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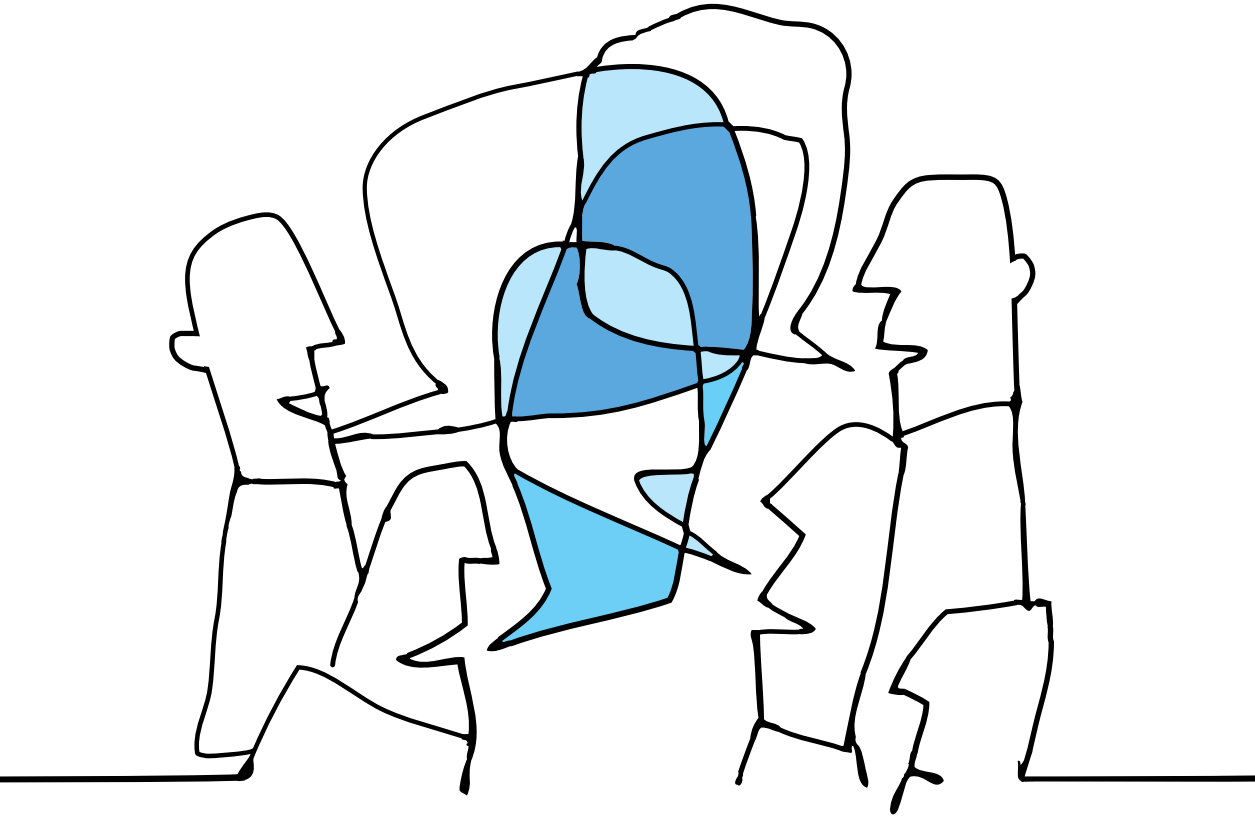
ARBITRATION IN INDIA

A HANDBOOK



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Introduction

The purpose of the instant handbook is to give a brief but clear account of the law on arbitration in India by highlighting some key points that parties and practitioners may keep in mind before entering into dispute resolution clauses for commercial transactions with an Indian connection or link.

The law of India on arbitration is not new but more recently there has been a course correction through judicial construction - a welcome step towards pro-arbitration policy considerations.

The Indian Arbitration & Conciliation Act, 1996 is the principal enactment that codifies the law on arbitration and is predominantly modeled on the UNCITRAL Model Law on International Commercial Arbitration. Further, India is a signatory to the New York Convention on Enforcement and Recognition of Foreign Arbitral Awards as well as the Geneva Convention on the Execution of Foreign Arbitral Awards.

Why Arbitrate?

Arbitration is a consensual and effective method of resolving commercial disputes. It allows disputing parties to settle their disputes outside of a national judicial system by referring to a private system of adjudication. The underlying characteristics which make arbitration an attractive and preferred method of resolving commercial disputes are:

1. Party autonomy, flexibility and procedural freedom to tailor the dispute resolution process and appoint arbitrators who are knowledgeable in the subject matter of dispute.
2. Parties free to decide the legal seat, venue of arbitration and language of arbitral proceedings.
3. Parties free to decide rules of law to govern their dispute, including, *ex aequo et bono or amiable compositeur* – fairness, equity and good conscience, by express election.
4. Arbitral Tribunal mandated to take into account usages of trade applicable to transaction.
5. Extent of court interference limited.
6. Arbitration results in a final and binding award, enforceable as a decree of court.
7. Ensures confidentiality of arbitral proceedings and resultant award.
8. It offers parties to an international arbitration a choice of a neutral forum for resolution of disputes and consequently negates fear of either party viz., "home court advantages".

Practitioner's Comment:

Arbitration is the preferred and more developed method of dispute resolution out of various forms, including, mediation, conciliation and expert determination.

Parties may also consider one or more methods to resolve disputes in a sequential manner. Start with, time bound mediation/settlement and on its failure; adjudicate the dispute through arbitration.

Arbitration Agreement

An arbitration agreement is a pre-condition for commencement of arbitral proceedings. An arbitration agreement may be a clause in a contract or a separate agreement to arbitrate all or certain disputes which have arisen or may arise in respect of a defined legal relationship, whether contractual or not.

Valid Arbitration Agreement

An arbitration agreement must be in writing. It will be considered to be in writing, if contained in *(a) document signed by parties; (b) exchange of letter, telex, telegrams or other means of telecommunication recording the arbitration agreement; (c) non-denial of the existence of the arbitration agreement in the Statement of Defence.*

The arbitration agreement is not required to be in any particular form. An arrangement between the parties to refer a dispute between them with respect to a contract to arbitration would spell out an arbitration agreement. See Supreme Court in *Visa International Ltd.*

If the intention of the parties to refer the dispute to arbitration can be clearly ascertained from the terms of the agreement, it is immaterial whether or not the expression "arbitration" "arbitrator" or "arbitrators" has been used in the agreement. See Supreme Court in *M Dayanand Reddy*. However, the intent cannot be in the nature of a mere possibility of agreeing to arbitrate in the future. It must be determined and obligatory to refer future disputes to arbitration.

A valid arbitration agreement is separable from the main contract, and the invalidity or rescission of the main contract does not necessarily entail the invalidity or recession of the arbitration agreement. See House of Lords in *Premium Nafta Products Ltd.* and Supreme Court in *SMS Tea Estates (P) Ltd.*

Practitioner's Comment:

Non-denial of existence of arbitration agreement in the Statement of Defence has been judicially interpreted to include non-denial of existence of arbitration agreement in the reply to any suit, application or petition etc. in Court [(2011) 1 SCC 320 @ Paragraph 12].

Drafting a clear and unambiguous dispute resolution clause is imperative. Dispute resolution clause should be drafted, specific to the transaction at hand. Avoid boilerplate dispute resolution clauses.

When drafting an arbitration clause/agreement, some guiding principles that must be kept in mind are:

- Unambiguous and clear intent to refer all future or existing disputes, contractual or not, to arbitration.
- Choice of law governing the substance of the dispute i.e. governing law of main contract.
- Choice of law governing the arbitration clause/agreement i.e. substantive matters governing the arbitration clause/agreement.
- Choice of procedural law governing the arbitration proceedings i.e. juridical seat of arbitration.
- Institutional arbitration as against ad hoc arbitration.
- Location of assets for enforcement of award and ascertaining law of arbitration of such country.
- Country with seat of arbitration is a New York Convention country and has in-turn been notified by India as a reciprocating territory.

In addition to the above, while drafting an effective arbitration clause/ agreement, it is advisable to consider the following:

- Multi-party Agreements
- Third Parties and Non-Signatories
- Arbitrability of Dispute
- Multi Tier Arbitration in India
- Waiver of right to appeal

Multi-party Agreements

Multi-party Agreements are of two types:

1. Several parties to one contract; or
2. Several contracts with different parties having a link or relation to the issues in dispute.

One contract with several parties i.e. three or more – Points to remember

- Ensure number of arbitrators appointed remain an odd number to increase prospects of a majority award.
- Arrive at a consensus to have joint nomination of arbitrators viz., claimants and respondents and clearly bring such consent in the arbitration clause.
- Look to have the arbitral proceedings governed by institutional rules which categorically contemplate multi-party arbitration and appoint arbitrators on party's failure to come to an agreement.
- Assess the position of law in the country where arbitration will be held i.e. lex arbitri, to ascertain permissibility of waiving right to appoint arbitrator in favour of an institution in the absence of consensus.

Several contracts with different parties – Points to remember

- It is not uncommon to find transactions where there are several parties operating under different contracts, with different choice of law and arbitration clauses, yet each contract is in some way connected or linked to the other and therefore may have a bearing on the issue in dispute.
- It is conceivable that if separate arbitration proceedings are initiated against different parties, then even though, the issue in dispute is related or linked, resultant awards or decisions may be conflicting.
- To avoid such conflicting decisions, it would be practical to have consolidated/concurrent arbitral hearings. This can, either be

Practitioner's Comment:

Best arbitration clauses are clear and straight forward.

Seek legal advice before drafting Multi-party Agreements viz., suitable dispute resolution clauses.

Drafting an arbitration clause when there are several contracts with different parties, requires a skilful understanding of the relationship between each of the party and the need to conceive and assess the nature of disputes that may arise in the future. Adopting concurrent arbitral hearings should not be considered a general rule.

Indian courts recognize the practicality of concurrent arbitral hearings of issues flowing out of different contracts if they have a bearing and/or relation to the matter in dispute. See Supreme Court in *P. R. Shah, Shares & Stock Brokers.*

incorporated by reference into the arbitration clause in the different contracts or before court by appointing the same arbitrator for related issues flowing out of different contracts.

- As arbitration principally works on the foundation of consent & privity of contract, there must be a proper link, connection or bearing on the issue in dispute for such a concurrent or consolidated arbitral hearing to take place.
- In either case, the arrangement ought to be made subject to necessary safeguards as to confidentiality.
- Adoption of concurrent arbitral hearings should be considered only after carefully assessing the transaction at hand, at the time of drafting an arbitration clause and subsequently, when a dispute arises.

Third Parties and Non-Signatories

- Parties consent is a fundamental requirement for arbitration to be binding between them. Generally parties who have not consented to arbitration either in the form of an arbitration agreement between each other or in the form of an arbitration clause which forms part of the main contract, cannot be forced to arbitrate disputes arising between them.
- Unlike courts, arbitrators being creatures of contract are not in a position to join third parties and/or non-signatories to a dispute without their consent, even if their presence has a bearing on the matter in dispute.
- In India, the position of law on joining third parties and/or non-signatories to arbitration has been addressed from the perspective of arbitrations seated/held in India as against those which are seated/held abroad.
- For arbitrations held in India (purely domestic or international commercial arbitrations held in India), the law does not permit courts to join third parties and/or non-signatories. However, the law makes a significant departure in arbitrations seated abroad. The legislature has made a clear departure when it comes to arbitrations seated abroad as it recognizes the possibility of joining third parties and/or non-signatories through court reference if the person approaching the forum is a party to the arbitration agreement or a person claiming through or under such party.
- However, joinder of third parties and/or non-signatories to arbitration is case specific and predominantly based on consensus. In exceptional cases, courts in India are known to join third parties and/or non-signatories if connection, link or bearing on the matter in dispute can be demonstrated clearly.

- In befitting cases, Indian courts are likely to recognize various legal doctrines to bind third parties and/or non-signatories to an arbitration agreement. Such doctrines include theory of implied consent, third party beneficiaries, assignment and other transfer mechanisms of contractual rights, where focus is placed on discerning the intention of the parties and, to a large extent, on good faith principles. Indian courts may in appropriate cases also consider the doctrine of agent-principal relations, apparent authority, piercing of veil (also called alter ego), joint venture relations, succession and estoppel, where focus is not on parties intention but rather on the force of the applicable law. See Supreme Court in ***Chloro Controls India P Ltd.***

Arbitrability of Dispute

- Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is primarily arbitrable. However, certain categories of proceedings have been reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and statutory tribunals), are nevertheless excluded from the purview of private fora. See Supreme Court in *Booz Allen and Hamilton Inc*.
- Generally, all disputes relating to *rights in personam* i.e. rights and interests of the parties themselves in the subject matter of the case, are considered amenable to arbitration; Whereas, all disputes relating to *rights in rem* i.e. rights exercisable against the world at large, are required to be adjudicated by courts and statutory tribunals.
- However, this is not a rigid or inflexible rule. Disputes relating to subordinate *rights in personam* arising from *rights in rem* have been considered to be arbitrable. Some well known illustrations of non-arbitrable disputes are:
  - Disputes relating to rights and liabilities which give rise to or arise out of criminal offences.
  - Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody.
  - Guardianship matters
  - Insolvency and winding up matters
  - Testamentary matters (grant of probate, letters of administration and succession certificate)
  - Eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the dispute.

Multi Tier Arbitration in India – Not yet

- The position in India with respect to validity of multi-tier or two – tier arbitration i.e. a provision for appellate arbitration in the arbitration agreement is pending determination before the Supreme Court.
- A two member bench of the Supreme Court of India was unable to come to a conclusion with respect to the validity of such an arbitration mechanism and has referred it to a larger bench for, inter-alia, determining whether such multi-tier arbitration mechanism in the arbitration clause/agreement is valid under the law of India and/or not contrary to its public policy. See Supreme Court in *Centrotrade Minerals*.
- The fate of the matter remains pending before the larger bench in the Supreme Court and in the absence of clarity, it is advisable to consciously avoid multi-tier arbitrations in contracts with an Indian background or connection. Even otherwise, single tier arbitration by itself is binding on parties and greater efficiency will be achieved by keeping arbitration clauses/agreements simple and straight forward.

Waiver of right to appeal

- Indian law does not recognize exclusion or waiver of right to appeal by the parties to an arbitration clause. However, in case such a waiver has been incorporated in the dispute resolution clause, courts in India are likely to consider such waiver as severable from the rest of the arbitration clause, if it can be established that the severable portion is clearly independent of the dispute being referred to and resolved by arbitration.
- In other words, to the extent the arbitration clause can be considered to be legal, the offending part may be separated and severed using a "blue pencil".
- It would however be preferable to avoid such clauses of waiver of right to appeal as they shall be considered invalid, being a restraint in legal proceedings. See judgment of Supreme Court in *Shin Satellite*.

Law governing substance of dispute and law governing arbitration agreement

- As most arbitrations take place pursuant to an arbitration clause in the 'main contract', this head assumes significant importance because an arbitration clause which forms part of the entire contract is as an agreement in its own right; and is considered collateral to and separable from, the main contract. It survives even if the main contract stands terminated or is considered a nullity.
- This principle of severability is not only interesting and useful in practice as it ensures efficacy of arbitration as an alternate to litigation but more importantly the principle also lays the foundation on which parties may choose to have the dispute governed by one system of law while elect another to govern the arbitration agreement and/or the procedure of arbitration.
- Indian law recognizes the principle of severability of an arbitration clause and consequently allows parties to elect the substantive law governing the dispute and/or substantive law of the entire contract as different from the law governing the arbitration agreement. See Supreme Court in *Reliance Industries & Anr.*
- The substantive law of the contract between the parties is the law which the arbitrators shall apply for deciding the disputes between the parties; Whereas, the governing law of arbitration covers matters relating to the arbitration agreement. For instance, whether a dispute is amenable to arbitration or not.
- Indian law gives importance to the principle of territoriality and the centre of gravity for determining law governing arbitration is the juridical seat of arbitration.
- Indian law also recognizes the difference between juridical seat of arbitration and venue of arbitration for reasons of convenience and therefore it is perfectly permissible to have an arbitration clause which categorically identifies the juridical seat of arbitration in one country while at the same time prefers to hold the arbitration elsewhere for reasons of convenience. In such a scenario, the law governing the arbitration agreement shall be the juridical seat of arbitration and not the venue of arbitration.

- Theoretically, parties may also choose a different procedural or curial law to govern the arbitration proceedings inasmuch as the same is not in conflict or inconsistent with any express choice of law governing the arbitration agreement i.e. law at the juridical seat of arbitration. It is however, advisable to not have a separate choice of law governing the procedure of arbitration as it is bound to complicate the conduct of arbitration.
- Therefore, while drafting a contract, it would be wise to consider the benefit or advantages (case specific) of either having one system of law which shall govern the substance of the dispute as well as the arbitration agreement or two separate systems of law. In either case it is advisable to make an express choice of law, to avoid any ambiguity or uncertainty. In exceptional cases, parties may also consider selecting another system of law to govern the procedure of arbitration.

Jurisdiction of arbitral tribunal – *Kompetenz – Kompetenz*

Indian law recognizes the principle of ***Kompetenz – Kompetenz*** and vests the power with the arbitral tribunal to rule on its own jurisdiction, including ruling on any objections, with respect to the existence or validity of the arbitration agreement. Therefore, the arbitral tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction.

- However, where the jurisdictional issues with respect to validity of arbitration agreement are decided by court before a reference is made to arbitration i.e. at the time of appointment of arbitrator or at the time of referring the parties to arbitration in terms of their agreement or at the time of awarding interim measures of protection, an arbitral tribunal cannot go into that decision again. It is not empowered to ignore the decision given by the Court and get over the finality conferred on an order passed prior to it's entering upon the reference.
- Therefore, the full play of the principle ***Kompetenz – Kompetenz*** shall be available to the arbitral tribunal in cases where it has not been constituted with court intervention.
- If an arbitral tribunal decides the issue of exercise of jurisdiction in the affirmative and proceeds with arbitral hearing, the aggrieved party can challenge such exercise of jurisdiction only at the time of objections to award (setting aside proceedings). It cannot challenge the order confirming jurisdiction in the interlocutory stage by way of an appeal.
- However, if the arbitral tribunal decides the issue of exercise of jurisdiction in the negative and terminates the reference, the aggrieved party has a right of appeal at that stage itself.

Pre-reference issues which courts will decide:

- Whether the party approaching the court has approached the right court;
- Whether there is a valid and enforceable arbitration agreement; and
- Whether the party who has sought indulgence, is a party to such an agreement.

Pre-reference issues which courts may decide or leave them to the decision of the arbitral tribunal:

- Whether the claim is a dead (long - barred) claim or a live claim.
- Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection.

Pre-reference issues which courts would leave exclusively to the arbitral tribunal:

- Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration)
- Merits of any claim involved in the arbitration.

Practitioner's Comment:
Whenever the court is seized of a jurisdictional issue at first instance, it will necessarily decide issues highlighted under category I above and may in appropriate cases decide category II issues as well.

Serious allegations of Illegality or fraud in the underlying contract if alleged before court at first instance i.e. pre reference, may also be decided by the court.

However, that does not mean an arbitral tribunal cannot decide such issues itself. An arbitral tribunal if seized of the jurisdictional issue at first instance is empowered to decide issues of illegality and fraud as well. See Supreme Court in *Patel Engineering and Boghara Polyfab Private Limited.*

Court assistance and intervention for arbitration

Court assistance for arbitration may be considered from the perspective of the bifurcation made in Arbitration and Conciliation Act, 1996:

Under Part I of the Act, which deals with arbitrations seated in India and considers the resultant award a domestic award, court assistance may be sought for the following:

- Stay of legal proceedings and referring parties to arbitration in terms of their agreement.
- Seeking measures of interim protection from court before or during arbitral proceedings or at any time prior to making of the arbitral award but before it is enforced.
- Appointment of arbitrators, if party or an institution, fails to appoint an arbitrator in terms of the procedure agreed upon by the parties.
- Appointment of substitute arbitrator(s) and/or termination of mandate of existing arbitrator(s) if the arbitrator(s) become *de jure* or *de facto* unable to perform his/her functions or for other reasons.
- Assistance in taking evidence in support of the arbitral proceedings.
- Setting aside and enforcement of domestic awards.
- Appeals against interlocutory orders of courts granting or refusing to grant measures of interim protection, setting aside or refusing to set aside an arbitral award.
- Appeals against order of arbitral tribunal accepting a plea of lack of jurisdiction and terminating the reference to arbitration and an appeal against an order of arbitral tribunal granting or refusing to grant an interim measure of protection.

Under Part II of the Act, which deals with arbitrations seated abroad and considers the resultant award as a foreign award, court assistance may be sought for the following:

- Referring parties to arbitration in terms of their agreement.
- Enforcement of foreign awards.
- Appeals against an order of court refusing to refer parties to arbitration and refusing to enforce a foreign award.

Further, under Part II, the position with regard to jurisdiction of Indian courts to restrain foreign arbitration proceedings has been examined extensively by the Supreme Court:

- Under Section 45 of the Act, the court shall, at the request of either party, refer the dispute to arbitration, unless it finds that the 'arbitration agreement' is null and void, inoperative and incapable of being performed.
- Thus, even where allegations of misrepresentation and fraud have been made, the court cannot interfere unless it finds that the 'arbitration agreement' is null and void, or otherwise inoperative and incapable of being performed.
- The dispute would be referred to the arbitrator and obtaining an anti-arbitration injunction from the court would be difficult.
- While giving a boost to foreign arbitrations, the Supreme Court made a clear distinction here is made of the 'arbitration agreement' as severable from the main agreement. See Supreme Court in *World Sport Group (Mauritius) Ltd.*

Therefore court intervention under Part I applies at all four stages:

- Commencement of arbitration.
- Conduct of arbitration.
- Challenge (setting aside) to domestic award.
- Recognition and enforcement of domestic award

Court intervention under Part II applies at only two stages:

- Commencement of arbitration; and
- Recognition and enforcement of foreign award

Enforcement and setting aside of Awards

Successful arbitral awards need to be enforced, and enforcement in India has been hitherto a challenge. With the recent decision of the Supreme Court in *Balco*, however, the decision of arbitral tribunals which have their seat outside India may face fewer obstacles from Indian courts.

Much of the difficulty in India *post* 1996 and *pre Balco* arose from the judicial construction of the provisions of the Arbitration and Conciliation Act, 1996 which provides for separate rules and discipline to regulate domestic awards (Part I) and foreign awards (Part II).

Part I envisages a more proactive role of Indian courts, with courts retaining the ability to impose interim measures or set aside awards. Part II on the other hand, adopts a far more deferential approach towards the foreign award and the appropriate remedy against such an award essentially lies at the time of enforcement. Courts deem a foreign award as a decree of that court if they are satisfied that the grounds for refusing enforcement are not met.

The burden of proof for non-enforcement is on the party impeaching the award and may be refused only if proper proof is furnished by it the court on any of the following grounds:

- Parties to the arbitration agreement were, under the law applicable to them, under some incapacity.
- The arbitration agreement was not valid under the law to which the parties have subjected it or under the law of the country where the award was made.
- The party against whom the award is invoked was not given proper notice of appointment of arbitrator or the arbitral proceedings or was otherwise unable to present its case.
- The award made deals with an issue which does not fall within the terms of the arbitration agreement or it contains decisions on matters beyond the scope of the agreement.
- Enforcement may also be refused, if the dispute as a whole is non-arbitrable under the law of India.
- Composition of the arbitral tribunal or the procedure followed was not in accordance with the agreement of the parties or was not in accordance with the law of the country where the arbitration took place.

- The award has not become binding on the parties or has been set aside or suspended by a competent authority of the country in which the award was made.
- Enforcement may also be refused, if the subject matter of the difference was not capable of settlement by arbitration under the law of India.
- Enforcement is detrimental to Indian public policy.

Domestic Award v. Foreign Award

Part II lays down in its two chapters, the rules regulating enforcement of foreign awards made in countries which are parties to the New York and Geneva Conventions. India has decided to extend the benefit of the New York and Geneva Conventions only to those countries which are notified by it since these are considered as reciprocating countries in the view of the government of India (GOI). See the Supreme Court in *Bhatia International*. Hence if the seat of arbitratation is not in a notified country, awards in such countries will not be considered as foreign awards even if the country has signed the New York or Geneva Convention.

Practitioner's Comment:
Since India has decided to extend the benefit of the NY and Geneva Conventions only to notified countries. Therefore, parties should carefully examine if the agreement is between litigants from countries notified by the Government of India to ensure that such awards are enforceable in India as foreign awards. [See Appendix]

There is presently no rule governing foreign awards made in non convention countries, and as acknowledged by the Supreme Court in *Balco*, this remains a lacuna in the Indian legislation.

Foreign awards are defined slightly differently in each of the chapters. Balco has clarified however the issue in simple terms. Part I shall apply in so far as the tribunal is seated in India *(Balco)*. Parties should note that the seat of arbitration is a legal concept and may vary from the venue of arbitration.

Unresolved Issues post *Balco*

Firstly, parties should not assume that the exclusion of Part I is necessarily in their best interests. Part I does vest Indian courts with some useful powers.

For instance, a party may move an application under Section 9 in Part I during the pendency of the arbitration to prevent the opposite party from selling its interest in the subject matter of the arbitration which may be located in India. This is a far less complex process, than first requesting such interim directions from the courts of the country governing the arbitration, as the Indian Code of Civil Procedure does not recognize interim orders from a foreign court or arbitral tribunal as an enforceable decree.

Further, an inter-parte suit for interim relief in India in support of arbitration outside India too would not be maintainable under the law as it stands today. Therefore, it is advisable to get proper advice while drafting an arbitration clause. One size does not fit all!

Secondly, enforcement of foreign awards may also face some interference through the particularly expansive interpretation of the term public policy adopted by the Indian Supreme Court in *Saw Pipes*. As per the Supreme Court, the following would contravene Indian public policy (a) violation of a fundamental policy of Indian law; (b) the interest of India; (c) justice or morality or (d) patent illegality. Though the decision of the Supreme Court in *Saw Pipes* has been diluted to a certain extent by subsequent decisions and interpretations of the courts, it has not been overruled and continues to be the law of the land. See Supreme Court in *Saw Pipes, McDermott Industries* and *Sumitomo Heavy Industries Ltd.*

Patent illegality is the ground with the broadest application and would be triggered when, for instance, the award was patently against the statutory provisions of substantive law in force in India. In the spirit of the *Balco* decision, violation of the rule applicable to the substance of the arbitration dispute under Section 28 of the Act, which was considered to be a breach of Indian public policy, may no longer be considered a breach of such policy with respect to foreign awards as the section falls under Part I. *Balco* does not however put a reign on the wide definition of public policy. This may be continued to be used to challenge, perhaps successfully, awards not fully compliant with Indian statutory laws.

Thirdly, the application of the principles laid down in *Balco* has been made applicable to arbitration agreements executed after 6-9-2012. Therefore, it is advisable for the parties who have executed arbitration agreement(s) on or prior to 6th September, 2012 to seek advice and if considered appropriate, amend their arbitration agreements, to avoid any ambiguity in future.

Arbitration under Bilateral Investment Treaties

Importance of Bilateral Investment Treaties

Bilateral Investment Treaties are an important weapon in the arsenal of multinational companies investing in India and Indian companies investing abroad. For instance, in 2011, White Industries, an Australian company was able to receive compensation from an arbitral tribunal against the Government of India (GOI) on account of judicial delay in enforcement of an ICC arbitration award issued in its favour. In recent times, reports have indicated that Russian company, Sistema JSFC filed a notice invoking the dispute settlement clause of the India-Russia BIT against the Indian Supreme Court's decision to cancel, among others, the telecommunications contract granted by GOI to Sistema Shyam Teleservices. Amongst others, Vodafone threatened action under the India-Netherlands BIT against the GOI's decision to amend the tax rules and retrospectively tax the company. Nokia seeking to invoke international arbitration against the Indian government under the India-Finland BIT over a tax dispute which affected the takeover of Nokia by Microsoft has also been reported.

Therefore, the BIT can go a distance in mitigating various risks including judicial delay presently faced by investors. Also, BITs can help Indian investors protect their investment in countries with which India has BITs. Countries like Mauritius, Cyprus, Netherlands or the United Kingdom which receive a significant amount of outbound investment are also countries with which India has a BIT.

Practitioner's Comment:
Investors should carry out a pre-investment diligence to examine if the investment may be structured in a manner which allows the investor to benefit from Indian BITs. If this is not possible, the party should try to negotiate for a specific arbitration clause in the concession agreement with the state party and have the seat of arbitration outside India.

Even in situations where there are no BITs between the relevant countries, the arbitration clause in the applicable contract may trigger the State's liability. Interestingly, in the Dhabhol arbitration, the ICC tribunal made the Government of Maharashtra jointly and severally liable for compensation to Energy Enterprise (Mauritius) Company even though it was not itself a party to the shareholder agreement through which the tribunal derived its jurisdiction.

Investors may potentially have a claim under BITs in cases ranging from cancellation of governmental contracts or permits on one hand and government sponsored or condoned harassment of resident staff on the other. Claims may arise even in cases where the investors are shareholders in a locally incorporated company which is subject to an internationally wrongful act.

Indian BITs

India, as on date has signed 82 BITs of which 72 have already come into force. While India is not a member of the ICSID, an organization dedicated to administrating investor-state arbitration claims, arbitrations may take place under the UNCITRAL or other rules or even on an ad-hoc basis. The *White Industries* arbitration of 2011 is a case in point of an investor-state arbitration administered under the UNCITRAL rules.

Overview of Indian BITs

Investment in India or in the Host Country

Under Indian BITs or any BIT for that matter, an investor may have a valid claim only if there is a valid investment in the host state. Some BITs even impose a pre-investment obligation on the host state. Investments are typically defined in the BITs. Some jurisprudence has evolved in the context of Article 25(1) of the ICSID Convention which requires consideration of additional factors such as (1) significant contribution; (2) substantial duration over which project implemented (3) sharing of operational risk and (4) contribution of host state even if the definitional requirements under the BIT are met. This is popularly referred to as the Salini test. Some tribunals such as the one in *Phoenix v Czech Republic* have also considered whether the assets were invested in accordance with the laws of the host state and whether there was a *bona fide* investment in those assets.

ICSID Tribunals have differed greatly on whether these factors are at all relevant and whether these factors should be taken as prerequisites or are only indicative. UNCITRAL tribunals have also varied on whether such tests may be transposed into the UNCITRAL jurisprudence. Some, such as *White Industries*, have examined the transaction against the touchstone of the Salini factors without making an affirmative ruling on its applicability in UNCITRAL arbitrations.

Using beneficial legal provisions of different BITs to build a strong case

Investors may benefit from the 'most favored nation' ('MFN') clause in Indian BITs. The benefit of this provision is that it allows the investor to benefit from legal rules contained in other BITs to which the host state is a party even if the applicable BIT does not have those legal rules. *White Industries* decision is a classic example. In *White Industries*, the arbitral tribunal denied each and every claim that the company brought under the India-Australia BIT. However, it held that the company had a valid claim against GOI under an "effective means" provision which while absent in the India-Australia BIT could be imported into that BIT from the India-Kuwait BIT through a MFN clause.

Practitioner's Comment:
The first jurisdictional step in BIT arbitration is a determination of whether there is an investment in the host state or not. It is important that investors not assume that the dictionary or ordinary meaning of investment will determine the jurisdiction of the tribunal. There is an extremely complex jurisprudence on the subject and parties should carefully review the transaction to determine whether it will constitute an investment for the purpose of the BIT. For example, even loans used for the benefit of the host state economy have been considered investments under BITs.

Practitioner's Comment:
Investors should first examine the MFN clause of the applicable BIT. Many MFN have restrictive conditions which may prevent importation of legal provisions from other BITs. If such restriction does not preclude importation, the investors should examine other BITs to identify the legal rules under which the chances of success are high.

Investors should note that the action or inaction of all three organs of the government i.e. legislature, executive or the judiciary may lead to a possible challenge under the BIT.

BITs typically include standard clauses on national treatment and fair & equitable treatment. There may be also provisions which require that the investment be provided full security and prohibit restrictions on repatriations of the returns on investment. Some BITs even include what is referred to as an umbrella clause which requires that the contracting party "observe any obligation it may have entered into with regard to the investment made in its territory by investors of the other Contracting Party". This is an extremely broad rule. Some tribunals have interpreted the provision in an extremely liberal manner with the result that even contractual breaches (where the state is a party to the contract) have triggered liability under international law.

Practitioner's Comment:
While there is no precedent value in investor-state arbitration, tribunals routinely refer to other tribunal decisions while making their determination. Therefore, investors should examine the jurisprudence that has developed under each of the rules making due allowance for differences in text of the different BITs.

The umbrella clause may also vary greatly in different BITS limiting the nature of benefit that may be available. The India-UK BIT, for example, stipulates that the umbrella clause shall only apply if there is no normal judicial remedy available in the host state. The India-Denmark BIT states that disputes arising with respect to investments should be resolved as per the terms of the underlying contract.

In short, BITs may allow investor to fully utilize the commercial opportunities offered by a host state while safeguarding against prejudices to its investment through the protection of international law. *White Industries* and a plethora of other arbitral tribunal decisions show that the protection under the BITs is an effective remedy available with an investor.

Appendix

List of notified countries under NYC and Geneva Convention by GoI –

The following countries have been notified by the Government of India (GoI) as Convention countries and if the seat of arbitration is in these countries, such award will be recognized as a foreign award in India:

Australia, Austria, Belgium, Botswana, Bulgaria, Central African Republic, Chile, China, Cuba, Czechoslovakia, Denmark, Ecuador, Germany, Finland, France, Ghana, Greece, Hungary, Hong Kong, Italy, Japan, Kuwait, Macao, Malagasy Republic, Malaysia, Mexico, Morocco, Nigeria, Norway, Philippines, Poland, Republic of Korea, Romania, San Marino, Singapore, Spain, Sweden, Switzerland, Syria, Thailand, Egypt, The Netherlands, Trinidad and Tobago, Tunisia, Tanzania, United Kingdom and United States of America.

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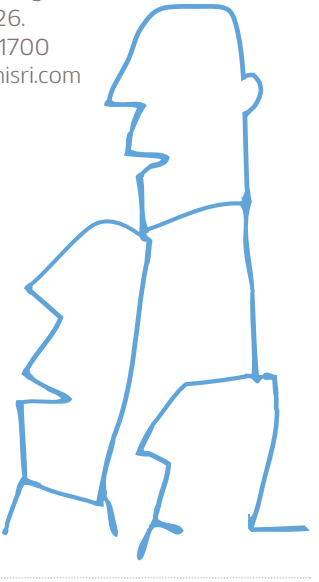

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