ENFORCEMENT OF FOREIGN AWARDS UNDER INDIAN ARBITRATION AND CONCILIATION ACT, 1996 — RECENT DEVELOPMENTS

By

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Introduction

Due to the impact of globalization on international trade, there has been a tremendous upswing in international transactions resulting in a large number of agreements being signed by the parties coming from different parts of the world. This in turn gave rise to an increasing number of contentious issues involving different jurisdictions, so also the Indian jurisdiction. Since parties to a commercial dispute are averse to settlement through Courts of law, they preferred alternative dispute resolution methods and particularly arbitration. After the whole arbitration process has been completed, the most commonly asked question relates to recognition and enforcement of awards made overseas on Indian soil.

The earlier arbitration enactments were replaced by the Arbitration Act 1940. The Act provided for the filing of an award in Court, to make the award a rule of Court and the right to have the award set aside on the grounds specified in the Act as well as an appeal against the decision on such a motion and the other legislation was the Foreign Awards Act 1961. There was a general feeling that the Arbitration Act 1940 had become outdated. Since the existing law whether it is the regular judicial process or arbitral process under the Arbitration Act 1940 was not conducive to the changing demands of liberalization, privatization and globalization of trade and industry. The need to revise the existing law resulted in the enactment of the Indian Arbitration and Conciliation Act 1996 which by virtue of its Section 85 repealed the earlier Act of 1940. The Act of 1996 was introduced in view of the growing[1] complexities of modern commercial transactions due to the globalization of the economy which necessitated an effective redressal mechanism for quick settlement of commercial disputes. A competitive economy, the need for providing a smooth and efficient flow to international business transactions and for increasing foreign exchange earnings in the era of economic reforms and to gain the confidence of foreign investors by showing more transparency in India's legal and dispute resolution system have perhaps prompted the enactment of this legislation. The Act is welcome in the context of globalization and liberalization of trade and economic policies because privatization of industry has led to the privatization of justice delivery system by granting more autonomy in matters of recourse to arbitration and conciliation as ADR mechanisms.

The Indian Arbitration and Conciliation Act of 1996 states in its preamble that it was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as well as to define the law relating to conciliation and for matters connected or incidental. The General Assembly of the United Nations recommended that all nations should recognize and follow the

1. *SBP & Co. v. Patel Engineering Ltd. & another*, (2002) 8 SCC 618.

UNCITRAL Model Law on International Commercial Arbitration of 1985 as a model legislation. Therefore the Indian Supreme Court initially interpreted the Act of 1996 in terms of UNCITRAL Model Law but subsequently changed track by stating that the 1996 Act deviated from the Model Law in certain aspects, hence the 1996 Act need not be interpreted only in terms of Model Law.

International Arbitration

International arbitration or foreign arbitration can take place either in India or outside India in cases where there are elements of foreign origin relating to the parties or the subject-matter of the dispute. The law applicable may be Indian law or foreign law depending on the agreement between the parties in this regard. The Calcutta High Court in the case of *Serajuddin v. Michael Golodetz*[2] laid down the necessary conditions relating to "foreign arbitration":

(a) arbitration should have been held in foreign lands, by foreign arbitrator;

(b) arbitration by applying foreign laws;

(c) as a foreign party is involved;

These are the essential elements of a foreign arbitration resulting in a foreign award.

To explain the term " foreign award " the Supreme Court in *N.T.P.C. v. Singer Company*[3], observed that where in London an interim award was made which arose out of an arbitration agreement governed by the Indian laws. It was held that such an arbitral award cannot be treated as foreign award and it is purely a domestic award which is governed by the laws of India in respect of the agreement and arbitration.

Under what circumstances shall an arbitration cease to be domestic and become international?. When we compare the Model Law with the Arbitration Act 1996 in this regard, one can see considerable divergence Article 1, Clauses 3 and 4 of the Model Law define the term "international" in a very wide manner and provides as follows. An arbitration is international if :

(a) The parties to an arbitration agreement have, at the time of conclusive of the agreement, their places of business at different places: or

(b) One of the following places is situated outside the state in which the parties have their places of business:

(i) The place of arbitration if determined in, or pursuant to, the arbitration agreement.

(ii) Any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected, or

(iii) The parties have expressly agreed that the subject-matter of the arbitration agreement related to more than one country.

The above provision of the Model Law applies multiple tests for the determination of what is "international" where as the Indian Act 1996 defines the term "international commercial arbitration" in Section 2(f) and provides as follows:

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 of any country other than India or

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

2. AIR 1960 Cal. 49.

3. AIR 1993 SC 998.

(iii) A company or 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.

It is clear from the above section that the Indian Act of 1996 does not apply multiple tests but applies only a single test of nationality to determine the international character of arbitration.

Enforcement of Foreign Awards under Part II

Before we proceed to discuss the enforcement of foreign awards it is necessary to understand the distinction between a domestic award and foreign award. In this context one has to bear in mind the extremely important distinction between Indian or international character of arbitration discussed above. Prior to the enactment of the present Act of 1996 the foreign arbitration agreements and awards were regulated by two separate Acts, namely, The Foreign Awards (Recognition and Enforcement) Act 1961 and the Arbitration (Protocol and Convention) Act, 1937 both of which now stand repealed due to the passing of the new Act of 1996. A 'foreign award' has been defined in Section 44 of the Act. It means an award made on or after October 11th 1960 on differences arising between persons out of legal relationships whether contractual or not, which are considered to be commercial under the law in force in India. It is important to note that an award does not become a foreign award merely because it was made in the territory outside India but it becomes so because it is made in the territory of a foreign state where arbitration agreement is not governed by the law of India. Therefore if an award is made on an arbitration agreement governed by the Indian law, though rendered outside India will not be treated as foreign award by the Indian Courts. In the leading case of *Harendra H. Mehta v. Mukesh H. Mehta*[4], the Supreme Court held that since the arbitration agreement was made and signed in U.S.A., the proceedings were held in U.S.A. and the award was made in U.S.A., it was a foreign award.

Geneva Protocol - 1923

Enforcement of judgments is a sovereign act and a state is not legally obliged to enforce them in its territory if they are rendered in another country. A circumstance of such an enforcement can arise only if there is a treaty between sovereign states to enforce each other's judicial pronouncements. Similarly the same principle applies in the case of enforcement of foreign arbitral awards also. A move was made by the protocol by aiming at creating an international legal regime for two purposes.

1. Recognition of validity of arbitration agreements entered into between persons belonging to different state parties.

2. Enforcement of arbitral awards made under those agreements by a state when they were rendered in its territory.

The Protocol contained seminal elements of the future arbitration law. They are as follows:

1. The parties could agree to refer to arbitration existing or future disputes.

2. They can determine which of the disputes should be referred to arbitration.

3. The disputes should be arbitrable.

4. A party may bar another party from having recourse to the Courts and compel it to settle the dispute as per the agreement.

5. The arbitration agreement must have been entered into between persons

4. AIR 1999 SC 2054.

who are subjects of the state parties even though the venue of arbitration was located in a state which was not a party.

The most important feature of the Geneva Protocol apart from the features above is that it covered all kinds of disputes, it also entitled the parties to make a reservation confining their obligations to the recognition and enforcement of arbitration agreements relating to disputes of commercial nature only. The Geneva Protocol's main defect was that it provided for recognition of international arbitral agreements, but not enforcement of awards given in other countries that have signed the protocol.

Geneva Convention on the Execution of Foreign Arbitral Awards of 1927

The Geneva Convention was signed to rectify the drawback in the Geneva Protocol by referring to the agreements covered by the protocol and made them enforceable even when they were given in other state-parties and went much beyond in laying down a more sophisticated legal framework for the enforcement of arbitral awards.

With regard to the conditions for the enforcement of foreign awards, Section 57 of the 1996 Act closely follows Articles 1(2), 2 and 3 of the Geneva Convention. The conditions are:

1. The award has been made in pursuance of a submission to arbitration that is valid under the law applicable there to.
2. The subject-matter of the award is capable of settlement by arbitration under the law of India

The above two conditions are sometimes referred to as "double arbitrability" which means the dispute must be arbitrable both under the law where the award has been made and also under the Indian law where it is sought to be enforced.

3. The award has been made by the tribunal constituted as per the agreement of the parties and in conformity with the applicable law.
4. The award has become final in the country where it has been *i.e.*, no proceeding by way of challenge or appeal should have been pending.
5. The award is not contrary to the public policy in India.
6. The award has not been annulled in the country where it has been made.
7. The award might not be enforced if the party against whom it was given has not been given proper notice to enable him to present his case.
8. The award might not be enforced if it does not deal with differences not referred.
9. The award might not be enforced if the party against whom it is sought to be enforced proves that under the applicable procedure in the country where the award has been made he had grounds of challenge other than those mentioned above or the Court might adjourn and give him enough time to get the award annulled by the competent tribunal in the country where it was given. But, then the question is whether under those conditions the award could be considered to have become final so as to satisfy condition (4) above.

Once the Court is satisfied that the foreign award is enforceable, the award shall be deemed to be a decree of the Court[5].

New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of - 1958

The Convention was signed under the framework of the Economic and Social

5. Section 58 of the Indian Arbitration and Conciliation Act, 1996.

Council of the U.N. as well as the initiative taken the International Chamber of Commerce for establishing an international legal regime for quick settlement of present or future disputes under arbitration agreements. The New York Convention applies to awards made in the state other than a state where their recognition and enforcement is sought *i.e.*, only to the awards made in foreign countries. It shall also apply to awards not considered as 'domestic awards' in the state where their recognition and enforcement is sought. Arbitration agreement must be in writing but also recognized an arbitration clause. The convention provided for 'National Treatment' *i.e.*, a country should not impose conditions, fees and charges for the enforcement of foreign awards more onerous than those imposed for the enforcement of domestic awards.

The most important feature of the convention is that it provided for the enforcement of awards even if the parties to the arbitration agreement were not subjects of any of the contracting states and even if the award was given in a state which was not a party to the convention. This is a clear deviation from the Geneva Protocol and Convention, but the Indian Act of 1996 requires that the awards must have been made only in the territories of convention countries[6].

Non-Convention Awards

Foreign awards which are not covered by the express provisions of Part-II Chapters 1 and 2 are called non-convention awards. At certain times, awards rendered in countries that are not parties to either the Geneva or New York Conventions are to be treated as non-convention awards. But awards even if they are made in the countries parties to those two conventions, under certain circumstances may be treated as non-convention awards. Further awards that are not technically covered by the provisions of Part II, Chapters 1 and 2 are also treated as non-convention awards.

In India in the field of enforcement of domestic awards there are very few problems but in the field of enforcement of foreign awards there are myriad problems. With regard to enforcement of foreign awards earlier the foreign award was first to be filed in Court, if the Court is satisfied that the foreign award is enforceable under the Foreign Awards Act 1961, then the Court allowed the award to be filed and subsequently pronounce a judgment according to the award. The High Court of Delhi in *Ludwig Wunsche & Co., v. Raunaq International Ltd.*[7], that under Section 7 of the Foreign Awards Act (legislation under New York Convention 1958) the Court has power to set aside the award and can only refuse enforcement of the award[8].

The grounds for non-enforcement of awards under the Foreign Awards Act which the Courts could apply were ample and the vaguest one[9] often employed by the losing party wishing to delay enforcement was that of public policy. The fact remains that many arbitral awards were held hostage to public policy and Courts often relied upon public policy for refusing enforcement of otherwise proper awards[10].

6. Section 44(b) of the Indian Arbitration and Conciliation Act, 1996.

7. [1989] 2 Arbitration Law Reporter 122.

8. Journal of International Arbitration, Vol.19-N 5 (2002), PP. 461-472.

9. *Mukesh H. Mehta v. Harindra H. Mehta*, (1995) 5 Com. LJ (Bom), the Court observed that the public policy is a vague term and of uncertain import.

10. In *Renusagar Power Co. Ltd. v. General Electric Co.*, the Supreme Court has held that in the field of international law Indian Courts can refuse to apply a rule of foreign law or recognize a foreign judgment of a foreign arbitral award if it is found that the same is contrary to public policy in India. The Court however also held that mere violation of law will not lead to a conclusion that public policy has been infringed.

The practical fallout of the ample discretion given to the Courts and the myriad options available to the losing party to object to an arbitral award was delay and even more delay. The most familiar legal saga was that of Renusagar.

Commercial Reservation

The 1996 Act under Section 44 defines foreign awards, which has been a matter of serious concern because coupled with the commercial reservation made by India to the New York Convention reflects that a foreign award means an award on differences considered as commercial under the law in force in India. This territorial restriction on a foreign award reduces the efficacy of international commercial arbitration. Fortunately today the Courts in India have liberalized their attitudes keeping in tune with the liberalization and globalization of the Indian economy[11] and which indicates the weakening of the commercial reservation in the international field.

Many states in the international community have adopted the New York Convention believing that a foreign award should be truly international in character, enforceable in all convention countries regardless of legal constraints posed by the national legal systems. But in India before the 1996 Act, the foreign awards were subjected to a three-tier Court system of award scrutiny which frustrated most of the unsuspecting foreign parties because it resulted in inordinate delay and much time-consuming. However, this anomaly was removed by the 1996 Act which under Part II States that all awards made outside India, irrespective of Indian law being applicable, are considered as foreign awards. However there is no express provision under Part II to this effect.

11. *RM Investments & Trading Co. P. Ltd. v. Boeing Co. Ltd.*, AIR 1994 SC 1 136.

Principle of De'merger

Under the old law the awards were not considered to merge with the judgments on them even when the law required that an arbitral award be made a decision of the Court before it could be enforced similarly the 1996 Act has maintained and strengthened this position by allowing an arbitral award to be enforced as if it were a decree of the Court but does not make an award the decree of the Court. If an award does not merge with a judgment that upholds it, an award that is not enforced will certainly not merge with the judgment that fails to enforce the award. Hence, the non merger of an award has another effect *i.e.*, an award that is said to be void, becomes unenforceable in law but does not cease to exist[12]. Therefore foreign award holders in India can now heave a sigh of relief, for if an award is refused enforcement by a Court, it will not merge with the judgment and will continue to exist outside India[13]. But the fact remains that the foreign Court to which the application is made to enforce the award might consider the judgment of the Indian Court to have settled the question and may hold the question *res judicata*. This of course shall rest purely on the domestic law of the country[14]. Moreover with respect to non-convention foreign awards upon enforcement under the common law system by way of suit, it has been held that the award merges in the judgment pronounced on the award[15].

12. Section 2(g) of the Indian Contract Act 1872 defines the word "void", it reads; "An agreement not enforceable by law is said to be void and Section 2(1) reads; A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

13. *C.O.S.I.D. Inc v. Steel Authority of India*, AIR 1986 (Delhi High Court) 8, 13. 16.

14. *P. Ramaswamy*, Enforcement of Annulled Awards - An Indian Perspective, Journal International Arbitration, Vol.19-N5 (2002), PP 461-472.

15. *East India Trading Co. v. Carmel Exporters and Importers,* 1 All ER 1053.

Limitation on Enforcement

The Indian Arbitration Act 1996 states under Section 43 that the Indian Limitation Act 1963 applies to arbitrations under which 12 years is prescribed for enforcement of a decree. Since Section 43 is in Part I of the 1996 Act, it applies only to domestic arbitrations *i.e.*, when the seat of arbitration is in India. Whereas Part II of the 1996 Act which applies to foreign awards is devoid of provisions on limitation.

Section 2(5) of the Act which extends its applicability to all arbitrations, may however, lead to Section 43 becoming applicable as was held to be the case for the applicability of the 1940 Act in the case of Raunaq International[16]. It may be pointed out that it has been held since a long time that limitation periods, if not explicit in legislation, should be read to be implicit in the arbitration agreement as a principle of equity[17].

If Indian law is applicable, a time bar clause may not result in the barring of the claim and only the right to arbitrate may be relinquished. A new amendment to Section 28 of the Indian Contract Act 1872 does away with subtle distinction that was previously drawn between the barring of remedies and the relinquishment of rights[18].

Problem of Interim Measures

Some serious problems of interpretation have arisen in the field of international commercial arbitration purely with respect to availability of interim measures of protection under Section 9 of the 1996 Act. Doubts were raised in respect of Section 9 which is incorporated under Part I of the Act regarding its application to commercial arbitration which is held outside India because Section 2(2) of the 1996 Act states that "this part shall apply where the place of arbitration is in India." It was pointed out that Part I would apply equally to domestic arbitration as well as international arbitration. But a problem arises where the place of arbitration is not in India but in a foreign state because then the provisions of Part I would not apply. In such a case, a party who is interested in getting interim measures from an Indian Court would not be able to do so as Section 9 would not be available to him. The UNCITRAL Model Law however, expressly provided in Article 1(2) that Article 9 (parallel to Section 9) would apply even when the place of arbitration is outside the state.

The above explanation clearly indicates that the problem was very much anticipated and provided for in the Model Law and it was pointed out that failure to provide for that contingency was a serious lacuna in the Indian Act[19]. The above situation has resulted in a conflict of opinions among some of the High Courts in India regarding applicability of Part I to arbitrations outside India. In *Dominant Offset (P) Ltd v. Adamouske Strojirny AS*[20], The High Court of Delhi interpreted Section 2(2) as an inclusive and not as an exclusive provision and held that part I would apply even where the place of arbitration is outside India.

The above opinion was followed by another Single Judge of the High Court of Delhi in *Olex Focas Pvt Ltd. v. Skoda Export Co Ltd.*[21], where the Judge held that "a careful reading and scrutiny of the provisions of 1996 Act leads to the clear conclusion that sub-section (2) of Section 2 is an inclusive definition and it does not

16. Supra. n.13.

17. Supra. n.20.

18. *Vulcan Insurance Co. v. Maharaj Singh*, (1976) 2 SCR 62.

19. *S.K. Chawla*, Law of Arbitration & Conciliation – Practice and Procedure (Calcutta: New Delhi, 1998) P-133 and *K.Y. Sharma*, Arbitration & Conciliation Act, 1996, Law and Practice, First Edition (Hyderabad, 2001), PP.26-28. Arbitration & Conciliation Act, 1996, Law and Practice, First Edition (Hyderabad, 2001), PP.26-28.

20. 1997 (2) Arb.L.R. 335.

exclude the applicability of Part I to this arbitration which is not being held in India. In an earlier but similar case *i.e., Kitechnology NV v. UNICOR Gmbh*[22], another Single Judge of the High Court of Delhi had a different opinion when he held, that in view of sub-section (2) of Section 2 of the Act, this is not an international commercial arbitration to which Part I shall apply. Where the parties to the agreement are foreigners and the place of arbitration is not in India and the law applicable in terms of arbitration clause is foreign law, then the provisions of this Act does not apply. Part II does not apply as it does not relate to enforcement of foreign awards.

A Division Bench in *Marriot International Inc. v. Ansal Hotels Ltd.*[23] also held that " the expression 'every arbitration under any other enactment' in sub-section (4) and 'all arbitrations' in sub-section (5) do not mean that Part I of the Act shall apply even to arbitrations taking place outside India". With respect to this interpretation of the Division Bench it is submitted that it is immensely correct as the words " all arbitration" should be taken to mean all arbitration Indian or International commercial arbitration if the venue is in India as Section 2(2) clearly states that Part I shall apply where the place of arbitration is in India.

However the controversy seems to have been settled by the Supreme Court of India in its decision in *Bhatia International v. Bulk Trading SA*[24], where it affirmed the decisions in Dominant and *Olex Focas* cases and held that Section 2(2) is an inclusive one and that it does not exclude the application of Part I to arbitrations held outside India. The decision is commendable because the Apex Court was trying to correct a very serious lacuna in the 1996 Act.

In subsequent cases such as *Inventa Fischer Gmbh & Co., v. Polygenta Technologies Ltd.*[25], *Trusuns Chemical Industry Ltd v. Tata International Ltd.*[26], *Bharat Aluminium Co. Ltd v. Kaiser Aluminium Technical Services*[27] and *Bulk Trading SA v. Dalmia Cement (Bharat) Limited*[28], the various High Courts in India held a similar view except the Gujarat High Court in *Nirma Ltd., v. Lurgi Energie Und Entsorgung GMBH, Germany*[29], took a different view.

The Supreme Court very recently in *Venture Global Engineering v. Satyam Computer Services Ltd. & another*[30], held that a foreign award that was passed outside India cannot be said to be not enforceable in India by invoking provisions of the Arbitration and Conciliation Act, 1996 or the CPC, 1908. However, it will be open to the parties to exclude the application of the provisions of Part I of the Act of 1996 by express or implied agreement, otherwise, the whole Part I would be applicable. In any event, applying the provisions of Section 34 to foreign international awards would not be inconsistent with Section 48 of the Act, or any other provision of Part II.

In the above case, the enforcement of a foreign award directing the foreign appellant company to transfer shares to an Indian company (respondent) was sought by the respondent in a foreign Court *i.e.*, the U.S. District Court was held to be violative of the shareholders agreement, therefore the appellant can challenge the award under Section 34 of the Indian Act of 1996, in an Indian Court. That apart, in view of the injunction restraining the respondent from effecting transfer of shares being the respondent, should not have proceeded with

21. AIR 2000 Delhi 161.
22. 1999 (1) Arb.L.R. 452.
23. AIR 2000 Delhi 377.
24. 2002 (4) SCC 105.
25. 2005 (2) Bom C.R. 364.
26. AIR 2004 Guj. 274.
27. AIR 2005 Chhatt. 21.
28. (2006) 1 Arb. LR 38 (Del.).
29. AIR 2003 Guj. 145.
30. AIR 2008 SC 1061.

the matter in a foreign Court without getting the earlier injunction order vacated. Both the Counsels have relied upon the decision delivered in the Bhatia International case.

In a recent case *i.e*, *Videocon Industries Limited vs. Union of India*[31], the Supreme Court of India, in respect of a question whether implied exclusion by the parties of the application of Part I of the Arbitration Act, 1996, examined its decision in *Bhatia*[32] where it said Part I would apply even to international commercial arbitrations held outside India, unless the parties expressly or by implication excluded the Part. The Apex Court in this case relied upon a decision given by the Gujarat High Court in the case of *Hardy Oil and Gas Co.*[33], in which the parties had clearly mentioned that the proper law of contract was Indian law and the proper law of arbitration as English law. It further observed that the High Court of Gujarat had correctly applied the ratio laid down in *Bhatia International* by realizing that Part I was impliedly excluded by the parties. Similarly in the present case, the Court concluded that a petition under Section 9 cannot be maintained because English law had been chosen as the proper law of arbitration. The Apex Court accordingly allowed the appeal and dismissed the petition of the Government.

In a much more recent case of *Yograj Infrastructure Ltd. v. Ssang Yong Engineering and Construction Ltd.*[34] The Supreme Court pronounced a judgment which is notable for two reasons. Firstly, it states that even if the agreement is subject to the laws of India, if the seat is Singapore and the arbitration is to be conducted in accordance with SIAC Rules, Part I is deemed to have been excluded. This judgment overrules impliedly several judgments of the Indian Court where the choice of substantive law of contract of Indian law was cited as the reason for the applicability of Part I despite a Non-Indian choice of seat.

Secondly, The judgment partially brings the Indian law on interim measures in international commercial arbitration held outside India in tune with the UNCITRAL Model Law on International Commercial Arbitration, 1985 (Model Law). According to this judgment, even if parties choose to exclude Part I impliedly by choosing the SIAC Rules, parties could nevertheless approach the Indian Courts before the commencement of arbitration for interim relief under Section 9 of the Act. This is significant because the original text of the Act (prior to the interpretation of the Act in Bhatia International) did not contain a provision for interim measures in arbitrations held outside India. Courts considered this to be an unconscious omission. We have hypothesized elsewhere that this omission might have been deliberate. Article 1(2) of the Model Law provided that although the Model Law applied only if the place of arbitration was within the territory of the country adopting the Model Law, Article 9, which dealt with interim measures of protection by Court, was applicable even if the place of arbitration was outside the territory of that country. This provision was not adopted in the 1996 Act. The absence of a provision for interim relief in Non-Indian arbitrations perhaps made the Supreme Court in Bhatia International to indulge in the interpretative exercise which the case is now famous for. After Bhatia International, implied exclusion acted, mostly, in an all or nothing fashion (although Bhatia International stated that parties could impliedly exclude all or some of Part I) either Part I applied or did not apply. Now, after Yograj Infrastructure, even if parties impliedly excluded Part I, nothing prevented them

31. 2011 (5) SCALE 678.

32. Bhatia, Supra note 24.

33. *Hardy Oil and Gas Ltd. v. Hindustan Oil Exploration Co. Ltd.*, (2006) 1 GLR 658.

34. 2011 (9) SCALE 567.

from approaching the Indian Courts under Section 9 of the 1996 Act before the commencement of arbitration. In this case, the Supreme Court may have got the outcome of choice of law and of forum completely wrong. It would seem that the Court's logic, reasoning and analysis on curial law, consequence of choice of the law of seat *etc*, is erroneous.

In a recent judgment dated 6th September, 2012 the Supreme Court's Constitution Bench entertaining a batch of appeals observed that "in a foreign seated international commercial arbitration, no application for interim relief would be maintainable under section 9 or any other provision, as Part I of the Arbitration Act 1996, is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India. Part I of the Arbitration Act 1996 is applicable only to all arbitrations which take place within the territory of India. Thus, in order to do complete justice, we hereby order that the law now declared shall apply prospectively to all the arbitration agreements executed hereafter."

Conclusion

The Indian Arbitration and Conciliation Act of 1996 was certainly a much required and tremendous effort to consolidate and amend the Indian law on arbitration and enforcement of foreign awards in tune with the developments in the international community. The UNCITRAL Model Law ignited and spurred the enactment of the Act and the Act has encompassed within its parameters domestic arbitration, domestic conciliation, international commercial arbitration, international commercial conciliation and enforcement of foreign awards. While several amendments are being considered to the 1996 Act as suggested by the Law commission of India particularly changes which deal exclusively with the aspect of delayed proceedings as most of the proposed changes are to be made in Part I of the 1996 Act it is yet to be seen how these amendments are going to influence foreign awards. However, the most significant forward step for India has been a change in the legislative and judicial attitude towards the notion "foreign award" as it is now "international award" *i.e.*, an award transcending all national borders and an environment in which international commercial arbitration can prosper.

The situation in respect of enforcement of foreign awards was fluid as the decision in Bhatia International case has been severely criticized as another example of uncalled for judicial interference in the arbitral process. The decisions of the Apex Court that have followed the Bhatia International case were also criticized on the ground that these rulings which give a different colour to the intention of the parties to the dispute are at a tangent to the very basic tenet of party autonomy which forms the cornerstone of arbitration. Since the decision in Bhatia International has been overruled by the Constitution Bench of the Apex Court stating that the decision was delivered keeping in view the scheme of international instruments. This decision of the Apex Court would help in boosting foreign investments in India and this augurs well for the Indian economy.

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