

THE CHOICE OF A FOREIGN SEAT IN DOMESTIC DISPUTES – AN OPPORTUNITY FOR ONE MORE STEP FORWARD IN INDIA’S JOURNEY TO ESTABLISH ITSELF AS AN ARBITRATION FRIENDLY JURISDICTION?

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Abstract

*The growth of India as an arbitral jurisdiction continues to raise interesting questions of principle and policy. This article explores one such question - whether Indian parties have the autonomy to choose a foreign seat. As a matter of statutory interpretation and case law, it is the authors’ view that the answer is yes. A comparative and policy analysis also suggests that the ability of domestic parties to choose a foreign seat should not be fettered. Nonetheless, until the question is definitively answered by the Supreme Court of India, parties must conclude their arbitration agreements with an awareness that choosing a foreign seat could pose certain enforcement and other risks. Finally, and somewhat propitiously, in a decision rendered just after the final draft of this article was completed, the Delhi High Court in *GMR Energy Ltd. v. Doosan Power Systems India Pvt. Ltd. C.S.(Comm.) 447/2017* confirmed that Indian parties are entitled to choose a foreign seat, albeit for different reasons than those discussed in this article in particular, the application of Section 28 of the Indian Contracts Act. The authors welcome the Court’s decision.*

I. Introduction

The choice of the seat of arbitration is one of the most important decisions that parties can make in the arbitral process and it is an important reflection of the principle of party autonomy. By selecting the seat of the arbitration, the parties select the law applicable to key issues including the support that national courts can render to the arbitral process and the grounds on

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which an award can be set aside. The seat also determines where the award is “made” for the purposes of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [“**New York Convention**”], which is essential to secure the enforcement of an award in any of the over 150 States that are party to the New York Convention.

The Supreme Court of India in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services* [“**BALCO**”] has described the seat as the “central point” or the “centre of gravity” of the arbitral process.¹ Notwithstanding this recognition, conflicting decisions at the High Court level have created a degree of uncertainty in India as to whether Indian parties can choose a foreign seat.

This article explores the position in India and offers a comparative and policy perspective on the choice of a foreign seat by domestic parties. Part II of this article explains the uncertain state of the law in India on whether two Indian parties can choose a foreign seat and concludes that the ambiguity is the result of an incorrect interpretation of the Arbitration and Conciliation Act, 1996 [the “**Indian Arbitration Act**”] and precedent. Through a comparative lens, Part III explores the autonomy of domestic parties to choose a foreign seat in four jurisdictions – England, China, the United States [the “**U.S.**”] and Singapore – that have taken varying approaches to the issue, before suggesting in Part IV whether, as a policy matter, domestic parties should be restricted from choosing a foreign seat. Finally, in Part V, the article sets out some practical considerations for Indian parties in choosing a foreign seat.

For so long as the current uncertainty remains, Indian parties wishing to agree to a seat outside India may need to take practical steps such as ensuring that the transaction is entered into through one or more entities incorporated outside India. However, the current uncertainty also creates an opportunity for the Indian courts to clarify the law and ensure that Indian parties can benefit from party autonomy to the fullest extent possible. This would mark one more step forward in India’s continuing (and admirable) journey to establish and promote itself as an arbitration friendly jurisdiction.

II. Sasan Power, Addhar Mercantile and the Supreme Court’s Missed Opportunity

Recent case law injects a degree of uncertainty into the issue of whether parties can select a non-Indian seat. However, this uncertainty appears largely from misapplication of precedent and the Indian Arbitration Act.

On June 12, 2015, the Bombay High Court in *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd.*² [“**Addhar Mercantile**”] held that two Indian parties cannot be permitted to choose a foreign seat because “the intention of the legislation is clear that Indian nationals should not be permitted to derogate from Indian law”.³ In stark contrast, within a few months, on September 11, 2015, the Madhya Pradesh High Court in *Sasan Power v. North American Coal Corporation* [“**Sasan Power**”] held, arguably rightly, that the Indian Arbitration Act permits “two

¹ *Bharat Aluminium Co v. Kaiser Aluminium Technical Services*, (2012) 9 SCC 552, ¶ 72 [hereinafter “**BALCO**”] (citing BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 3.54 (6th ed. 2015)).

² *Addhar Mercantile Pvt. Ltd. v. Shree Jagdamba Agrico Exports Pvt. Ltd.*, (2015) SCC OnLine Bom 7752 [hereinafter “**Addhar Mercantile**”].

³ *Id.* ¶ 8.

Indian Companies to arbitrate their dispute in a foreign country [...] The [arbitration] agreement cannot be termed as null and void or incapable only because the parties chose to arbitrate their dispute in a foreign country”.⁴

A. The Misapplication of Statute and Precedent in Addhar Mercantile

In *Addhar Mercantile*, the claimant filed applications before the Bombay High Court for the appointment of an arbitrator under Section 11(6), and for the provision of interim relief under Section 9 of the Indian Arbitration Act.⁵ Both parties were incorporated in India. Rather unusually, the arbitration agreement provided for “*arbitration in India or Singapore and English law to be app[lied]*”.⁶ The court was therefore required to determine whether the seat was India or Singapore, which would in turn determine the court’s jurisdiction to grant the relief sought by the claimant. The court held that the seat of arbitration must be India. According to the court, under Section 28(1)(a) of the Indian Arbitration Act, it is the “*public policy*” of India that “*Indian nationals should not be permitted to derogate from Indian law*”.⁷ The court also referred to the Supreme Court’s decision in *TDM Infrastructure v. UE Development India Private Limited* [“**TDM Infrastructure**”] to support this finding.⁸

Addhar Mercantile arguably does not reflect certain key provisions of the Indian Arbitration Act.

First, contrary to the court’s finding, Section 28 of the Indian Arbitration Act only addresses the parties’ choice of law of the substance of the dispute, and in any event, does not apply where the parties have chosen a foreign seat. Section 28, which is modelled on Article 28 of the UNCITRAL Model Law on International Commercial Arbitration, is titled “*Rules applicable to the substance of dispute.*” The Section states, *inter alia*, the following:

“**Where the place of arbitration is situated 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...*”⁹

The Bombay High Court in *Addhar Mercantile* appears to have conflated the concepts of procedural and substantive law in arbitration. Section 28 is unequivocally only intended to regulate the parties’ choice of the law governing the **substance** of the dispute, that is, the law governing the parties’ rights and obligations under contract or tort. This is different from the **seat** of the arbitration, which determines the applicable **arbitral laws** and the procedural framework that governs the arbitration. Section 28, in fact, presupposes that the parties have already made their choice of seat. The provision clearly states that it only applies where the “*place of arbitration*” is India.

⁴ *Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd.*, (2015) SCC OnLine MP 7417, ¶ 57 [hereinafter “Sasan Power”].

⁵ *Addhar Mercantile*, (2015) SCC OnLine Bom 7752, ¶ 1.

⁶ *Id.* ¶ 3.

⁷ *Id.* ¶ 8.

⁸ *TDM Infrastructure v. UE Development India Pvt. Ltd.*, (2008) 14 SCC 271 [hereinafter “TDM Infrastructure”].

⁹ Arbitration and Conciliation Act, No. 26 of 1996 (India), § 28.

Indeed, the Supreme Court reached the same conclusion in *BALCO*. In construing Section 28, the court unambiguously stated in *dicta* that the provision only addresses the substantive law of a dispute and has no application where the parties have chosen a foreign seat:

*“As the heading of the Section 28 indicates, its only purpose is to identify the rules that would be applicable to “substance of dispute”. In other words, it deals with the applicable conflict of law rules. This Section makes a distinction between purely domestic arbitrations and international commercial arbitrations, with a seat in India. Section 28(1)(a) makes it clear that in an arbitration under Part I to which Section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide “the dispute” by applying the Indian “substantive law applicable to the contract”. This is clearly to ensure that two or more Indian parties do not circumvent the substantive Indian law, by resorting to arbitrations. The provision would have an overriding effect over any other contrary provision in such contract. On the other hand, where an arbitration under Part I is an international commercial arbitration within Section 2(1)(f), the parties would be free to agree to any other “substantive law” and if not so agreed, the “substantive law” applicable would be as determined by the Tribunal. The Section merely shows that the legislature has segregated the domestic and international arbitration. [...] This will not apply where the seat is outside India.”*¹⁰(emphasis added).

The Bombay High Court in *Addbar Mercantile* did not mention the *dicta* in *BALCO*. Given that *BALCO* was decided by a five-bench judge of the Supreme Court and is widely considered a watershed decision in the jurisprudence of Indian arbitration, *BALCO* may have impacted the court’s analysis of Section 28 in *Addbar Mercantile*, had the court considered it.

Second, the court’s reliance on the Supreme Court decision in *TDM Infrastructure* is questionable. In *TDM Infrastructure*, the Supreme Court was asked to decide the relevant appointing authority under Section 11 of the Indian Arbitration Act.¹¹ Under Section 11, as it was then, read with Section 2(1)(f) of the Act, the appointing authority is the Supreme Court only if the dispute is an “*international commercial arbitration*”, which is defined as an Indian-seated arbitration where, among other things, one of the parties is incorporated outside India.¹² The applicant argued that the dispute was an “*international commercial arbitration*” because the directors and shareholders of the petitioner company were said to be residents of Malaysia.¹³

The Supreme Court rejected this broad interpretation of nationality. The court appears to have been persuaded that, among other things, adopting a broad characterization of nationality would widen the scope of disputes that qualify as an “*international commercial arbitration*”. This would in turn allow Indian entities to circumvent the mandatory requirement of Section 28(1)(a) that Indian substantive law apply to wholly domestic disputes. The court thus held that “[t]he intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country”.¹⁴ However, it is important to note that the court was not asked to, and did not decide whether Section 28 also restricted the autonomy of Indian parties to choose a foreign seat. Indeed, in a corrigendum to the decision, the court expressly

¹⁰ *BALCO*, (2012) 9 SCC 552, ¶ 123.

¹¹ *TDM Infrastructure*, (2008) 14 SCC 271, ¶ 3-4.

¹² Arbitration and Conciliation Act, No. 26 of 1996 (India), § 2(1)(f)(ii).

¹³ *TDM Infrastructure*, (2008) 14 SCC 271, ¶ 1, 6.

¹⁴ *Id.* ¶ 20.

caveated that its findings were only limited to assessing its jurisdiction to act as appointing authority under Section 11 of the Act.¹⁵ There was no dispute that the seat in *TDM Infrastructure* was India. The decision of the court in *Addbar Mercantile* to apply the reasoning in *TDM Infrastructure* was therefore questionable given the entirely different question before the court in *Addbar Mercantile*.

Third, the court failed to consider an important Supreme Court precedent, *Atlas Exports Industries v. Kotak & Company* [**Atlas Exports**]¹⁶. In *Atlas Exports*, the appellant argued that the choice of a foreign seat by two Indian parties contravened Indian public policy and the Indian Contract Act, 1872,¹⁷ thereby rendering the arbitration agreement null and void.¹⁸ The Supreme Court rejected this argument. Giving primacy to party autonomy, the court held that “*merely because the arbitrators [were] situated in a foreign country [it] cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement.*”¹⁹ The decision in *Atlas Exports* is more persuasive than *TDM Infrastructure* because, unlike the latter case, it addresses the same question as in *Addbar Mercantile*.

B. The Sasan Power Saga

In contrast to the Bombay High Court in *Addbar Mercantile*, the Madhya Pradesh High Court in *Sasan Power*²⁰ concluded that two Indian parties can choose a foreign seat. The respondent in *Sasan Power* filed an application under Section 45 of the Indian Arbitration Act to stay court proceedings commenced by the claimant and to compel arbitration. The claimant opposed the application on the basis that the choice of a foreign seat – London – rendered the arbitration agreement null and void. The court enforced the arbitration agreement and the parties’ choice of a foreign seat.

Consistent with the analysis above, the court rejected the argument that Section 28 restricted the parties’ choice of a foreign seat. Notably, the court relied on *BALCO* and held that Section 28 “*will not apply where the seat is outside India*”.²¹ The court also cited *Atlas Exports* and held that the mere choice of a foreign seat by sophisticated parties could not render an arbitration agreement unenforceable.²² Furthermore, referring to the corrigendum in *TDM Infrastructure*, the court distinguished that case on the basis that it was limited to determining the appointing authority under Section 11 of the Indian Arbitration Act.²³

The decision of the Madhya Pradesh High Court was appealed to the Supreme Court, providing a ripe opportunity for the Supreme Court to resolve the High Court split and clarify whether

¹⁵ *Sasan Power*, (2015) SCC OnLine MP 7417, ¶ 54.

¹⁶ *M/s Atlas Exports Industries v. M/s Kotak and Company*, (1999) 7 SCC 61 [*hereinafter* “*Atlas Exports*”].

¹⁷ Section 28 of the Indian Contract Act provides that an agreement in restraint of legal proceedings is void and Section 23 provides that an agreement that is contrary to public policy is invalid.

¹⁸ On the facts of the case, the objection appears to be misplaced because the contract in *Atlas Exports* was in fact a tri-partite agreement between the two disputing Indian parties and a foreign party (incorporated in Hong Kong). The court did not address this factual point, which was arguably rendered moot given its decision that two Indian parties can choose a foreign seat.

¹⁹ *Atlas Exports*, (1999) 7 SCC 61, ¶ 11.

²⁰ *Sasan Power*, (2015) SCC OnLine MP 7417.

²¹ *Id.* ¶ 45.

²² *Id.* ¶ 57.

²³ *Id.* ¶ 53.

two Indian parties can choose a foreign seat. However, on appeal, the Supreme Court adopted a different approach. The court found that, as a result of how the parties had attempted to novate the contract, the contract and the arbitration agreement in question had become a tripartite agreement between the claimant, the respondent and the respondent's foreign parent.²⁴ As such, the dispute was not one between Indian parties. The court therefore expressly stated that it would not decide the question of whether two Indian parties can choose a foreign seat.²⁵

Although arguably right on the facts of the case, the Supreme Court's decision is a missed opportunity to clarify that Indian parties can choose a foreign seat.²⁶

III. Domestic Parties and Foreign Seats – A Comparative Perspective

Different jurisdictions have adopted different approaches to the question of whether domestic parties can choose a foreign seat. On the “*pro-arbitration*” end of the spectrum are jurisdictions like England and Singapore that have no restrictions on the autonomy of domestic parties choosing a foreign seat. China and the U.S., on the other hand, have directly or indirectly adopted a more conservative approach that only permits domestic parties to choose a foreign seat when the dispute has some foreign element, such as the place of performance. The following section briefly sets out the positions in these four jurisdictions.

A. England

Arbitration in England is governed by the English Arbitration Act, 1996 [“**English Arbitration Act**”]. In contrast to India, the Act does not draw a distinction between domestic and international arbitrations seated in England.²⁷ Given the unified approach of the English Arbitration Act, it is unsurprising that English law does not limit domestic parties from choosing a foreign seat. On the contrary, the Act upholds party autonomy in the choice of a seat. Section 3(a) of the Act provides that the “*seat of arbitration*” means the “*juridical seat of the arbitration*” designated by, *inter alia*, “*the parties to the arbitration agreement*”. The general principles of the Act contained in Section 1 further reinforce the primacy of party autonomy by expressly allowing parties to “*agree how their disputes are resolved*”.²⁸

²⁴ *Sasan Power v. North American Coal Corporation*, (2016) 10 SCC 813, at 834.

²⁵ *Id.* at 813, 834 & 836.

²⁶ For completeness, it is worth noting that some authors have suggested that the Supreme Court in *Reliance Industries Limited v. Union of India*, (2014) 7 SCC 603, impliedly accepted the ability of domestic parties to choose a foreign seat because the Court refused to exercise supervisory jurisdiction and set aside a foreign arbitral award on the basis of the parties' choice of a foreign seat. As the parties in that case did not dispute the choice of a foreign seat or otherwise raise that issue before the Supreme Court, the authors are of the view that it would be inappropriate to draw any conclusions from the Supreme Court's silence on the ability of domestic parties to choose a foreign seat. Indeed, the fact that the Supreme Court in *Sasan Power* chose not to address the question suggests that the issue is far from settled by that court.

²⁷ Indeed, the drafting committee of the Act specifically rejected this distinction. See Friel, *Arbitration in Context, in ARBITRATION IN ENGLAND, WITH CHAPTERS ON SCOTLAND AND IRELAND* 33 (Julian D.M. Lew et al. eds., 2013).

²⁸ English Arbitration Act, 1996 (U.K.), § 1(b). The authors have not found any case law that suggests that English courts would refuse to enforce an arbitration agreement or an arbitral award in relation to a dispute between English parties on the basis that the parties chose a foreign seat.

B. Singapore

Arbitration in Singapore is governed by two statutes, the Singapore International Arbitration Act, 2002²⁹ [**“Singapore IAA”**] and the Singapore Arbitration Act, 2002³⁰ [**“Singapore Arbitration Act”**] that create separate regimes for international and domestic arbitrations respectively. The dual-regime in Singapore was motivated by the desire to have greater supervision over disputes involving weaker domestic parties, in particular, small businesses and consumers, and to a lesser extent, the development of the Singapore legal profession.³¹ The Singapore Arbitration Act thus provides a greater degree of curial supervision in domestic arbitrations, including allowing appeals on points of law to the Singapore courts.³²

Notwithstanding the policy concerns articulated in relation to domestic disputes, Singapore has not made the application of the Singapore Arbitration Act to domestic disputes mandatory. Parties to a domestic arbitration may therefore opt out of the greater protections conferred by the domestic arbitration regime and elect the less interventionist regime of the Singapore IAA.³³ The Singapore IAA in turn incorporates Article 20(1) of the UNCITRAL Model Law which provides that *“parties are free to agree on the place of arbitration.”* Thus, although Singapore has created a dual-regime for domestic and international arbitrations, it does not fetter the autonomy of domestic parties to choose a foreign seat.³⁴

C. People’s Republic of China

Arbitration in China is governed by the Arbitration Law of the People’s Republic of China, 1994 [**“PRC Arbitration Law”**]. Article 128 of the Contract Law of the People’s Republic of China, 1999 provides that *“parties to a foreign-related contract **may** apply to a Chinese arbitration institution or another [...] institute for arbitration”*. Foreign-related arbitrations are domestic arbitrations with the following foreign elements: (i) at least one party is a foreign national, foreign legal entity, or is stateless; (ii) the habitual residence of at least one party is in the territory of a foreign state; (iii) the subject matter of the dispute is located outside China; (iv) the legal facts establishing, altering or terminating the parties’ relationship occurred outside China; or (v) there are *“other*

²⁹ The Act was originally implemented in 1994 and, following numerous amendments, was eventually consolidated and republished in 2002.

³⁰ Like its international arbitration counterpart, the domestic Arbitration Act was also republished in a consolidated form in 2002, with the original Act being published in 2001.

³¹ LAW REFORM COMMITTEE, SUB-COMMITTEE ON REVIEW OF ARBITRATION LAWS, REPORT ¶¶ 10-13, n. 16 (1993) [*hereinafter* “Law Reform Committee”]. As the Law Reform Committee in Singapore observed, *“a greater degree of curial supervision and intervention is . . . generally considered to be more appropriate in the case of domestic arbitration . . . both for the development of domestic commercial and legal practice, and for a closer supervision of decisions which may affect weaker domestic parties.”*; See also ROBERT MERKIN & JOHANNA HJALMARSSON, SINGAPORE ARBITRATION LEGISLATION ANNOTATED 2 (2009) (*“The Model Law, by reason of its non-interventionist approach, was thought not to be fully appropriate to domestic arbitrations which may involve small businesses and indeed consumers.”*).

³² Arbitration Act, (Cap. 10) (Revised Edition 2002) (Singapore), § 45.

³³ MERKIN & HJALMARSSON, *supra* note 31, at 2; See also 2002 Arbitration Act, (Cap. 10) (Revised Edition 2002) (Singapore), § 3 (*“This Act shall apply to any arbitration where the place of arbitration is Singapore and where Part II of the International Arbitration Act (Cap. 143A) does not apply to that arbitration.”*); LAW REFORM COMMITTEE, *supra* note 31, at ¶ 16 (*“[T]he preference of the Committee is to permit commercial parties the freedom to a free to have disputes dealt with according to the international arbitration regime (albeit with a lesser degree of curial intervention.”*).

³⁴ The authors have not found any case law that suggests that Singapore courts would refuse to enforce an arbitration agreement or an arbitral award in relation to a dispute between Singapore parties on the basis that the parties chose a foreign seat.

circumstances” which suggest that the legal relationship may be “*foreign-related*”.³⁵ A wholly owned Chinese subsidiary of a foreign company will not be considered “*foreign*” for the purposes of Chinese arbitration law.³⁶

The provision’s silence on wholly domestic arbitrations left some ambiguity as to whether domestic parties in a non-foreign related transaction could also submit their disputes to a foreign arbitral institution or seat. However, in 2012, the Chinese Supreme Court in *Jiangsu Aerospace Wanyuan Wind Power v. LM Wind Power* resolved this ambiguity and held that two domestic parties could not choose a foreign arbitral institution unless their dispute had a foreign-element.³⁷ The court thus held that the arbitration agreement between two domestic parties, including a wholly-owned subsidiary of a foreign company, in relation to the purchase of wind turbines in mainland China was invalid and unenforceable because the agreement provided for ICC arbitration in Beijing.³⁸ Various other courts have since refused to enforce arbitral awards or arbitration agreements between domestic parties with a foreign seat or arbitral institution where the dispute has no foreign nexus.³⁹

The restriction on domestic parties choosing a foreign seat or arbitral institution is based on the requirement of preserving the “*judicial sovereignty*” of the Chinese courts. The Beijing No. 2 Intermediate People’s Court in *Beijing Chaolaixinsheng Sports and Leisure v. Beijing Suowangzhixin Investment Consulting* refused to enforce an award in an arbitration administered by the Korean Commercial Arbitration Board, stating that “[s]olving civil disputes in a state involves the **judicial sovereignty of such state**, which is effected by the **public policy** of that state. Parties are only allowed to make arrangement based on the scope permitted by the law. Any agreement outside the scope of the law is considered invalid”.⁴⁰

Recent case law suggests that Chinese courts may be adopting a broader view of what constitutes a foreign-related arbitration, including where the disputes relate to Chinese free trade

³⁵ See Interpretation on Certain Issues Concerning the Application of the Law of the People’s Republic of China on the Application of Laws to Foreign-Related Civil Relations issued by the Chinese Supreme Court (2013), art 1.

³⁶ Reply to Inquiry regarding Validity of an Arbitration Clause between Jiangsu Astronautics Wanyuan Wind Power Equipment Manufacturing Co., Ltd. and LM Wind Power (Tianjin) Co. Ltd., (2012) Min Si Ta Zi No. 2 (Aug. 31, 2012).

³⁷ *Id.*

³⁸ In determining the situs of an arbitration, Chinese law looks at both the location of the juridical seat and the domicile of the administering arbitral institution chosen by the parties. Thus, foreign-seated arbitrations include arbitrations that are seated outside China and arbitrations where the parties have designated a foreign arbitral institution, such as the ICC, to administer the arbitration, even where the seat is China. See ARBITRATION IN CHINA: A PRACTITIONER’S GUIDE 101-103 (Wei Sun & Melanie Willems eds., 2015). Arbitrations related to or conducted in Hong Kong, Macau and Taiwan are generally considered “foreign-related” and are subject to separate agreements between China and those jurisdictions.

³⁹ See, e.g., Beijing Chaolaixinsheng Sports and Leisure Co., Ltd. v. Beijing Suowangzhixin Investment Consulting Co. Ltd., ErZhong Min TeZi No. 10670 (Beijing No. 2 Interm. People’s Ct., Jan. 20, 2014) [*hereinafter* “Beijing Chaolaixinsheng”], where the court refused to confirm an arbitral award where the parties had chosen the Korean Commercial Arbitration Board to administer the arbitration; Shanghai Kejiang IT Co. Ltd v. Fanstang Consultant Co. Ltd. (Shanghai No. 2 Interm. People’s Ct., Nov. 13, 2014), where the court held that an arbitration agreement that designated HKIAC as the administering institution as invalid because the dispute related to Chinese parties and the subject matter was based in mainland China.

⁴⁰ Beijing Chaolaixinsheng, ErZhong Min TeZi No. 10670 (Beijing No. 2 Interm. People’s Ct., Jan. 20, 2014), ¶¶ 5- 6.

zones.⁴¹ However, the general limitation on parties *in* choosing a foreign seat or arbitral institution in purely domestic disputes *remains*.

D. United States

Arbitration in the U.S. is primarily governed by the Federal Arbitration Act, 1925 [“**FAA**”]⁴². In 1970, the U.S. implemented the New York Convention and the implementing provisions are contained in Chapter II of the FAA. Section 202 excludes disputes between domestic parties without, *inter alia*, a “reasonable relation with one or more foreign states” from the scope of application of the New York Convention in the U.S.⁴³

The legislative history of the provision clarifies that the carve out in Section 202 was intended to “make it quite clear that arbitration arising out of relationships in interstate commerce remains under [Chapter I] of the original [FAA] and is excluded from the operation of the proposed Chapter 2 [implementing the New York Convention]”.⁴⁴ Thus, domestic parties cannot contract out of the FAA in disputes that are not truly international. As a result, notwithstanding a choice of a foreign seat, parties to a wholly domestic dispute will remain subject to the curial supervision of the U.S. courts under Chapter 1 of the FAA.⁴⁵ U.S. courts have noted the tension between Section 202 and the otherwise pro-arbitration stance of the U.S. that has developed since the provision was implemented in 1970.⁴⁶

In practice, there is limited jurisprudence in the U.S. courts on the application of the carve out for domestic disputes in Section 202.⁴⁷ However, there have been instances where U.S. courts have refused to enforce arbitration agreements between domestic parties with a foreign seat where the dispute had no “reasonable relation” with a foreign state.⁴⁸

⁴¹ See Sabrina Lee, *Arbitrating Chinese Disputes Abroad: A Changing Tide?*, KLUWER ARB. BLOG (Apr. 7, 2016), available at <http://arbitrationblog.kluwerarbitration.com/2016/04/07/arbitrating-chinese-disputes-abroad-a-changing-tide/>.

⁴² State law may also apply to arbitrations in certain limited circumstances where the dispute does not relate to interstate or foreign commerce. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 162-163 (2d. ed. 2014).

⁴³ Section 202 provides that: “An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in Section 2 of this title, falls under the Convention. **An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states** (emphasis added). For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.”

⁴⁴ Foreign Arbitral Awards, S. Rep. No. 91-702, 91st Cong., 2d Sess. 6 (1970) (Appendix: Statement of Richard D. Kearney).

⁴⁵ BORN, *supra* note 42, at 333 (“... even if the New York Convention, and the second chapter of the FAA, do not apply to an agreement between U.S. parties specifying a foreign seat, it is important to note that [Sections] 3 and 4 of the FAA still apply. In principle, these provisions would also provide for the recognition and enforcement of most arbitration agreements under a relatively pro-arbitration legislation regime. That regime is somewhat less favorable than the FAA’s second chapters and the New York Convention, but it would nonetheless generally provide an adequate basis for enforcing an agreement to arbitrate.”).

⁴⁶ *Enco Offshore Company v. Titan Marine*, (2005) 370 F. Supp. 2d 594 (“To say that it is the public policy of the United States and the Fifth Circuit to enforce contractually agreed-upon arbitration provisions would be an understatement... If there is an agreement in writing to arbitrate, it is the public policy of the federal courts to enforce that provision [...] The obvious problem is that [Section] 202 seems to state a different public policy for international arbitrations involving solely American parties.”).

⁴⁷ *Id.* (“The course of action to undertake when an agreement involving two U.S. citizens agreeing to a foreign arbitration clause is missing a foreign element other than the arbitration clause is unclear. The case law in this circuit and others is not overwhelming in its breadth or depth.”).

⁴⁸ For instance, in *Enco Offshore Company v. Titan Marine*, the U.S. District Court in the Southern District of Texas refused to enforce an arbitration agreement which designated London as a seat where the dispute was between two

IV. Should Domestic Parties be allowed to Choose a Foreign Seat – A Policy Perspective

Based on the approaches of the jurisdictions set out above, and the reasoning in *Addbar Mercantile*, there appear to be three main rationales for restricting domestic parties from choosing a foreign seat: (i) the need for curial supervision to protect weaker parties, as in the case of Singapore; (ii) the need for curial supervision as a categorical matter for all domestic disputes, as in the case of China and the U.S.; and (iii) ensuring that domestic parties do not circumvent domestic law by resorting to foreign seated arbitrations, as articulated in *Addbar Mercantile*. Although there may be merit to some of these concerns, none warrant a blanket restriction on domestic parties choosing a foreign seat. Each of these policy concerns is addressed in turn.

The desire to protect weaker parties is a policy concern that transcends arbitration. However, it is incorrect to equate all domestic disputes with disputes that involve parties of unequal bargaining power. Domestic disputes could well involve sophisticated commercial parties who prefer limited curial intervention and greater speed and finality in their arbitrations. Conversely, there could be international consumer disputes or international disputes between businesses of different sizes that involve weaker parties. The desire to protect weaker parties thus cannot justify a categorical restriction on domestic parties choosing a foreign seat. Indeed, this nuance is evident in the approach adopted by Singapore that makes the Singapore Arbitration Act, with its increased curial supervision, the default regime applicable to domestic arbitrations, while granting parties the autonomy to contract out of it.

The second policy concern, as seen in China and the U.S., is the desire to exercise greater curial supervision over all domestic disputes (albeit both jurisdictions take a nuanced view of what qualifies as a domestic dispute). Such supervision may be warranted in certain cases, like consumer disputes, but it should not extend categorically to all domestic disputes. Where parties (particularly sophisticated commercial entities) have elected to submit their disputes before a privately constituted tribunal, it should be unnecessary for courts to impose an additional level of supervision over the process.

The third policy concern, articulated in *Addbar Mercantile*, is the need to restrict domestic parties from circumventing applicable domestic laws. As explained above, this concern elides the concept of the seat with the substantive law applicable to the dispute between the parties. By choosing a foreign seat, parties are not making a choice of the applicable substantive law. Furthermore, there are ways for tribunals and courts to ensure that parties do not use arbitration as a way to circumvent applicable mandatory laws. Tribunals may, through the use of conflict of laws analysis, determine that, despite any express choice of law by the parties, mandatory laws of other jurisdictions must be applied to the dispute. At the recognition and enforcement stage, courts may similarly ensure that parties do not circumvent important local laws by using the public policy exception under Article V(2)(b) of the New York Convention.

U.S. companies in relation to rig operations off the coast of Louisiana, *See id.*; *See also* Reinholz v. Retriever Marine Towing & Salvage, 1994 AMC 2981 (Southern District of Florida), where the court refused to enforce an arbitration agreement which designated London as a seat when the dispute was between U.S. citizens and a U.S. company for the salvage of a yacht in U.S. waters.

Notably, there are also important policy reasons for permitting parties to choose a foreign seat. Constraining the choice of seat constrains the parties' ability to adapt their dispute resolution provision to the specifics of their commercial relationship. This may, in turn, constrain parties in their commercial dealings. For example, two Indian parties may be more reluctant to transact if they cannot agree to a neutral seat outside India. Alternatively, Indian parties may transact through or involve non-Indian entities to be able to select a seat outside India.

V. Practical Implications for Indian Parties

From a practical perspective, the present uncertainty on whether Indian parties can choose a foreign seat has a number of consequences that parties should consider and manage when drafting their arbitration agreements.

At the outset, and to the extent that it is compatible with the regulatory, tax, and other aspects of the transaction, parties should consider the possibility of incorporating at least one foreign entity to the transaction. Alternatively, where one of the parties has a foreign parent, the foreign parent could become a party to the agreement by taking on *de minimis* obligations in the agreement (for instance, by providing a limited financial guarantee). The presence of a foreign entity in the transaction will alter its character – and therefore alter the character of any future dispute – from being purely domestic to becoming an international one. As a result, any restriction on the choice of a seat will no longer apply to the parties. Indeed, the Supreme Court in *Sasan Power* concluded that the dispute in question was not a domestic arbitration because a foreign parent was a party to the arbitration agreement.⁴⁹

Should the parties be unable to structure their transaction to include a foreign party, and the transaction remains a domestic one, the choice of a foreign seat is nonetheless feasible, albeit with some risk. The degree of risk will turn on two key issues: (i) whether the counterparty has assets outside India that could be used to satisfy any award; and (ii) whether there will be a need to obtain judicial assistance during the arbitration (e.g. interim relief to seize assets or assistance in the taking evidence). Each of these is explained in turn.

First, and perhaps the most important risk, arises at the enforcement stage where an unsuccessful party could resist enforcement of the foreign award before the Indian courts on the basis that the choice of a foreign seat is impermissible under Indian law. There are two grounds on which enforcement of the foreign award could be challenged under the Indian Arbitration Act. First, it could be argued that the foreign award is contrary to the public policy of India under Section 48(2)(b) of the Indian Arbitration Act. Such an argument would not be novel. Albeit not in the context of enforcement proceedings, the Bombay High Court in *Addhar Mercantile* accepted public policy as the basis to restrict Indian parties from choosing a foreign seat.⁵⁰ Second, the award may be challenged on the basis that the arbitration agreement is null and void for designating a foreign seat under Section 48(1)(a) of the Indian Arbitration Act.⁵¹

⁴⁹ *Sasan Power v. North American Coal Corporation*, (2016) 10 SCC 813, ¶ 813, 834.

⁵⁰ *Addhar Mercantile*, (2015) SCC OnLine Bom 7752, ¶ 20.

⁵¹ Section 48(1)(a) of the Indian Arbitration Act provides that a foreign award may be refused enforcement if the arbitration agreement “*is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*”.

The significance of this enforcement risk ultimately turns on where the assets of the unsuccessful party are located. If there are assets outside India, the need for enforcement proceedings in the Indian courts is reduced, which in turn reduces the enforcement risks of choosing a foreign seat. However, and as is likely to be the case with many Indian parties, if the assets are primarily located in India, Indian enforcement proceedings may become important. Parties should therefore consider where the assets of the counterparty are located when deciding to choose a foreign seat.

Second, parties should consider whether there will be a need to obtain judicial assistance from the Indian courts in any future dispute. Should the arbitration agreement be held null and void, it is likely that the Indian courts will be unable to grant judicial assistance to the parties in the arbitral process. Most importantly, this impacts the ability of the parties to seek interim relief under Section 9 to preserve assets necessary to satisfy any award or to obtain the assistance of the courts in the taking of evidence necessary for the arbitration under Section 27 of the Indian Arbitration Act.

Again, where the counterparty has assets outside India that could be used to satisfy an award, there may be limited need to seek interim relief from the Indian courts as such relief could be sought from the courts of the jurisdiction where the assets are located. Likewise, and subject to the specific aspects of the dispute, where the operations of the counterparty are conducted outside India (for instance, through a foreign parent) it is likely that evidence will also be located abroad. In such cases, there may similarly be limited need to seek assistance from the Indian courts. However, where either the assets or the evidence relevant to the dispute are primarily located in India, parties may need to seek the assistance of the Indian courts and should therefore consider the risks of choosing a foreign seat.

A further risk that parties should consider is the possibility of an Indian court issuing an anti-arbitration injunction. Anti-arbitration injunctions are mandatory orders issued by courts to restrain parties from commencing or proceeding with an arbitration.⁵² Indian courts may grant anti-arbitration injunctions on the basis of *forum non-conveniens* (i.e., in cases where the proceedings are oppressive or unconscionable because the forum is not suitable for the resolution of the dispute) or where the arbitration agreement is null and void, inoperative or incapable of being performed under Section 45 of the Indian Arbitration Act.⁵³ If the Indian courts consider an arbitration agreement between domestic parties with a foreign seat to be null and void, the courts may grant an anti-arbitration injunction restraining the parties from commencing or proceeding with an arbitration at the foreign seat. A party that fails to comply with the injunction could be subject to contempt proceedings before the Indian courts.⁵⁴ Anti-arbitration injunctions are not a common occurrence and, in any event, do not stop the arbitral tribunal at the foreign seat from continuing proceedings. Nevertheless, structuring the arrangement through a non-Indian party may avoid the risk that the Indian courts consider the arbitration agreement null and void (and thus seek to restrain any arbitration pursuant to it).

⁵² Julian Lew, *Control of Jurisdiction by Injunctions Issued by National Courts, in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 185 (Albert Jan van den Berg ed., 2007).

⁵³ McDonald's India Private Limited v. Vikram Bakshi & Ors., (2016) 232 DLT 394.

⁵⁴ Noorali Babul Thanewala v. K.M.M. Shetty, AIR 1990 SC 464.

VI. Conclusion

India has made great strides in promoting itself as an arbitration friendly jurisdiction. The current uncertainty in Indian law as to whether domestic parties may choose a foreign seat is anomalous. At present, parties may need to take account of that uncertainty. For example, the uncertainty creates a reason for parties to structure their agreements through non-Indian entities in order to avoid the risk that the Indian courts may consider an agreement to arbitrate in a seat other than India to be null and void. However, the removal of this uncertainty would both promote party autonomy and be consistent with current efforts to promote India as an arbitration friendly jurisdiction. It would mark one more step forward in India's efforts to establish and promote itself as an arbitration friendly jurisdiction.