Arbitration and Conciliation Act, No. 26 of 1996. §2(2).

23 Section 2(f), Arbitration and Conciliation Act, 1996 provides that- "*international commercial arbitration means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is*

(i) An individual who is a national of, or habitually resident in, a country other than India; or

(ii) A body corporate which is incorporated in any country other than India; or

(iii) An association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) *The Government of a foreign country*."

the Act.[24] This has been reinforced by the Amendment, whereby barring Sections 9, 27 and 37, Part I has expressly been made inapplicable to international commercial arbitrations seated outside India.[25]

Next, we must consider whether Part II of the Act would be applicable in such an event. An award which results from such an arbitration will be considered a 'foreign award' under Part II of the Act.[26] Applicability of Part II is solely based on the seat of arbitration and whether the seat is located in a country which is a signatory to the New York Convention and been notified by the Central Government in the Official Gazette. Once this criterion is fulfilled, Part II would apply and the 'foreign award' from such an arbitration would be recognised and enforced in India.

The major risks that two Indian parties take while arbitrating their disputes outside India is that, (i) they may not have recourse to the Indian courts under Section 9, 27 and 37, as they are not covered under the definition of an international commercial arbitration and nor are they governed by Part I of the Act, and (ii) the foreign award may be open to resistance under Part II of the Act as being against public policy of India.

The Act does not envisage a situation where two Indian parties can choose a seat for their arbitration outside India. This anomaly could have been removed by the Amendment by broadening the definition of 'International Commercial Arbitration', to include an arbitration seated abroad.

The Indian judiciary has been faced with this dilemma for some time and has been unable to give a clear answer. This issue came up before the Supreme Court of India in *Atlas Exports Industries v. Kotak and Company* ["***Atlas Exports***"].[27] In *Atlas Exports*, the issue raised was that the '*award should have been unenforceable inasmuch as the very contract between the parties relating to arbitration was opposed to public policy under Section 23 read with Section 28 of the Indian Contract Act, 1872*.'[28] The contention raised was that the contract was opposed to public policy as it implicitly excluded the

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24 Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 S.C.C 552 (India); Videocon Industries Ltd. v. Union of India and Anr., (2011) 6 S.C.C 161 (India).

25 This is based on the proviso to section 2(2) of the Arbitration and Conciliation Act, 1996, added by the Amendment.

26 Section 44, of the Arbitration and Conciliation Act, 1996 provides as follows: "*Section 44 – Definition – In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on difference between person arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India,* […] *(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies*."

27 (1999) 7 S.C.C 61 (India).

28 *Atlas Exports*, (1999) 7 S.C.C 61, ¶10 (India).

remedy available under Indian law and compelled two Indian parties to have their disputes arbitrated by foreign arbitrators. Section 28 of the Indian Contract Act, 1872 provides that agreements in restraint of legal proceedings are void; the Supreme Court held that this case would be covered by the exception to Section 28 which excludes arbitration agreements from its purview.[29] The court went onto hold that '*merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement*'.[30] Thus, the arbitral award arising out of a foreign-seated arbitration between Indian parties was held to be not unenforceable or opposed to public policy.

The precedential value of this finding is only that of an *obiter dicta* and, therefore, has not been followed by many courts. Before this question could be re-examined, by any other court, the Supreme Court in *TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.* ["***TDM***"] held that the intention of the legislature behind Section 28 of the Act, is that Indians should not be permitted to derogate from Indian law by agreeing to conduct arbitration outside India with foreign substantive law, as this is against the public policy of India.[31] Section 28 of the Act provides for the rules on which the Tribunal would decide a matter, if the arbitration is seated in India.[32] The Court added a corrigendum in *TDM* to the effect that '*any findings/observations made hereinbefore were only for the purpose of determining the jurisdiction of this Court as envisaged under Section 11 of the 1996 Act and not for any other purpose*.' It is noteworthy that in *TDM,* a single bench of the Indian Supreme Court (designate of the Chief Justice of India to decide application under Section 11 of the Act) did not consider the earlier judgment of *Atlas Exports*, which was delivered by a two-judge bench.

Since then various High Courts have taken different positions on this issue. In the recent decision of *Sasan Power Ltd. v. North America Coal Corporation India Pvt. Ltd.*, the Madhya Pradesh High Court upheld an arbitration agreement where two Indian parties had chosen a foreign-

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29 Section 28 of the Indian Contract Act, 1872 provides as follows:- "*Section 28- Agreements in restraint of legal proceedings, void-* […] *Exception 1.-Saving of contract refer to arbitration dispute that may arise.- This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the disputes so referred."*

30 *Atlas Exports,* (1999) 7 S.C.C 61, ¶ 11 (India).

31 (2008) 14 S.C.C 271 (India).

32 Section 28, Arbitration and Conciliation Act, 1996 provides as follows:-: "*Rules applicable to substance of dispute – (1) Where the place of arbitration is situate in India – (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India; (b) in international commercial arbitration, - (i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute* […]"

seated arbitration.[33] The Court followed the decision in *Atlas Exports* and permitted the Indian parties to arbitrate outside India, and held that if the seat is in a country which is a signatory to the New York Convention, then Part II of the Act would be applicable. The agreement cannot be held to be null and void because the parties had opted for a foreign-seated arbitration. The High Court further held that where two Indian parties had willingly entered into an agreement in relation to arbitration, the contention that a foreign-seated arbitration would be opposed to public policy was untenable. The court reasoned that where parties, by mutual agreement, had decided to resolve their dispute by arbitration and chosen a seat of arbitration outside India then in view of the provisions of section 2(2) read with Section 44 of the Act, Part II of the Act would govern the proceeding rather than Part I.

The High Court of Bombay in *M/s. Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd.* has taken a contradictory view on the same issue.[34] The arbitration clause in *Addhar Mercantile* provided that the arbitration could be seated in India or Singapore and English law was to apply. The appellant argued that since both the parties were Indian, they could not be allowed to derogate from Indian law and that the arbitration clause should be interpreted to mean that the arbitration be seated in India. The respondent refuted this argument on the grounds that parties had agreed to the seat of arbitration to be at Singapore and English Law to apply. The High Court in this case followed *TDM* and held that Indian nationals were not allowed to derogate from Indian law. It is noteworthy that the High Court did not consider the rider in *TDM,* which limited its application, or *Atlas Exports*. This question also came up before the High Court of Delhi in *Delhi Airport Metro Express Pvt. Ltd. v. CAF India Pvt. Ltd.*[35] The High Court, unfortunately, skirted around this issue by holding that one of the defendants, a Spanish entity, continued to remain a party to the arbitration under the agreement, making it an international commercial arbitration and not an arbitration between two Indian parties.

The argument that two Indian parties choosing a foreign seat is contrary to Section 28 of the Act is untenable, as Section 28 becomes applicable only when the arbitration is seated in India. The question is not whether two Indian parties may choose a foreign law as their substantive law, but whether they can choose a seat of arbitration outside India and whether this choice would not be against the public policy of India.

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33 F.A. 310 of 2015, Sep. 11, 2015 (Bombay High Court) (India). An appeal against this judgment is pending in the Supreme Court of India, though no stay has been granted.

34 Arb. App. No. 197 of 2014 and Arb. Pet. 910 of 2013Jun.12, 2015 (Bombay High Court) (India).

35 2014 (4) Arb. L.R. 273 (Delhi).

In the absence of any legislative clarification, the Supreme Court in an appropriate case, will have to authoritatively rule on this contentious issue to avoid further confusion.

C. Can Emergency Arbitrator's Awards Be Enforced?

One reason why two Indian parties may choose to have their arbitration seated outside India is the availability of speedy relief before the constitution of the arbitral tribunal. Although parties may approach the tribunal for interim relief during the arbitration process, a problem arises when there is need for such urgent relief before the constitution of the tribunal. In such a scenario, the parties can either approach the court or wait for the tribunal to be constituted. In India, parties to an arbitration generally approach the court under Section 9 of the Act, as waiting for the tribunal to be constituted, might take some time and render the relief infructuous. Though approaching the court for urgent interim relief, before constitution of the tribunal, is the norm, it is not ideal as the primary reason why parties choose to arbitrate is to escape the rigours of the court system.

In order to overcome this situation, arbitral institutions around the world have introduced provisions for appointment of emergency arbitrators. Such provisions were first introduced in 2006 by the International Centre for Dispute Resolution of the American Arbitration Association.[36] Since then, all major arbitral institutions, including LCIA,[37] SCC[38], ICC[39] SIAC[40] and HKIAC[41] have amended their rules to make it possible for a party to request for appointment of emergency arbitrators.

The emergency arbitration procedure is similar in all institutions. The emergency arbitrator has wide discretion to decide the procedure and is normally required to make a quick decision, given the urgency of the relief. An emergency arbitrator's decision can either be in the form of an order or an award. Under some institutional rules (such as the SIAC Rules[42] and the HKIAC Rules)[43], the decision may automatically lapse if a request for arbitration is not filed, or if the arbitral tribunal is not constituted within a certain time period. Under other institutional rules (such as the LCIA Rules)[44], the decision will not automatically lapse. The emergency arbitrator

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36 International Centre for Dispute Resolution, *ICDR-AAA Rules 2006*, Art. 37.

37 Even though Article 9 provided for expedited formation of arbitral tribunal, LCIA amended its rules in 2014 to include provisions for emergency arbitrators, Article 9B.

38 Arbitration Institute of the Stockholm Chamber of Commerce, *Arbitration Rules, 2010*, Appendix II (Jan 1, 2010).

39 International Chamber of Commerce, Rules of Arbitration 2012, art.29, Appendix V (Jan. 1, 2012).

40 Singapore International Arbitration Centre, *SIAC Rules 2013,* art. 26(2), Schedule 1 *(*Apr. 1, 2013).

41 Hong Kong International Arbitration Centre, *Administered Arbitration Rules*, art. 23.1, Schedule 4 (Nov. 1, 2013).

42 Singapore International Arbitration Centre, *SIAC Rules 2013,* art. 7, Schedule 1, Article 7.

43 Hong Kong International Arbitration Centre, *Administered Arbitration Rules*, art. 19(d), Schedule 4.

44 London Court of International Arbitration, *LCIA Arbitration Rules 2014*, art. 9B (Oct. 1, 2014).

ceases to play any role in the arbitration once the tribunal is constituted. The tribunal, under most institutional rules, is permitted to vary the emergency arbitrator's decision. Therefore, the decision of the emergency arbitrator is not final.

In view of these changes in the institutional rules, the Law Commission in its report had suggested an amendment to the Act to give statutory recognition to the concept of emergency arbitrators.[45] This amendment was intended to be introduced in Part I of the Act, which defines arbitral tribunal to be a sole arbitrator or a panel of arbitrators.[46] The arbitral tribunal would be as appointed according to the procedure agreed between the parties or under Part I, if the parties are unable to appoint the tribunal.[47] The change that the Law Commission sought to bring about was to broaden the definition of 'arbitral tribunal' to include an emergency arbitrator appointed under any institutional rules. However, this suggestion was not incorporated in the Amendment. If this amendment would have been accepted, decisions of emergency arbitrators would be enforceable as orders of the court.[48] In the present scenario, in an arbitration seated in India, conducted under the institutional rules, which allow parties to request for appointment for emergency arbitrators, the decision of an emergency arbitrator will not be enforceable, as emergency arbitrators are not recognised under the Act.[49]

In case of international commercial arbitrations seated outside India, the question is whether the decision of the emergency arbitrator qualifies as a 'foreign award' to be enforceable under Part II of the Act.

The term "arbitral award" is defined in the New York Convention as "[including] *not only awards made by arbitrators appointed for each case but also made by permanent arbitral bodies to which parties have submitted."*[50] Even though this definition of an award is unclear, the opinion amongst experts of international commercial arbitration is that the New York Convention only envisages

45 LAW COMMISSION OF INDIA, REPORT NO. 246 – AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996 37 (2014), *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf.

46 Arbitration and Conciliation Act, No. 26 of 1996, § 2(1)(d).

47 Arbitration and Conciliation Act, No. 26 of 1996, § 11.

48 Section 17 of the Act has recently been amended to make interim orders of the arbitral tribunal enforceable. Post amendment, Section 17 (2) reads as follows: "*Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be deemed to be enforceable under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were an order of the Court*".

49 In the case of an ad-hoc arbitration, Indian Arbitration Act does not include any provision for appointment of an emergency arbitrator. Therefore, such a situation can only arise if the arbitration is conducted under institutional rules.

50 Article I(2), New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, June 10, 1958, 330 U.N.T.S. 38.

enforcement of final awards.[51] Since the decision of an emergency arbitrator is capable of being modified by the arbitral tribunal, and is not final in nature, it is not capable of being enforced under the New York Convention. Moreover, since the New York Convention only recognises an 'award', any decision of the emergency arbitrator in the form of an 'order' will also not be enforceable under the New York Convention. Therefore, it will be very difficult to enforce the decisions of emergency arbitrators in India even under Part II of the Act.

One way to overcome this hurdle of unenforceability would be introduce further amendments to incorporate specific provisions for the enforcement of an award passed by an emergency arbitrator. For instance, Singapore has amended the definition of "arbitral tribunal" to include an emergency arbitrator appointed pursuant to the rules of arbitration agreed by the parties. Therefore, in Singapore, the reliefs granted by an emergency arbitrator are enforceable like the orders of an arbitral tribunal.[52] In Hong Kong, a specific provision has been introduced in their arbitration ordinance for the enforcement of reliefs granted by an emergency arbitrator.[53] As explained above, the Law Commission had intended to do something similar, which unfortunately, did not see the light of the day.

Parties in India have had to find a solution to fill the gap created by the lack of emergency interim relief. The High Court of Bombay, was faced with a situation where an emergency arbitrator appointed under SIAC Rules, had granted emergency relief, which the respondent failed to comply with.[54] Since this decision was not enforceable *per say* in the Indian courts, the claimant applied for similar relief under Section 9 of the Act for grant of interim relief pending the constitution of the tribunal. The Bombay High Court granted relief in similar terms as the emergency arbitrators. Therefore, the claimant was able to use the decision of the emergency arbitrator to persuade the Court to pass a similar order, which would be enforceable against the respondent.

This, however, is not a viable method of enforcing the decisions of an emergency arbitrator as it increases the burden upon the courts and upon the parties. If decisions of emergency arbitrators

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51 Jean-Paul Beraudo, *Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals*, 22 J. INT'L ARB. 245, (2005); *see also* David A.R. Williams QC, *Interim Measures*, 225 THE ASIAN LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 244 (2007) ("*The prevailing view is that such orders are not enforceable as an award under the New York Convention*").

52 International Arbitration (Amendment) Bill, 2012, § 2 (Singapore).

53 Hong Kong Arbitration (Amendment) Bill, (2013) Cap. 609, § 22B (Hong Kong).

54 Avitel Post Studioz Limited and Others v. HSBCPI Holdings (Mauritius) Limited Arb. P. 1062 of 2012 Jan. 22, 2014 (Bombay High Court) (India); Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Others, (1998) 1 S.C.C 305 (India).

were made directly enforceable, parties would not have to approach the court under Section 9, for interim relief or for enforcing decisions procured from emergency arbitrators. Therefore, it would be advisable to make suitable amendments in the Act to remove this loophole.

III. Conclusion

From the above discussion, it is clear that there remain some ambiguities in India's revamped arbitration law, which require judicial clarification. The legislative effort to amend the Act, to plug loopholes in the country's arbitration law, goes a long way in portraying India as an arbitration friendly jurisdiction. However, the issues identified in this article are still lurking in the background and should be dealt with at the earliest.