Chapter – VII

Judicial Experience in International Commercial Arbitration
JUDICIAL EXPEDIENCY IN INTERNATIONAL COMMERCIAL ARBITRATION

“The way we run our courts has not, in essence, changed for 150 years.”


Human and Business relations are joyous and jealous and both are agnatic and at the same time turn out to be avaricious. Be it partnership or trust-based relationship, counterparts turn to be contending rivals. This irritable element may spring up even in case compatriots like Conventional Judicial System and Alternate Dispute Resolution system. Despite infantile inconveniences and occasional hiccups, the camaraderie of judiciary and arbitration institutions cannot be undermined or even under-rated. It is desirable now to have a glance at the desirable proportion of co-ordination and co-operation between the national legal systems and international arbitration institutions for proper appreciation of the international commercial arbitration.

7.1. COURTS AND ARBITRAL TRIBUNALS AS PROMISING COMPATRIOTS:

There has been a mistrust and misconception that judiciary and portals of arbitral mechanism are going to be sworn enemies but not partners in the dispensation of justice to the public. But subsequent events established that the very epitome of public justice itself has generated the concept of ‘private justice’ as a dear complement to public justice. The courts have always tried to keep pace with developments in technology both with regard to the process of the system of justice and the cases that pass through it. Photographs and visual aids have been used in the courts for decades and television links have been available in the courts for a number of years. E-mail has now been recognised in the new Civil Procedure Rules and it is interesting to note that ‘virtual reality’ technology has been used during the giving of evidence in the “Bloody Sunday” enquiry headed by Lord Saville. It is unlikely to take very long before all documents in a case are e-mailed to all the parties, along with all of the pleadings, skeleton arguments and even authorities. The advent of secure electronic dealing rooms facilitates just this. Whilst the
advent of the photocopier increased the size of the court bundles enormously, the advent of e-mail and electronic storage of documents is likely to reduce this once again. 537 Arbitral awards. But the relationship between the courts and arbitration continues to shift in the present day matters. It was a momentous historical event in June 1958 when a diplomatic conference at the UN building in Manhattan signed a treaty which became one of the vital foundations of international trade: “The Convention on the Recognition and Enforcement of Foreign Arbitral Awards” better known as the ‘New York Convention’.

The Convention commits the courts of signatory states to enforce awards made by arbitration tribunals in other signatory states. It has become the basis on which arbitration has developed in recent years: the attractiveness of arbitration depends on a certainty that it will be possible to enforce an arbitral award wherever necessary (e.g., wherever the party required paying the award has the appropriate assets). Arbitration also depends on the support of courts during the tribunal itself, to provide injunctive relief to demand evidence or compel witnesses. But the relationship between the courts and arbitration remains far from straightforward. Case law continues to evolve on questions of the enforcement of foreign arbitral awards. And even in jurisdictions which are party to the Convention, court support for arbitration is by no means guaranteed.

In theory, the basic principles of how courts should deal with arbitration awards granted in other jurisdictions are well established. However, a range of recent decisions have drawn attention to the uncertainties in the system. One area of uncertainty is over whether the courts of the country where an arbitration is heard have primacy over other jurisdictions’ courts in deciding the fate of an arbitration award. The growth of international arbitration depends on reliable court enforcement of The French courts have repeatedly proven willing to enforce arbitration awards which have been set aside in the original seat of the arbitration, arguing that an arbitration award is a private, transnational decision which requires the support of no one country’s courts to exist.

In the UK, by contrast, the courts have typically declined to enforce awards which have been set aside in the seat of arbitration. “If you wished to prevent enforcement of an award, you would normally start by challenging the award in the seat of the arbitration, as a successful challenge would prevent enforcement elsewhere,” explains Amal Bouchenaki, an associate at Orrick Rambaud Martel in Paris. Recently the case of Dallah v Pakistan has seen the English courts addressing the issue of courts’ jurisdiction over arbitrations heard elsewhere from a different angle. The case arose out of a US$345 million contract between Dallah and a trust controlled by the Pakistan government to build housing facilities near Mecca for hajj pilgrims.

Neither side fulfilled their obligations, the housing was never built, nor did the matter go to an arbitration in Paris in 1998. However, the original contract and its arbitration clause were with the trust, not the government of Pakistan itself, and the government argued that it was not bound by the arbitration clause. The tribunal disagreed, and ordered the government of Pakistan to pay $20 million to Dallah. Dallah began enforcement proceedings in London. The government of Pakistan resisted enforcement, on the grounds that it was not a party to the original arbitration agreement. The English courts decided that this was correct. In reaching this decision, they conducted a full rehearing of the issue. Dallah appealed, arguing the English courts were not entitled to conduct a full rehearing of this issue.

According to Dallah, under the New York Convention only the courts of the seat of the arbitration had such a power, because of the principle – implied, they argued, by the wording of the New York Convention – of primacy of the seat of arbitration. In July 2009 the Court of Appeal rejected the appeal. The full effects of the case are not yet clear, but it establishes that the English courts do not consider themselves obliged under the New York Convention to defer to the courts of the seat of arbitration. “Arbitral tribunals are, in principle, competent to decide their own jurisdiction, but in practice that question is also decided by the court of the seat or an enforcing court later on,” explains one London-based arbitration practitioner. “The question at stake was: does the extent of control vary between the court of the seat and an enforcing court?”

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538Dallah Real Estate and Tourism Holding Company (Appellant) v The Ministry of Religious Affairs, Government of Pakistan (Respondent) [2010] UKSC 46 On appeal from the Court of Appeal (Civil Division) [2009] EWCA Civ 755
uncertainty involves the place of arbitration under Brussels Regulation 44/2001, which requires the courts of EU member states to enforce decisions made by other EU members’ courts. In September 2008, the European Court of Justice delivered its opinion on this issue in the case West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA. The dispute arose when a vessel operated by West Tankers collided with a jetty owned by Italian company Erg, prompting a charter party arbitration between Erg and West Tankers in London. Erg’s insurers Allianz SPA, however, initiated litigation against West Tankers in Italy to recover their costs.

The UK courts granted an injunction to stop the Italian case, arguing that Allianz, in acting for its client Erg, was bound by the arbitration clause between Erg and West Tankers; but the question of whether arbitration qualified as basis for an anti-suit injunction under Regulation 44/2001 was referred to the European Court of Justice. In her decision, the Advocate General of the ECJ ruled that anti-suit injunctions cannot, in fact, be applied between EU states on the basis of an arbitration agreement. Member states’ courts should consider any existing arbitration agreements when deciding whether to accept a case, but the final decision is theirs. The case, and others preceding it, has provoked debate as to whether Regulation 44/2001 should be amended to apply to arbitration. The European Commission ordered a report on the issue, written by three professors from the University of Munich. The professors accepted that the legal basis for excluding arbitration from the Regulation – that arbitration is best served by the New York Convention, which requires the courts of signatory countries to recognise awards made in other signatories – was sound. But they argued that the risk of practical problems – for example those two EU countries might come to concurrent, contradictory opinions about the validity of an arbitration agreement – mean that the Regulation should be amended to put arbitration within its remit.

The recommendation has been met with shock by many arbitration practitioners. A questionnaire distributed amongst cross-border litigation practitioners across Europe produced a response strongly against the reform. The Commission is expected to decide on the reform during 2010. “It’s impossible to predict which way the Commission will rule,” says José Rosell of Hughes Hubbard. “There is intense lobbying from both sides.”

Whatever the commission decides, in practice, support for arbitration by the courts will likely continue to vary widely across Europe. Support from state courts is vital for international arbitration. Indeed, the historic dominance of Paris in Europe’s arbitration scene is in large part down to the French courts’ historically positive attitude towards arbitrations. France’s judiciary has tended to only challenge arbitral decisions under rare circumstances. Recent research by British barrister V.V. Veeder QC found that in the 1980s French courts only set aside or varied arbitration awards in 16% of the cases where an award was appealed. In the last decade, however, other European countries have taken steps to increase court support for arbitration, with mostly successful results. Spain, for example, enacted a new arbitration law in 2001, bringing Spain into line with international standards. Since then, a group of pro-arbitration practitioners have worked to bring the attitudes of the judiciary to arbitration in line with international norms. David Arias, a partner at Perez-Llorca in Madrid, is the secretary-general of the group. “It is a Spanish tendency to go from one extreme to another,” says Arias. “Before the Arbitration Act, the courts were reluctant to support arbitration. We’ve done a lot of work since then, publishing articles and holding educational events. Now, the courts are extremely supportive and there are many cases granting interim relief and enforcing arbitration awards.”

In Central and Eastern Europe, too, progress is being made on educating courts about arbitration. “Ten to fifteen years ago the Bulgarian courts viewed arbitration with scepticism,” says Alexander Katzarsky of Georgiev, Todorov& Co in Sofia. “Attitudes have significantly improved since then.” In Hungary, too, according to Dr AndrásSzecskay of Szecskay Attorneys at Law, “arbitrators are respected, and the state courts dismiss most challenges to arbitration awards.” Bartosz Kruzewski, a partner at Clifford Chance in Warsaw, says that similar progress has been made in Poland. “In the past there have been worrying cases of the courts struggling with the independence of arbitration,” he says. “But in recent years there has been real progress and for the most part, the courts now see arbitration as an ally, rather than a competitor.” However, it is not only antipathy towards arbitration that can cause problems, but simple inexperience. “Polish courts are not often well equipped to deal with arbitration enforcement cases, which can be quite complex,” says Kamil Zawicki, a partner at Warsaw’s Kubas Kos
Gaertner. “The result is that, despite the New York Convention, there are real obstacles to the collection of arbitration awards.”

Western European practitioners remain sceptical that the courts in Central and Eastern Europe have really improved in terms of their attitude to arbitration. “There are still problems. Too many courts in Eastern European jurisdictions still see arbitration as a strange animal,” says Markus Meier of Hengeler Mueller in Germany. Stockholm and Vienna have grown in popularity as arbitration venues as companies doing business in CEE try to avoid arbitrating disputes in the region. “Clients have learned to avoid arbitrating in jurisdictions where there is no tradition of arbitration, such as some jurisdictions in Eastern Europe,” says Christopher Stipple of Vienna’s DordaBruggerJordis. “In Austria the courts assist arbitration by granting provisional relief and in the evidentiary process, for example by summoning witnesses. They very rarely grant challenges to awards.”

Outside the EU the situation is more mixed still. In Serbia, for example, a new arbitration law in 2006 produced a legislative regime friendly to arbitration. “The Serbian Chamber of Commerce and the ICC are doing a lot to promote arbitration in Serbia,” says Ivana Rackovic, head of dispute resolution at Belgrade’s Karanovic&Kincolic. But the court’s attitudes have not yet been tested. “So far we have not had a case where the courts have been asked for help in furnishing evidence for an arbitration, so it’s impossible to judge their attitude.” In Latin America, the courts have still to adjust to arbitration. “There are some Latin American countries, like Mexico, which are party to the New York Convention but where in practice the courts can’t be relied upon to enforce arbitration awards,” says José Vicente Roldán of BrosetaAbogados of Spain. But in Brazil, “changes in legislation and in the attitude of the courts mean that arbitration has become more popular in recent years,” says José Rosell of Hughes Hubbard & Reed.

More than half a century since the signing of the New York Convention, it now has 142 signatories, including emerging powers such as China, India and the UAE. But there remain many jurisdictions which, though they are party to the Convention, have some way to go in providing a secure base for arbitration. And, even in countries where arbitration is well established, complex questions over the interpretation of the
Convention remain outstanding. With luck, the next 50 years of the Convention should see it fulfil its goals of universal judicial support for arbitration, it is expected.\textsuperscript{540}

1. **Australian cases**

\textbf{Esso Australia Resources Ltd. & Others v Plowman & Others}\textsuperscript{541}

confidentiality in arbitration, the question whether documents produced or information disclosed to an opposing party in an arbitration which is to be heard in private are confidential simply because the arbitration is to be heard in private was determined by the High Court of Australia in \textit{Esso Australia Resources Ltd & Others v Plowman\& Others} (\textit{Esso v Plowman}) in April 1995.

The four to one majority decision of the court is that such documents and such information are not confidential merely because of the private nature of the hearing. The facts that the case arose out of agreements for the sale of Bass Strait gas by Esso/BHP to two Victorian public utilities, the Gas \& Fuel Corporation and the State Electricity Corporation. Esso/BHP sought an increase in the price of the gas supplied pursuant to the agreements. The utilities refused to pay. The agreements contained arbitration clauses and the dispute was referred to arbitration pursuant to those clauses. The utilities sought disclosure of information relating to the calculations justifying the proposed price increases which, in the absence of confidentiality agreements, Esso/BHP was not willing to provide. The utilities refused to enter into confidentiality agreements. Esso/BHP insisted, pointing to the commercially sensitive nature of the information of which disclosure was being sought.

\textbf{The major questions}: The major questions posed for the court's determination were whether, either because of an implied term in the arbitration agreements or because of the inherent nature of arbitration as a method of resolving disputes;

- arbitration hearings are to be conducted in private the parties to an arbitration have a general obligation of confidence in relation to all documents and information prepared for and used in the arbitration, and Arbitration


- the parties to an arbitration have an obligation of confidence in relation to documents and information compulsorily disclosed during the course of an arbitration.

The answers: In response to those questions the majority of the High Court held that

- while the arbitrator has the power, in determining the procedure to be followed at an arbitration, to decide who shall be present at an arbitration hearing, that power is to be exercised subject to the provisions of the contractual submission to arbitration.

- the parties to an arbitration have a narrow duty (similar to that carried by a party in relation to discovered documents) of confidentiality in relation to all documents and information prepared for and used in the arbitration, and

- Subject to the legitimate interest of the public in obtaining information about the affairs of public authorities, documents produced under compulsion (pursuant to an arbitrator's direction) attract the same confidentiality which would attach to them if the parties were litigating their dispute.

Confidentiality: The court took the opportunity to consider the broader question of whether in Australia 'confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration'. The Court held that it was not.

The majority observed that in an arbitration the goal of complete confidentiality cannot be achieved. This is because, among other reasons

- witnesses in the arbitration could not be bound by any such obligation

- a court may be called upon to review an arbitration award, and

- a party may need to disclose various details about the arbitration to a third party (such as an insurance company).
**Privacy:** The court held that in Australia, subject to any contrary intention in the arbitration agreement, arbitrations are to be held in private, that is, they are not open to the public. Chief Justice Mason commented “... I prefer to describe the private character of the hearing as something that inheres in the subject matter of the agreement to submit disputes to arbitration, rather than attribute that character to an implied term.” All five judges who heard the case agreed that privacy is an inherent quality of commercial arbitrations.

**Commercial concerns:** There has been some criticism of the decision on the ground that it will undermine the confidence of parties in the privacy of arbitration hearings in Australia and thereby make Australia a less attractive location for arbitrations. Other commentators have suggested that these concerns are overstated. Few jurisdictions deal with the issue of confidentiality in legislation governing arbitrations. The Singapore legislation provides that on the application of any party, arbitration proceedings shall be heard 'otherwise than in open court'. A wider duty of confidentiality than that stated in *Esso v Plowman*,542 does not appear to be provided in more than a handful of jurisdictions.

Where confidentiality is a concern the parties can provide for a duty of confidentiality in their arbitration agreement. *Esso/BHP* could, for example, have required the arbitration clauses in the gas sale agreements to include a duty of confidentiality. However, parties should be aware that witnesses in the arbitration will not be bound by the arbitration agreement and hence will not be bound by any contractual obligation of confidentiality.

**Statutory amendments:** If legislative provision were to be made for the duty of confidentiality, the scope and extent of the duty would need to be addressed. Attention would also have to be given to the question of whether to enact this duty for international arbitrations only or for both international and domestic arbitrations *Resort Condominiums v Bolwell & Another*543 - enforcement of foreign interlocutory order. The question of whether an interlocutory order of a foreign arbitrator made in a foreign jurisdiction is enforceable in Queensland as a 'final award' pursuant to the New York

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542 Ibid
543 (1995) 1 Qd R 406
convention, was considered by Lee J in the Supreme Court of Queensland in Resort Condominiums International Inc v Bolwell & Another\(^{544}\) in October 1993 (Resort Condominiums). The judge held that such an award was not enforceable as an 'arbitral award' pursuant to the Convention. It is understood that the decision is subject to appeal.

**The facts**

Resort Condominiums (RCI USA), a US corporation, conducted a world-wide time sharing business. It ran the 'RCI Exchange Program'. Briefly, the program allowed exchange (usually during vacations) between persons in separate countries who wished to spend vacation time in one another's country. RCI USA entered into a license agreement with RCI Australia pursuant to which RCI Australia was permitted to operate the RCI Exchange Program in a certain part of the Asia-Pacific region in exchange for a royalty fee. Disputes broke out between the parties based upon RCI USA alleging against RCI Australia, among other matters, non-payment of royalty fees and breach of other conditions of the license agreement. The license agreement contained an arbitration clause. RCI USA obtained a temporary restraining order in the Indiana State Court against RCI Australia which required the provision of information, financial statements and other information including discovery. RCI USA terminated the license agreement. Complex procedural battles took place between the parties, both in the US courts and before an arbitrator in Indianapolis. RCI Australia participated by teleconference in the arbitration proceedings but only to object, asserting that as the license agreement terminated so the right of either party to refer the matter to arbitration had ceased. Having made that point, the representative for RCI Australia withdrew. Nonetheless, the arbitrator heard RCI USA's application for interim relief and made detailed orders. Until the making of a final award, the arbitrator restrained RCI Australia from refusing to comply with the trust account provisions of the license agreement, acting otherwise than in accordance with the arbitration clause, refusing to allow RCI USA access to its financial material and related conduct. In the Supreme Court of Queensland RCI USA sought to enforce the arbitrator's award. RCI Australia opposed the application.

\(^{544}\)Ibid.
The major questions: The main questions which Lee J had to decide were whether

- an 'arbitral award', as referred to in the New York Convention, included an interlocutory order made by an arbitrator or whether it only referred to an award which finally determined the rights of the parties

- if an award determines some of the matters in dispute between the parties (an 'interim award') that is sufficient to render it an award which the Australian court would enforce

- a general discretion exists whether to enforce a foreign award

- the orders made by the arbitrator in this case were contrary to public policy.

The answers: Lee J held that:

- a reference to an 'arbitral award' in the New York Convention does not include an interlocutory order made by an arbitrator but only an award which finally determines the rights of the parties

- the expression 'arbitral award' may include a valid interim award, however, the particular ruling made by the arbitrator in this case was not an 'arbitral award' as it did not determine all or at least some of the matters in dispute between the parties

- there exists a general discretion whether to enforce a foreign award

- Some of the orders made by the arbitrator were contrary to public policy and so ought not to be enforced, being far-reaching as to both subject matter and time and made without regard for the scope of the license agreement.

The issues raised by the decision:

The decision in Resort Condominiums has attracted considerable comment and some criticism. The principal objection to the decision is directed to the decision that there is a general discretion whether to enforce a foreign award, beyond the matters set out in Article V of the New York Convention. Some commentators strongly disagree with this conclusion. They argue that it has seriously undermined the purpose of the convention which is to require enforcement of foreign awards in all cases, subject only to
the grounds stated in Article V. Other critics of the decision have said that it is not supported by the authorities cited to support it. In addition, there has been criticism of the broad construction the decision appears to give to the public policy exception to the enforcement of foreign awards. This criticism is on the basis that the breadth of this construction could compromise the cardinal objective of the convention, namely the speedy and liberal enforcement of foreign awards.  

7.1.1 ‘PUBLIC POLICY’ EXCEPTION - A CHECK ON UNRULY HORSE:

It was in 1824, the concept of ‘Public Policy’ was described in the historical case of Richardson Vs. Mellish 546 “Public Policy is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail.” In Egerton Vs. Brownlo, 547 the House of Lords described ‘Public Policy’ as – “that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against public good.” Recognition and enforcement of a foreign arbitration award rests on a delicate balance between the Courts and the arbitral process. Court ensures that privatisation of justice does not take place in a legal vacuum where the dominant party or both the parties can flout all the established principles of justice and morality. In that regard, ‘Public Policy’ plays an important function by providing the ultimate sanction – non-enforcement.

Public Policy and International Council of Arbitration - the Inherent Conflict:

Due to its inherit benefits, like neutrality, expediency, specialised arbitrators, confidentiality and finality of award, possibility of appeal on the merits of the dispute, I.C.A has become a part and parcel of the emergence and evolution of transnational governance, ‘conceived as the process through which the rules of the system in place in a social setting are adapted to the needs of those who live under them’. But such privatisation of justice system is capable of redefining the State role by transforming it to be just another commercial partner and making the state judicial system incapable to

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546 (1824) 2 Bing. 228; {(1824-34) All E.R. Rep. 258}
547 (1853) 4 H.L.C. 1
control and ensures that dominant party is equipped with its own custom made justice.\textsuperscript{548} It is not clear whether there is any real autonomy for the often desperately poor States involved in the contracts. For instance, in drawing up the contract for the Baku pipeline project a major US law firm representing the oil consortium partners was alleged to have ‘proposed, cajoled [and] coerced’ country partners Turkey, Georgia and Azerbaijan into accepting certain contract provisions.\textsuperscript{549} To prevent the miscarriage of justice, the role of a supervisory body becomes important. In the absence of any central body of international commercial arbitration, the courts of the seat and the enforcing States fulfil this void.\textsuperscript{550}

But the reliance on national Courts may often result in the politicization of the arbitration as there is a real possibility that national courts will be tempted to use local law to vitiate an award. The foregoing discussion confronts us with two conflicting situations, namely, the need to enforce arbitration awards and the protection of justice through judicial review. The solution lies in the judicious use of the ‘Public Policy’ exception. On one hand, it reflects the reality that arbitration can neither exist in a legal vacuum nor be ‘entirely privatised’ and vital judicial interests are to be respected.\textsuperscript{551} On the other hand, by recognising that the pro-enforcement policy of the State also falls within the ambit of Public Policy\textsuperscript{552} it ensures that the use of Public Policy as a ground for non-enforcement is used sparingly and judiciously.

**PUBLIC POLICY – AN OVERVIEW:**

The term ‘public policy’ does not admit of any definition. It is a variable quantity, which must vary and does vary, with the habits, capacities and opportunities of the public. Public policy, however, is not the policy of a particular Government. It connotes


\textsuperscript{551} See, Revere Copper & Brass, Inc. v. Overseas Private Investment Corporation, Public Policy Exception to International Commercial Arbitration Articles 628 F.2d 81, 82 (D.C. Cir. 1980) (“there is a strong public policy behind judicial enforcement of binding arbitration clauses”)

some matter which concerns the public good and the public interest. Public Policy can be defined as that which “reflects the fundamental economic, legal, moral, political, religious and social standards of every state or extra-territorial community …and cover principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception.” According to ILA, the most often quoted definition of Public policy is the one offered in Parsons & Whitmore Overseas Co. v. Societe Generale de L’Industrie du Papier, where it was held that enforcement of a foreign award may be denied on public policy grounds ‘only where enforcement would violate the State’s most basic notions of morality and justice’. 8 Categories Based on the sources, scope and fields of operation, public policies can be categorised under the following heads:- National Public Policies - These policies pertain to one single nation. Depending upon the elements and application, national policies can be sub-divided into domestic public policy, and international public policy. The main differences and similarities between international Articles public policy and domestic public policy are:

International Domestic Differences

Extra-territorial scope – Territorial scope – applies to transactions without foreign with foreign elements. Part of a law area’s private Part of a law area’s domestic international law private law. Judges may consider other Judges consider their law areas’ public policies area’s public policy only (no comparative element) Similarities ,, Sub-categories of national public policy pertaining to the same law area,, Same variety of national and international sources.

While in most of the Countries, this distinction is not very explicit, in France, the two policies are distinct and are known as order public interne and order public international. However, the absence of an explicit distinction has not thwarted the application of International Public Policy in cases involving foreign elements and judges have often preferred it over the wider domestic policies. For instance, in Scherk v. Alberto-Culver Co., the US Supreme Court, recognising the difference between international and domestic public policy, refused to entertain an appeal for non-

553 Parsons & Whitmore Overseas Co. v. Societe Generale de L’Industrie du Papier 508 F. 2d 969 (2nd Cir. 1974).
554 508 F.2d 969, 974 (2d Cir. 1974)
enforcement. Similarly, our own Supreme Court in Renusagar Power Electric Co. v. General Electric Co.,\textsuperscript{557} has held that Public Policy must be construed to mean the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced.

Multinational Public Policies- These reflect the Public Policies of a group of nations, e.g., ‘European public policy’ of the European Union, which was mentioned in the Eco Swiss case v. Benetton International\textsuperscript{558} Transnational Public Policies- Transnational public policy reflects the fundamental values, the basic ethical standards, and the enduring moral consensus of the international business community\textsuperscript{559} Examples are human rights (such as opposition to racial, sexual and religious discrimination and slavery), bonos mores (including opposition to corruption, terrorism, genocide and paedophilia), fair hearing and due process. Since, both the international and transnational Public Policies have extra-territorial scope and are cross-border in nature; sometimes they are used interchangeably.\textsuperscript{560} In the famous case, Westland-Helicopters v. F and V, the Swiss Federal Supreme Court has held that the order public under Article 190(2)(e) of Private International Law is limited to transnational values.\textsuperscript{561}

GENERAL ATTITUDE TOWARDS PUBLIC POLICY IN DIFFERENT JURISDICTIONS:

Judicial approach to the public policy exception has undergone a significant change. Public Policy, which was once described as ‘a very unruly horse, and when once you get astride it you never know where it will carry you’,\textsuperscript{562} and was seen as ‘an unsafe and treacherous ground for legal decision’\textsuperscript{563} has actually helped in the furtherance of

\textsuperscript{557}AIR 1994 SC 860 at 888
\textsuperscript{558}[1999] 2 All ER 44
\textsuperscript{560}See, Hebei Import & Export Corp v Polytek Engineering Co Ltd, XXIVa Yearbook 652, (1999).
\textsuperscript{561}Decision of the Federal Supreme Court dated April 19, 1994, BGE 120 II 155
\textsuperscript{562}Richardson v. Mellish (1824)2 Bing 229 : 130 ER 294
\textsuperscript{563}Janson v. Driefontein Consolidated Gold Mines Limited (1900) 3 All ER 426
ICA by curbing parochial interests of the States, in favour of party autonomy. Pursuant to the pro-enforcement bias, the Courts in different jurisdictions have severely narrowed down the scope of Public Policy exception in the following manner: Public Policy Of The Enforcement State- Article V (2)(b) of the New York Convention, 1958 expressly refers to ‘the country where recognition and enforcement is sought’. The Courts, barring a few exceptions, have generally accepted the above proposition in its letter and spirit. For instance, in West acre Investments Limited v. Jugimport spider Holding Limited Waller LJ had held that, unless the illegality is of a fundamental nature, contracts would be enforceable unless:

(a) England is the place of performance and the contracts contravene 'English domestic public policy'; or

(b) England is not the place of performance, but the contracts contravene the domestic public policy of both the place of performance and the place of the proper law.

Again in, Hebei Import & Export Corp. v. Polytek Engineering Co Ltd, Bokhary J specifically commented that awards ‘which do not meet their domestic standards’ (i.e., awards which are ‘made in circumstances where a domestic judgment or award would have to be set aside’) may nevertheless be enforceable under the New York Convention, unless the awards are ‘so fundamentally offensive’ to the enforcement State’s notion of justice that the enforcement court ‘cannot reasonably be expected to overlook’. These cases show that it is upon the enforcing

564 According to one study, in the first 20 years following the introduction of the treaty, “of the one hundred and twelve decisions recorded as having applied the New York Convention, only three refused enforcement of an award on the grounds of a breach of public policy. Of those three decisions, two are in fact based on the non-arbitrability of the subject-matter, [and the third could] equally have been based on... a violation of the principles of due process.” See, Fouchard, Gaillard, Goldman, International Commercial Arbitration (Emmanuel Gaillard, et al. eds., Kluwer Law International 1999) at 997-98
565 [1999] 1 QB 785
566 [1999] 3 WLR 811
567 Again, in SocieteEuropeenne Etudes et Enterprises v. People’s Federal Republic of Yugoslavia, even though the award was technically unenforceable under the Swiss law, the Dutch HogeRaad allowed the award to be enforced, noting that under the New York Convention, it was not bound to examine what link connected the award to the law of the country where it was made, and in the absence of such link, refuse recognition and enforcement. Two years later, however, when the case again came before the HogeRaad,
state to decide whether there is a Public Policy violation or not. Public Policy at the Time of Enforcement- in US, a number of cases have established that such public policy must be “well defined and dominant” and “ascertained by reference to the laws and legal precedents.” But due to its ever transient nature, it would be treacherous to rely on the retrospective Public Policies.

This is also the attitude of ILA, which favours limiting the public policy exception to public policies which apply at the time when enforcement is sought. Narrow Construction of Public Policy – The general trend clearly brings out the fact that Courts, when asked to enforce foreign awards, adopt a narrow approach and this is achieved by a distinction between domestic and international public policies. We will conclude the discussion by illustrating some examples, where the Courts have adopted a narrow approach.

In Coutinho Caro & Co. U.S.A. v. Marcus Trading, Inc., the party challenging the enforcement of the arbitral award argued that the tribunal’s decision, which found that the arbitration clauses were severable, was against the public policy of the United States. The court remarked that “erroneous legal reasoning or misapplication of established legal principles by an arbitral panel should generally not be held to violate public policy within the meaning of the Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier,” Convention in that public policy did not equate with “national policy” (in the diplomatic or foreign policy sense), and it would not refuse to enforce an award in favour of the Egyptian party simply because of Public Policy Exception to International Commercial Arbitration Articles tensions at that time between the United States and Egypt.

In Hubei Import & Export Corp. v. Polytek Engineering Co Ltd., the Hong Kong’s Court of Final Appeal had held that the reasons “must go beyond the minimum
which would justify setting aside a domestic judgment or award.” The judgment thus brings out a clear distinction between the standards to be applied while dealing with a domestic award and a foreign award. In *Westland-Helicopters v. F and V*\(^{573}\), the Swiss Federal Supreme Court has held that Article 190 (2) (e) PIL is undisputed and that this provision only allows challenge to awards which are incompatible with “universal” and not “domestic” Swiss public policy and hence granting of punitive damages was not considered sufficient to refuse the enforcement.

7.1.2. INDIAN SCENARIO:

Most Indian arbitrations are *ad hoc* arbitrations, meaning that they are not administered by an arbitration institution like Singapore International Arbitration Centre (“SIAC”) or London Court of International Arbitration (“LCIA”). In an *ad hoc* arbitration the parties decide details such as, composition of the arbitral tribunal, procedure of arbitration etc. On the other hand, an institutional arbitration is more structured. Once an institutional arbitration is invoked, the institution has its own set of rules and procedure, and even a procedure for appointment of an arbitration institution is usually more effective in compelling a party, avoiding arbitration, to participate. One of the deterring factors for a party choosing an institutional arbitration has been the fee an arbitration institution charges. However, surprisingly a very small portion of the fee goes towards the revenue of an institution; whereas, a major portion of the cost goes towards legal fee. Singapore allows foreign lawyers and law firms to represent a party in an arbitration proceeding. This results in a lower cost in terms of legal fee as a party is not compelled to choose a Singapore lawyer or a law firm. Instead one can be represented by their counsels or a law firm from their home country at a relatively lower legal fee.

Indian *ad hoc* arbitrations have been, at least in high stake matters, primarily dominated by former High Court and Supreme Court judges. These judges have managed to bring with them the same tolerance for delay that has plagued the Indian court system. Seeking dates and adjournments is a common practice in the Indian courts system, which is often done at the expense of the parties. Also, there are a special category of parties, who after having become painfully aware of their weak case on merit, will want to resort

\(^{573}\)80 ILR 622 (1987-10-23)
to any delaying tactics to delay adjudication. With a combination of an interfering courts and sometimes unscrupulous parties, this class of litigants can very conveniently impugn every aspect of the arbitration clause, which they voluntarily chose to incorporate. Even if the matter is referred to an *ad hoc* arbitration, and the courts do not intervene, the arbitrator in *an ad hoc* arbitration can take his or her time in arbitrating.

India and Indian parties have much to gain from expediting our adjudication process. Our trial court system has an abysmal disposal rate and commercial litigation in major metropolitan cities largely has become an interim injunction practice, while the trials drag on. With lack of trial there are some fundamental deficiencies in the Indian system as evidentiary rules have lost its significance because a court at an interim injunction only takes a *prima facie* view. This has in itself led to a strange mutant version of an adversarial system that India inherited from the British legal system. An adversarial system is based on the premise that both the plaintiff and a defendant try to establish their factual veracity through examination and cross examination of witnesses. In addition, physical and documentary evidence has to be admitted after having put through the rules of evidence. These requirements were not just technical rules, but were formulated after centuries of jurisprudential experience that suggested that certain kinds of evidence were intrinsically unreliable. This in itself begs the question whether the large part of commercial litigations in these major cities are being decided on imperfect truth as facts are not tested through conventional mechanisms.

With the advent of United Nations Commission on International Trade Law (“UNCITRAL”) oriented arbitration regime through the Arbitration and Conciliation Act, 1996 (“1996 Act”) there was a new hope in terms of expeditious remedy, particularly in view of the *non obstante* clause contained in the Section 5 of the 1996 Act, and the power of an arbitrator to rule on his or her own jurisdiction under Section 16 of the 1996 Act. Sections 5 and 16 of the 1996 Act, in effect, mandated the courts to not interfere in arbitrations. However, *ad hoc* arbitrations despite of the 1996 Act have failed to deliver timely justice. 574

574 Abhishek Singh, New Rules of the Singapore International Arbitration Centre- Dispute Resolution made Expedient, April 15, 2012.)
The term ‘Public Policy of India’, though used in Sections 34(2)(b)(ii) and 48(2)(b) of the Arbitration and Conciliation Act, 1996, is not defined. Due to lack of any precise definition, the burden rests upon the Courts to mould the Public Policy exception in a way that greater justice could be achieved. The analysis of judicial trend regarding the construction of Public Policy makes an interesting topic for discussion. Since, an exhaustive analysis is outside the scope of the paper, we will only cull out the major developments in the field of ICA, and would try to understand the nature of complexities involved. Taking a cue from the previous chapter, we can discuss the judicial trend towards application of Public Policy under the following heads:

Public Policy Of The Enforcement State- Section 48(2)(b) of the Arbitration Act, 1996 clearly mentions that it is the ‘Public Policy of India’. Even prior to its enactment, in Renusagar Power Electric Co. v. General Electric Co., the Supreme Court had observed that public policy comprehended in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 is the “public policy of India” and does not cover the public policy of any other country.

Public Policy at the Time of Enforcement: In Muralidhar Agarwal v. State of Uttar Pradesh, while dealing with the concept of “public policy”, the Court had observed that Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation and hence it would be rendered useless if it were to remain in fixed moulds for all time. The Court had further observed that the difficulty of discovering what public policy is at any given moment does not absolve the Judges from the duty of doing so, and that they have to look beyond the jurisprudence and that in so doing, they must consult not their opinion at a given moment, or what has been termed customary morality, but also the social consequences of the rule propounded, especially in the light of the factual evidence available as to its probable results.

Construction of Public Policy the See-‘SAW’ Trend – How the Public Policy is to be construed is still not settled in India. In fact, the judicial trend can be aptly compared

575 AIR 1994 SC 860
576 (1974) 2 SCC 472, pp- 482-483
with a pendulum. In *Gherulal Parakh v. Mahadeodas Maiya*\(^{577}\), the Court has shown its favour towards a narrow approach, by observing that though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public. But such an approach was rejected in *Muralidhar Agarwal v. State of Uttar Pradesh*\(^{578}\) and was observed that in a case, where the validity of award is challenged, there is no necessity of giving a narrower meaning to the term “public policy of India” and wider meaning is required to be given so that the “patently illegal award” passed by the Arbitral Tribunal could be set aside. However, the first authoritative pronouncement on Public Policy with regard to ICA was rendered in *Renusagar Power Electric Co. v. General Electric Co.*,\(^{579}\) Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian Law, (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression ‘public policy’ was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds An apparent shift can, however, be noticed from the decision in *ONGC v. SAW Pipes Ltd.*,\(^{580}\) where an additional ground ‘patent illegality’ was added, but with a safeguard that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. This pronouncement has come under lots of criticism from a number of commentators on the ground that this broader approach would provide a ‘backdoor’ to introduce new heads of Public Policies and enforcement of foreign awards would be difficult. However, the researcher submits that most of the fears are unwarranted for. The bases of this submission are the following: In ONGC, the Court has very clearly made an

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\(^{577}\)AIR 1959 SC 781. The Court further observed that though heads of public policy are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days.  
\(^{578}\)AIR 1994 SC 860. Based on this proposition the Court held that mere violation of Section 9(1) of FERA which imposes prohibition to make any payment to or for the credit of any person resident outside India except in accordance with any general or special exemption from the provisions of this Sub-section which may be granted conditionally or unconditionally by the Reserve Bank, would not make an award non-enforceable. This was followed in Smita Conductors Ltd. v. Euro Alloys Ltd. 2001(7) SCC 728  
\(^{579}\)(1984) 4 SCC 679.  
\(^{580}\)(2003) 5 SCC 705. In this case, the Court held that where the award is contrary to the contract, i.e., if the contract says that no interest is payable for delayed payment, but interest is granted under the award, the same would be bad on the ground of Public Policy.
important distinction between a ‘foreign award’ and a ‘domestic award’. The Court recognized that the scheme of Section 34 and 48 of the 1996 Act are not identical.\footnote{581} The Court held that the concept of enforcement of the award after it becomes final as in the case of a foreign award is different from the situation where the validity of award is challenged before it becomes final and executable, as in the case of a domestic award.\footnote{582} Court has also expressed as an abundant caution that the illegality must go to the root of the matter. So, even assuming that patent illegality would be a ground even in relation to a foreign award, we would not be facing a new challenge. The manifest disregard of law, as a ground for vacation of an award has always been applied if it is of such a fundamental nature. And hence, ONGC has not increased the scope of Public Policy exception.

7.1.3. TAMING UNRULY HORSE- SEARCHING FOR A WORKABLE SOLUTION:

Public Policy exception has attracted everybody’s attention. So, even when public policy is not available as a defence under the Public Policy Exception to International Commercial Arbitration Articles annulment provisions of Article 52(1) of the ICSID Convention, the parties successfully used the ground in \textit{SOABI v. Senegal}.\footnote{583} Though

\footnote{581} The Act provides for a direct challenge to a domestic Award (Section 34). A domestic Award is enforceable as a decree passed by a Civil Court, after the period provided for challenging the same is over, and in case it is challenged, after the challenge fails (Section 36). Whereas, insofar as a foreign Award is concerned, it is not enforceable in India unless the Court finds that it is enforceable. For that purpose, the party which seeks its enforcement has to make an application to the Court and has to satisfy the Court about its enforceability (Section 49). It is only after the party satisfies the Court that a foreign Award becomes enforceable as a decree passed by a Civil Court (Section 49). The Act, provides different remedies to persons, against whom domestic Award is made and person against whom foreign Award is made. A person against whom a domestic Award is made, has to immediately approach the Court for challenging the same by making an application under Section 34 of the Act otherwise the person in whose favour the Award has been made can execute the same as a decree. On the other hand, a person against whom a foreign Award has been made, is not required to challenge the same, because it cannot be executed against him in India unless the Court finds that it is enforceable. He can wait till the person in whose favour the foreign Award has been made, makes an application before the Court (Section 47). See, Jindal Drugs Limited v. NoyVallesina Engineering SpA and other: 2002 (2) Arb. LR 323 (Bombay).

\footnote{582} See, AbhishekKolay and NilanjanaChatterjee, \textit{Public Policy in International Commercial Arbitration- Embracing a Global Standard}, [2006] 1 Comp LJ 22 (J)

\footnote{583} SociétéOuestAfricaine des BétonsIndustriels (SOABI) v Senegal, Case No.ARB/82/1, Award, February 25, 1988, 6 ICSID Rev. — FILJ 125 (1991), 2 ICSID Rep. 114 (1994). The Courd’appel held that execution of the award against the specified assets would contravene the international ordre public (public policy) of immunity. See, Edward Baldwin, Mark Kantor and Michael Nolan, Limits to Enforcement of
general trend has shown an inclination for narrow interpretation of Public Policy, in the absence of any specific guidelines, there are fears that national Courts may protect their parochial interest at the cost of the award. To attain uniformity in the standards in Public Policy, there have been a number of suggestions. For instance, to curb the local bias of the judges, some of the commentators have suggested setting up of a central international court. Other suggestions include the application of mandatory rules and the application of Transnational Public Policies. But there are problems with most of the approaches.

For instance, application of all mandatory rules would result in, encouragement of State legal expansionism, denial of party autonomy and ultimately, arbitration may lose favour in the business community, as national legal systems would offer greater chance of avoiding third countries’ mandatory rules

On the other hand, adoption of transnational policies would impose a very high threshold. Moreover, in the absence of any treaty, the lack of opinion Juris may help the parties to affect their own preferences without having to prove that they have become customary international law.

So, what should be the Solution? The solution lies in the application of all the approaches but in different stages. The solution that this article presents has three stages:

1. The first stage deals with the duty of an arbitrator. Arbitrator has a duty to render an award which is ‘enforceable at law’. So, for the sake of enforcement, he has to ascertain those mandatory rules, common to both the seat and the enforcing States, so that the violation of them does not take place. When a number of States are involved, transnational mandatory rules are to be applied. Even if the parties

584 This fear is not without basis. In the recent Argentine case of Jose Cartellone Construcciones Civiles, S.A. v Hidroeléctrica Norpatagonica S.A., the Supreme Court ruled that the right to annul an award based on ‘public policy’ extended to the issue of whether the decision was constitutional or simply unlawful or unreasonable thereby effectively reopening the merits, thus making practically every award amenable to judicial scrutiny, which is not desirable.


586 See, W. Michael Reisman, Law, International Public Policy (so-called) and Arbitral Choice in International Commercial Arbitration <www.law.yale.edu/documents/pdf/Reisman.ICCA_ Speech_ for_Montreal.6.15.06.pdf>

587 See, Art. 35 of the Arbitration Rules of ICC
expressly provide to bypass such rules, the arbitrators of the 1991 Resolution of
the Institute of International Law concerning the autonomy of the parties in
international contracts between private persons or entities recognize such power.

2. In the absence of any overriding transnational rule, which is imbibed in the
national legal system, the international public policy should be used to determine
whether any award would violate the nation’s Public Policy. What should be the
content of ‘international public policy’, was provided by ILA, which divides it
into three categories, two of which are the ‘fundamental principles’ that the
enforcement State wishes to protect even when it is not directly concerned, and
the rules designed to serve the enforcement State’s ‘essential political, social or
economic interest’.

3. If the enforcing country has no relation with the dispute and is unlikely to be
affected in any manner, then universal public policy should be taken into account.
Such an approach got support from Swiss Court in Beverly Overseas S.A. v.
Banka Zagreb, where the Court held that if the facts that need to be analysed
to determine the compatibility of a Swiss based international award has no or few
links to Switzerland, then universal policy has to be considered.

The interrelationship between ICA and the national Courts of the adjudicating and
enforcing forum:-

1. The seat of the arbitration influences the determination of procedural law and
other administrative aspects of the arbitration. For instance, if some rules are
treated by forum state as Mandatory Rules, contravention of such may attract
annulment in the adjudicating country.

2. National law provides the contextual framework in which all international
commercial arbitrations take place, by permitting such arbitration.

588 See, Richard H. Kreindler, Approaches to the Application of Transnational Public Policy by Arbitrators,
(2003) 4 The Journal of World Investment 239 (http://www.icsi.edu/cs/September%202007/Articles/)
ArkaMajumdar, Judicial expediency in arbitration – Taming the Unruly Horse – Public Policy Exception
to International Commercial Arbitration, (http://www.icsi.edu/cs/September%202007/Articles/)(visited on
4-3-11)
589 case no.4C.172/2000 http://www.bger.ch. Visited on 12-12-11
3. Enforcement of an arbitral award necessarily requires the enforcing party to go to some ‘national body’ within the territory in which the enforcing party desires to enforce the arbitral award.

Thus Indian courts have narrowly construed the ground of public policy in relation to foreign awards (unlike domestic awards where Saw Pipes has construed it widely. The judicial policy with regard to ‘Public Policy’ enunciated in Renusagar case has been dented in *Venture Global Engineering vs. Satyam Computer Services*.\(^{590}\) This case has exposed the enforcement of foreign awards to a challenge on the grounds of domestic public policy. This pronouncement has deep ramifications for international commerce as it poses a significant threat to achieving uniformity and consistency in international commercial arbitration and attracting foreign investors as a neutral country. Satyam Computer Services Limited (SCS), an Indian Company entered into an agreement with Venture Global Engineering (VHE) to create a JV company by the name of Satyam Venture Engineering Services Ltd., An arbitration clause was inserted in the shareholder agreement (SHA) executed by the companies, providing that the State Law of Michigan would be governing law of the contract. SCS alleged that the VGE had committed an event of default under SHA and thereby, it had exercised its option of purchasing VGE’s share in the JV Company at its book value. On the failure of the parties to resolve the dispute amicably, the matter was referred to arbitration. The arbitrator directed VGE to transfer the shares to SCS and consequently, SCS filed for enforcement of the award before the US District Court, Michigan. VGE objected to the enforcement, arguing that it was in violation of FEMA regulations in India.

“Patent Illegality” or an award contrary to substantive provisions of law had been interpreted by the apex court in *ONGC vs. Saw Pipes*\(^{591}\) to be contrary to public policy and consequently, a ground for setting aside the award under Sec-34 of the Arbitration and Conciliation Act, 1996. VGE controversially argued that as the award was against the provisions of FEMA, it would be open to challenge under Sec-34. The submission was controversial because Sec-34 is found in Part-I of the Arbitration Act, which deals only with domestic awards, while Part-II covers enforcement of foreign awards. The Supreme Court’s consideration was limited to this important question of law. In *Bhatia*
International\textsuperscript{592}, the court had categorically erased the distinction between Part-I and Part-II of the Arbitration Act, stating that provisions under Part-I would apply to all arbitrations and to all related proceedings. For arbitrations held in India, the provisions would be compulsorily applicable and only the derogable provisions of Part-I could be deviated from. In international commercial arbitrations, held outside India, the provisions of Part-I would apply by default unless the parties expressly or impliedly, excluded all or any of its provisions through agreement. Relying on this pronouncement, the court held that the judgment debtor cannot be deprived of his right under Sec-34, Part-I to invoke the bar of public policy to set aside an awards, although it is not a domestic award, and although there is a specific part of the Arbitration Act devoted to such awards. The court further held that the non-obstante clause contained in Sec-11.05(c) of the Shareholders Agreement which provided that the shareholders should, at all material times act in accordance with the Companies Act and other applicable rules in India overrode the specific arbitration agreements. The court held that the enforcement, must, therefore, be in India.

The Court further remarked that as the award, its enforcement, the concerned companies and the entire transaction had a ‘close nexus’ with India, Satyam Computers cannot evade the laws of India by taking the award to foreign courts. Now the said judgment of the Supreme Court in Venture Global\textsuperscript{593} goes against the judgment in Renusagar\textsuperscript{594} where the court has construed ground of public policy in relation to foreign awards very narrowly.\textsuperscript{595}

Despite a precedent suggesting that ‘the term public policy’ be interpreted in a restrictive manner, the court held that any arbitral award which violates Indian Statutory provisions is ‘patently illegal’ and ‘contrary to public policy’. By equating ‘patent illegality’ to an ‘error of law’, the court effectively paved the way for losing parties in the arbitration process to have their day in Indian courts on the basis of any alleged

\textsuperscript{592} AIR 2002 SC1432; SCC 2002 (4) 105

\textsuperscript{593} (2007) 5 SCC 705.

\textsuperscript{594} (1984) 4 SCC 679

contraventions of Indian law, thereby resurrecting the potentially limitless judicial review which the 1996 Act was designed to eliminate.596

The Logic behind Supreme Court’s decision was that the Act is not providing that Part-I shall not apply where the place of arbitration is not in India. It is also not providing that Part-I will “only” apply where the place of arbitration is in India. Thus the legislature has not provided that Party-I is not to apply to arbitrations which take place outside India.

It was also observed by the Apex Court that Section 2(1) (f) of the Arbitration and Conciliation Act, 1996 defines an International Commercial Arbitration. The definition makes no distinction between international commercial arbitrations held in India or outside India. An international commercial arbitration may be held in a country which is a signatory to either the New York Convention or the Geneva Convention (herein after called ‘the convention country’). An International Commercial Arbitration may be held in a non-convention country. The said Act nowhere provides that its provisions are not to apply to international commercial arbitrations which take place in a non-convention country. Admittedly, Part-II only applies to arbitrations which take place in a convention country. So according to the Supreme Court, the legislatures could not have wanted that Non-Convention country awards be not enforced in India, therefore, Part-I of the Arbitration and Conciliation Act, 1996 also applies to foreign awards.

Why the Indian Supreme Court’s decision is inappropriate? Now, the Supreme Court’s decision is misconceived on a number of grounds. First being the interpretation of Sec-2(2) of the Act. Now, if Supreme Court verdict is accepted then Part-I of the Act will apply to all arbitrations. Now an international commercial arbitration means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is –

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

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

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


Therefore, going by the verdict of the Supreme Court, Part-I of the Act will also apply to all commercial arbitrations where any one of the parties is Indian.

Firstly, the provisions of Part-I would apply to every commercial arbitration proceeding where any one of the parties is not Indian (i.e. foreign) unless the parties by agreement express or implied, exclude all or any of its provisions. This certainly cannot be the intention of the legislature to allow the Indian Courts to take cognizance of any foreign arbitration because Part-I of the Arbitration and Conciliation Act, 1996 applies to international commercial arbitration.

Secondly, the said judgment goes against the preamble of the Act, which says that “And whereas the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.” This particular decision would be a far cry from the unification envisaged. The principle of party autonomy also suffers and great deal as each and every party to any commercial arbitration proceeding anywhere in the world would have to exclude the provisions of the Part-I of the Arbitration and Conciliation Act, 1996, even though they know nothing about it. Any foreign party would think twice before conducting business with an Indian company as the arbitration clause would then get subject to Indian courts even if the place of arbitration is different and the place of enforcement of an award is different.

Thirdly, it was not wrong for the respondent to evade the legal and regulatory scrutiny to which this transaction would have been subject to had it been enforced in India. The benefit of an international commercial arbitration lies in the fact that the arbitration can take place in a neutral country and can be enforced against the parties in countries where the particular party has assets. The Supreme Court should have

597 Ibid. p-280.
considered the Sixth Circuit’s judgment on the appeal from the Michigan District Court’s decision in favour of Satyam.\footnote{United States Court of Appeals for the Sixth Circuit Venture Global Engineering, LLC, Plaintiff-Appellant vs. On appeal from the United States District Court for the Satyam Computer Services Ltd., Eastern District of Michigan, 25 May, 2007.}

The Court held that “the district court did not decline to overturn the Award because it found the public policy concern to be unpersuasive. As the district court pointed out, the facts indicate that Indian law would actually not be violated by the enforcement of the Award. Indian law would only be violated by the enforcement of the Award in the absence of evidence of the RBI’s consent. Because Defendant submitted uncontroverted evidence that the RBI had provided its consent, the record indicated that Indian law would not be violated by enforcement of the Award.” This policy is also found in the case \textit{Soleimany vs. Soleimany}\footnote{Sumeet Kachwaha-2008:An eventful year in Indian Arbitration, Newsletter Arbitration, International Bar Association Legal Practice Division March 2009.}, where the concluded that it would also not enforce “a contract governed by law of a foreign and friendly state, or which requires performance in such a country, if performance is illegal by the law of that country.” Furthermore, no application for enforcement can proceed until an application for setting aside (perhaps in a different forum based on the choice of losing party) has worked itself out. The enforcement mechanism for foreign awards has thus been rendered inefficient, clumsy, and uncertain.\footnote{2008 (8) scale 576}

\textbf{In TDM Infrastructure Pvt. Ltd. Vs. U.E. Development India Pvt. Ltd.}\footnote{2008 (8) scale 576}, the Supreme Court was called upon to interpret the meaning of ‘International Commercial Arbitration’. The facts of the case were that a wholly owned subsidiary of a Malaysian Company brought arbitration against another wholly owned subsidiary of a Malaysian company. The petitioner contented that all its shareholders and directors are Malaysians. Also that all meetings of the Board of Directors take place in Malaysia except for one meeting, which was statutorily required to take place at the registered office in India. The petitioner claimed that though both the companies are incorporated in India, the central management and control is exercised in a foreign State and therefore the arbitration qualifies as an ‘international commercial arbitration’ within the meaning of
Sec-2(1)(f)(iii). Justice S.B. Sinha rejected this contention and held that if both companies are incorporated in India; then the arbitration between them would necessarily be a domestic arbitration irrespective of the foreign control and management. The court rested its decision on the proposition that as a matter of ‘public policy’, Indian Companies i.e. companies incorporated in India can only opt for Indian law as the governing law of the contract. If arbitration between them is held to be an ‘international commercial arbitration’ then they would be able to opt for a foreign law, which the Court held would be contrary to Indian public policy.

The Supreme Court of India only considered Sec-2(1)(f)(iii). Other significant provisions of this section were not specifically considered. In our opinion, the conjunction “or” between Sec-2(1)(f)(ii) and Sec-2(1)(f)(iii) could offer a pro arbitration indent and could have brought the ensuing arbitration within the meaning of ‘international commercial arbitration’. Harsh Sethi and A.K. Gupta opine that if incorporation outside India was to be the ‘sole and final test’, there would be no need for the conjunction “or” at the end of sec-2(1)(f)(ii). This decision has deep ramifications as it lays down a futile proposition that as a matter of law, companies incorporated in India cannot opt for a governing law other than India in contractual matters even when they are owned, controlled and managed from a foreign country. Indeed this will negatively affect the growth of international trade in India, and raise more questions about India being an ‘arbitration friendly’ country.602

The Possible Solution: The most effective solution to the present problem would be just solved by an amendment to the Arbitration and Conciliation Act, 1996. Art.1(2) of the UNCITRAL Model Law on international commercial arbitration should be added to our Arbitration Act.603 This will provide safety measures to any party requiring interim measures etc. The present act of Supreme Court dismissing foreign awards under public policy has got criticism from various ends.604 Till now, parties would be well advised to

603 Art-1(2) of the UNCITRAL Model Law on international commercial arbitration provides that – “The provisions of this Law, except Art-8,9,17H, 17-I, 17-J, 35 and 36, apply only if the place of arbitration is in the territory of this State.”
incorporate in the arbitration clause opting out of Part-I of the Indian Arbitration and Conciliation Act, 1996 in case of foreign arbitration. 605

CANADIAN EXPERIENCE IN INTERNATIONAL ARBITRATION:

By adopting the Model Law and acceding to the New York Convention, Canada and its provinces, significantly improved the old Canadian arbitration regime. These improvements include the establishment of the following principles: limited scope of court intervention, consistent recognition and enforcement of foreign arbitral awards, party autonomy and freedom of contract. Such improvements provide parties involved in international arbitrations in Canada with the advantages of certainty, predictability, consistency and expediency in dealing with international commercial disputes.

III. JURISPRUDENCE IN CANADA

Recent Canadian case law (both at the federal and provincial level) demonstrates that courts are increasingly giving effect to both the Model Law and the New York Convention by demonstrating a tendency towards enforcement of arbitral agreements and limiting the scope of judicial review over both Canadian international and foreign arbitral awards. These trends are seen in the case law relating to stays of proceedings, judicial review of Canadian international arbitration awards and the recognition and enforcement of foreign arbitral awards.

(a) Stay of Proceedings - Giving Effect to Parties’ Intention to Arbitrate
Recent case law demonstrates that judges will give effect to parties’ intention to arbitrate even in cases where the written agreement relating to arbitration is unclear, capable of interpretation or poorly drafted. Since the legislative changes discussed above, Canadian courts have consistently upheld parties’ rights to arbitrate their differences where they have agreed to do so by contract and courts have increasingly resolved any ambiguities in such agreements in favour of giving effect to the parties’ intention to refer disputes to arbitration. In addition, the mandatory language of Article 8(1) of the Model Law, as

adopted in the respective provincial legislation, effectively provides that, unless the arbitration agreement is null and void, inoperative or incapable of being performed and, provided that a timely request is made, the court does not have the discretion to refuse to refer a matter to arbitration or to stay the court proceedings. Courts have applied these principles in favour of arbitration in cases where parties seek to stay judicial proceedings in the courts.

For instance, in the leading case of *Onex Corp. v. Ball Corp.* the Ontario Court had to consider whether a dispute between parties to a complex joint venture agreement concerning rectification of a contractual term ought to be submitted to the courts or to arbitration. Blair J. referred the dispute to arbitration and stayed the court action despite a dispute between the parties that rectification does not fall within the scope of the arbitration clause and that it is not a remedy that an arbitral tribunal is capable of granting. In doing so, Blair J. relied on the parties’ intention that disputes arising from the agreement be arbitrated, the parties’ choice of the law of Ontario as the governing law of the contract (which law includes the equitable remedy of rectification) and on the recent legislative and policy changes. Blair J. stated as follows:

That law [the law of the Province of Ontario] also includes a relatively recent, and clear, shift in policy towards encouraging parties to submit their differences to consensual dispute resolution mechanisms outside of the regular court stream."I see nothing in the Agreement which excludes rectification from the arbitration process as a matter of principle or law". Blair J. stated further At the very least, where the language of the arbitration clause is capable of bearing two interpretations, and on one of those interpretations fairly provides for arbitration, the courts should lean towards honouring that option, given the recent developments in the law in this regard to which I have earlier referred. The 1988 Ontario case of *Boart Sweden A.B. v. NYA Stomnes A.B.* referred to by Blair J. in the *Onex* decision, demonstrates a clear shift in the law

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606(1994), 12 B.L.R. (2d) 151 (Ont. Gen Div.), Blair J. [hereinafter "Onex"]
towards encouraging arbitration over litigation in courts. In Boart Sweden, Campbell J., writing for the court, relied on Article 8 of the Model Law, as adopted in Ontario, and referred to arbitration certain claims that fell within the terms of the arbitration clause of an international agreement in issue, and granted a temporary stay of court proceedings of related claims that fell outside the agreement. In doing so, and in refusing to consolidate the proceedings in a single court action, the court relied on the ‘very strong public policy’ that parties that have contractually agreed that they will arbitrate their claims instead of seeking resort to the courts, should be held to their contract. The court also held that to consolidate all the claims into a single court action would fail to give effect to the law which gives courts a clear direction to defer to arbitration and would ‘drive a hole’ through Article 8 of the Model Law (as adopted in the Ontario International Commercial Arbitration Act).

Similarly, in the case of Canadian National Railway Co. v. Lovat Tunnel Equipment Inc.640 the Ontario Court of Appeal held that a contract for the sale of machinery which provided that, “the parties may refer any dispute under this Agreement to arbitration, in accordance with the Arbitration Act of Ontario” meant that either party could elect for binding arbitration (in spite of the apparently permissive word “may”). In that case, the respondent/purchaser of machinery brought an action in the Ontario courts seeking $27,000,000 in damages from the appellant/designer of the machinery alleging improper design, construction and manufacture of the machinery, breach of contract and negligence.

The appellant’s motion to stay the action and refer the matter to arbitration under Article 8 of the Model Law, as adopted in the Ontario International Commercial Arbitration Act, was refused at first instance. The Court of Appeal allowed the appeal and stayed the action. In doing so, the Court relied on the parties’ intention to arbitrate. Finlayson J.A., writing for the majority in Lovat Tunnel, stated as follows:

It appears to me that the plain meaning of section 11 of the contract [“the parties may refer any disputes under the contract to arbitration”] is that either party to the contract may elect to have a matter in dispute that is covered by the contract referred to

640 (1999), 174 D.L.R. (4th) 385 (Ont. C.A.), [hereinafter "Lovat Tunnel"].
arbitration. In this case, since the respondents had initiated proceedings in the courts, the appellants were presented with a choice between electing binding arbitration or acquiescing in the respondents’ decision to resort to the courts. To suggest otherwise is to render the clause surplus age. …. In a considered view, the correct interpretation of the clause is that “parties” means “either party”. Thus either party may refer a dispute to binding arbitration and arbitration then becomes mandatory. Failing such an election by one of the parties, the matters in dispute can be resolved in the courts. In Lovat Tunnel, the Ontario Court of Appeal, while not expressly reversing, distinguished one of its earlier decisions in the case of McNamara Construction of Ontario Ltd. and Brock University. 611 In McNamara, the construction contract in issue contained an arbitration clause that provided in the case of any dispute arising between the parties that: “either party hereto shall be entitled to give to the other notice of such dispute and to request arbitration thereof; and the parties may with respect to the particular matters then in dispute agree to submit the same to arbitration in accordance with the applicable law of the place of building.” The trial judge held that the clause merely provides a right to give notice only, the arbitration was not mandatory and the parties must agree to arbitrate before the matter will be submitted to arbitration. In upholding the trial decision in McNamara the Court of Appeal stated that the contract carefully avoids foreclosing the parties the option of recourse to the Courts. The Court of Appeal in Lovat Tunnel 612 distinguished the wording of the clause in McNamara stating that the parties in that case had to serve notice of arbitration but it was permissive for them to agree to proceed. Finlayson J.A., writing for the court, stated that he could not agree that the obligation to arbitrate in Lovat Tunnel had to be agreed upon by both parties. Finlayson J.A. stated as follows: …There is an abundance of English authority where language that is less precise than what we are dealing with here has been held to constitute an agreement to submit disputes to binding arbitration. 613 In any event, there has been a significant change since 1970 and McNamara in the attitude of the courts and the legislature as to the desirability of encouraging the resolution of disputes between the parties other than by resort to the courts. The Court of Appeal in Lovat Tunnel then

611 (1970), 11 D.L.R. (3d) 513 (Ont. C.A.) [hereinafter "McNamara]
612 Edmonton (City of) v. Lovat Tunnel Equipment Inc., 2000 ABQB 882
expressly considered and endorsed the statements made by Blair J. in Onex referred to above and granted the stay of proceedings and referred the matter to arbitration.

Similarly, the Alberta Court of Appeal in the case of Kaverit Steel & Crane Ltd. v. KoneCorp,614 allowed a stay of court proceedings and referred a matter to arbitration where parties to a licensing agreement had agreed to arbitration. Kearns J.A., writing for the Court of Appeal, held that the power to grant or withhold a reference to arbitration is very limited under the Alberta International Commercial Arbitration Act, and the law requires that the parties be held to their bargain. The Saskatchewan courts have also demonstrated a tendency to observe the pattern of judicial deference to arbitration in dealing with motions to stay court proceedings.615 In addition, Canadian courts have held that a large and liberal interpretation of arbitration clauses ought to be applied in order to give effect to the resolution goals of the parties.616 For instance, it has been held that arbitration agreements survive both the fundamental breach and completion of a contract, otherwise arbitration could be easily avoided and its effectiveness would be seriously impaired.

Judicial Review and Enforcement of Canadian International Commercial Arbitral Awards:

Canadian courts have increasingly exercised restraint in reviewing international commercial arbitration awards made in Canada and have refused to overturn such awards except in very limited circumstances. In doing so, Canadian courts have upheld the Model Law principle of limited scope of review of arbitral awards.

614(1992), S5 Alta. LR. (Zd) 287 (C.A.), leave to appeal to S.C.C. refused, [1992] 2 S.C.R See for example, BMW Investments Ltd. v. Saskferco Products Inc. [1994] S.J. 629, 33 C.P.C. (3rd) 158 (Sask. C.A.)[hereinafter “BMW Investments”] where it was held that nothing in the Alberta Builders’ Lien Act, S.S. 1989-90, c. B-7.1 expressly or impliedly abrogated the right to use mechanisms, such as arbitration, and there was no inconsistency between the arbitration agreement of the parties and that Act.


In the leading case of *Quintette Coal Ltd. v. Nippon Steel Corp.* \(^{617}\), the British Columbia court refused to set aside an international commercial arbitral award made in British Columbia on the ground of an alleged error of law. In doing so, the court cited the British Columbia *International Commercial Arbitration Act*, which confers no power on courts to set aside an award on the ground of error of law. On appeal, the Court of Appeal upheld the trial decision and also held that courts must try to minimize judicial intervention in international commercial arbitration awards. The *Quintette* decision has been followed in numerous court decisions throughout the Canadian provinces, for example in Alberta \(^{618}\) and Saskatchewan. \(^{619}\)

More recently, in the case of *Corporacion Transnacional de Inversiones, S.A. de C.V. v. STET Internationals, S.p.A.* \(^{620}\) Lax J. of the Ontario Superior Court of Justice, refused to set aside a decision of an international commercial arbitral award made in Ottawa, Canada and enforced the award. In doing so, Madam Justice Lax stated that courts extend a high degree of deference to the decisions made by arbitral tribunals acting pursuant to the Model Law. Her Honour also stated that the grounds for refusing to enforce an award are to be construed narrowly, and the public policy ground should be invoked only where enforcement would violate basic notions of morality and justice. Examples would include instances of corruption, bribery or fraud, or where the tribunal’s conduct is so serious that it cannot be condoned under the law of the enforcing state.

**Recognition and Enforcement of Foreign Arbitral Awards:**

Since Canada’s accession to the New York Convention and the adoption of the Model Law, Canadian courts have consistently shown restraint in reviewing foreign international commercial arbitration awards and have refused to overturn foreign arbitral awards except in very limited circumstances. For instance, Canadian courts have rejected challenges to foreign arbitral awards based on public policy grounds. The case law

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\(^{619}\) BMW Investments, supra.

demonstrates that the refusal to enforce a foreign arbitral award on grounds of its violation of the public policy of the forum will only be justified where the award contravenes a fundamental principle of justice or fairness in substantive or procedural respects. In the leading case of *Schreter v. Gasmac Inc.*, the Ontario court granted an application under section 35 of the Model Law, as adopted in the Ontario *International Commercial Arbitration Act*, for recognition and enforcement of an international arbitral award made in the American state of Georgia (and confirmed by the U.S. Federal Court). The Canadian respondents opposed enforcement of the award on a number of grounds, including:

1. The award had merged in the Georgia court judgment and could only be enforced as a foreign judgment and not as an international award;
2. There was a denial of natural justice because the arbitrator had failed to give reasons for her award, and,
3. It would be contrary to the public policy of Ontario to enforce the award because the award included a sum which represented an acceleration of further damages not contemplated by the agreement between the parties.

The court rejected these grounds and held that the Ontario *International Commercial Arbitration Act* did not give the court jurisdiction to refuse to enforce an award where an award has been confirmed by a court order or judgment in the jurisdiction where the award was made. The court stated that It is clear that any such bar to enforcement would create a gaping hole in the scope of the [Ontario International Commercial Arbitration] Act and in the assistance and encouragement it is able to offer to those who wish to use the mechanism of international commercial arbitration with relative ease and with confidence in the enforcement procedure.

The court stated further … The purpose of enacting the Model Law in Ontario and in other jurisdictions is to establish a climate where international commercial arbitration can be resorted to with confidence by parties from different countries on the basis that if the arbitration is conducted in accordance with the agreement of the parties, an award will be enforceable if no defences are successfully raised under articles 35 and 36 [of the Model

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Law as adopted in Ontario]. The court also held that the Ontario *International Commercial Arbitration Act* did not give the court jurisdiction to refuse to enforce an award where the arbitrator failed to give reasons. It was held that the arbitrator’s failure to give reasons for the award did not constitute a denial of natural justice in the circumstances and this was not a case where the court should exercise its discretion to refuse to enforce the award.

Finally, the court rejected the respondent’s public policy argument and narrowed the scope of review on such a basis. The court noted that the concept of imposing public policy on foreign awards is meant to guard against enforcement of a foreign award which fundamentally offends local principles of justice and fairness, and where the procedural or substantive rules diverge markedly from those of the forum where enforcement is sought, or where there was corruption or ignorance on the part of the tribunal which could not be tolerated. The court stated that the enforcement procedures of the Model Law could be brought into disrepute if Ontario courts were to invoke public policy to re-open the merits of an arbitral award on legal issues decided in accordance with the law of a foreign jurisdiction, and where there has been no misconduct. Here, the court held that the respondent had a full hearing and full argument before the arbitrator, and in any event, the concept of acceleration of payments could not be said to be *per se* contrary to public policy in Ontario. Accordingly, there was no basis to direct the re-trial of issues on the merits. The *Schreter v. Gasmac* case has been referred to frequently in Canadian case law and demonstrates the tendency of Canadian courts to recognize and enforce foreign arbitral awards.

**IV. Recent Developments and Future Trends:**

No discussion of international arbitration in Canada would be complete without a reference to the alternate dispute resolution mechanisms established under the North American Free Trade Agreement (“NAFTA”). For private commercial disputes arising under the sphere of the NAFTA, NAFTA Parties ought to be aware that Article 2022 of NAFTA specifically provides for the encouragement and use of arbitration and

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other alternative dispute resolution techniques as the desirable means of resolving such controversies. The NAFTA creates and provides various alternate dispute resolution mechanisms for NAFTA Parties. Of these mechanisms, NAFTA’s Chapter 11 on investment most significantly impacts the role for international arbitration. It is likely that the number of international arbitrations involving private investment disputes under the NAFTA will increase. The jurisprudence in this area is developing and ought to be monitored.

SINGAPORE EXPERIENCE IN I.C.A:

Here is a focus on SIAC and the SIAC Rules, especially in view of the latest amendment to the SIAC Rules by virtue of the International Arbitration Amendment Bill of 2012 (“Amendment Bill 2012”), which has been introduced in March of 2012 with particular focus which aids an Indian party. Just to put things in perspective, below is the table with the percentage of growth experienced by various arbitration institutions between the period of 2000 and 2009, as discussed in the article Making the Arbitration Experience More Effective For Indian Parties by Ankit Goyal and Vivekananda N,

<table>
<thead>
<tr>
<th>Arbitration Institution</th>
<th>Percentage of growth in the number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Chamber of Commerce, Paris</td>
<td>51%</td>
</tr>
<tr>
<td>International Centre for Dispute Resolution, US</td>
<td>64%</td>
</tr>
<tr>
<td>Singapore International Arbitration Centre, Singapore</td>
<td>208%</td>
</tr>
</tbody>
</table>

Singapore Arbitration and its advantages:

Some of the reasons that have particularly benefited Singapore as a favoured arbitration destination have been due to a result of external factors such a sluggish trial

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625 For instance Chapter 19 of the NAFTA establishes tri-national panels to review anti-dumping and countervailing duty law determinations made by domestic judicial bodies of NAFTA Parties. 78. For a comprehensive discussion on this topic, see Henri C. Alvarez, "Arbitration Under the North American Free Trade Agreement", (2000), 16:4 Arbitration International 391.
626 See discussion in Henri C. Alvarez, ibid, at pp 419-430. (http://www.adrchambersinternational.com/publications.htm) (visited on 12-12-11)
court system. Similarly, although institutional arbitration opportunities have been recognized by other global eminent institutions such as the LCIA and LCIA has manifested in their presence in India, India by far, has failed to offer an internationally recognized arbitration institution. Although, one cannot completely negate the presence of Indian arbitration institution, they simply do not enjoy the same level of global recognition and reputation. This in turn can also transform how an award rendered by Indian arbitration institution would be viewed by an enforcing court abroad.

Even though, by virtue of being a signatory to the New York Arbitration Convention, India shall recognize and enforce all awards rendered in other New York Arbitration Convention signatory countries, India only recognizes and enforces those awards that have been rendered in countries that are listed in official gazette. As a result one of the losing destinations has been Hong Kong, which despite of its geographical proximity cannot render arbitration awards that are enforceable in India. Singapore, has acquired an international arbitration friendly attitude. Courts are non-interfering in nature, and assure impartiality and neutrality when dealing with international parties. The Singapore international arbitration law, which is modelled after UNCITRAL and SIAC Rules was amended to improve expediency and flexibility. In addition, Singapore is also a foreign lawyer and law firm friendly jurisdiction allowing them to freely represent parties in arbitrations.

**Emergency Interim Relief and SIAC Expedited Procedure**

In July of 2010, the SIAC Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") were amended to provide for emergency arbitrator procedure and expedited arbitration procedure. The amendment was aimed at accommodating the urgency and expediency a commercial dispute requires.

Rule 26.2 of SIAC Rules provides for emergency arbitrator procedure. Rule 26.2 permits a party to request appointment of an emergency arbitrator even before a tribunal has been formed. The request under the SIAC Rules has to demonstrate an emergency. The party making the request for an emergency arbitration procedure has to do so simultaneously with a notice of arbitration or soon after filing the notice of arbitration. The SIAC Chairman can accept or reject an application for emergency arbitrator. If the
SIAC Chairman accepts a request for an emergency arbitrator, then the deputy of the Chairman will appoint an emergency arbitrator within a day of the receipt of notice of arbitration. The emergency arbitrator then sets the schedule for considering and passing the order for interim relief. The order is passed within 2 (two) days of the appointment of an emergency arbitrator. The emergency arbitrator’s role extinguishes after passing an emergency order. Unless the parties agree, the emergency arbitrator does not participate in the proceedings once the tribunal is constituted. Once the tribunal is constituted the tribunal reconsiders the emergency order and can choose to modify or affirm or vacate the emergency order. The emergency order loses its force if the tribunal is not constituted within 90 (ninety) days of the order. The order also loses its force if either the claim is withdrawn or the final order is passed. Here is a case study involving two Indian parties embroiled in a dispute. In The expedited and emergency arbitrator procedures under the SIAC Rules – Six months on, how have they fared an article by Jonathan Leach and Julian Brenholtz it was discussed that, “Two Indian parties were embroiled in a dispute, where the claimant had issued three bank guarantees to the respondent. The respondent was about to encash the bank guarantees, and the claimant invoked the emergency procedure praying for an urgent interim injunction under SIAC Rules 26.2, precluding the respondent from encashing. The application for the interim injunction was received by SIAC at 9:30 pm, Singapore time. The Chairman of SIAC ruled to treat the applications through the emergency procedure. The emergency arbitrator was appointed the very next day, who within a day fixed a schedule for consideration. Within a week the parties made written submissions, after which a hearing over the telephone was conducted within a week. An interim order was passed a day after the telephone hearing“.

Rule 5.1 of the amended SIAC Rules provides that prior to the full construction of an arbitral tribunal any party may apply to the SIAC in writing requesting that the arbitral proceeding to be conducted by the expedited procedure. Such a request can be made under Rule 5.1 if any of the following criteria is satisfied,

(a) If the amount of dispute is less that Singapore Dollar 5 Million (equivalent of United States Dollar 3.8 Million, or
(b) Parties by agreement want to do so, or
(c) In case of exceptional emergency.
SIAC Rule 5.2 vests the power with the Chairman to decide, after taking into account the views of the parties. The expedited procedure will apply if the Chairman deems it applicable within the facts of a case. Here are the salient features of an expedited procedure,

(a) The Registrar may shorten any time limits under the SIAC Rules,
(b) The case is referred to a sole arbitrator to expedite the proceeding, at the same time the Chairman can decide to refer it to multiple arbitrators,
(c) parties also have the flexibility to have the matter decided only on documentary evidence by mutual agreement, otherwise the tribunal shall hold formal hearing where examination by experts and other witnesses will be conducted and summation will be made by counsels,
(d) Award in an expedited procedure has to be made within six months, however the Registrar in exceptional circumstances has the authority to extend the time,
(e) Under the expedited procedure, the tribunal is obligated to provide reasons for the award (in a summary form), however the parties in interest of expediency can request that no reasons be given.

An expedited procedure can assist a party with a strong case on merits to get speedy remedy. So if a dispute involves less the Singapore Dollar 5 Million, a party can make an application based on exceptional circumstances and if the request is granted by the Chairman then that party can secure quick disposal even if the other party to the arbitration is reluctant to expedite the hearing.

Amendment Bill 2012: The Amendment Bill of 2012 affects the following four major areas:

1. The power of review by a court at any stage the arbitrator’s ruling on its own jurisdiction. The most significant aspect of this particular amendment is that, in addition to a court reviewing the decision of an arbitrator to exercise erroneous jurisdiction the courts can also review a ruling where the arbitrator has held that she does not have the jurisdiction to decide a particular dispute. This approach can further support the arbitration system, in a case where the arbitrator erroneously believes that, she lacks jurisdiction.
2. Less formalistic approach where a written arbitration agreement is absent, provisions are being made to find an arbitration agreement by conduct or oral agreement (that has been eventually reduced to writing), this too is a pro arbitration measure that looks at the conduct of parties to see if the parties intended to arbitrate.

3. In addition an arbitral tribunal has been specifically empowered to award interest and cost; this provision obviously adds teeth to an arbitral award.

4. Lastly the amendment aims to provide the same legal sanctity to an order of an emergency arbitrator as a regular tribunal.

The said Amendment Bill was enacted and came into effect on 1 June 2012:

International Arbitration (Amendment) Act 2012: The main amendments are as follows:

1. Providing legislative support to “emergency arbitrators” An emergency arbitrator is one appointed prior to the constitution of the arbitral tribunal who has the power to award interim relief, such as interim injunctions. The Act gives emergency arbitrators the same legal status as a conventionally constituted tribunal. There was considerable pressure from the Singapore International Arbitration Centre (SIAC) to implement this change as SIAC had introduced an emergency arbitrator procedure in its rules with effect from 1 July 2010. However, as it was previously unclear how the status and powers of emergency arbitrators compared to those of a fully constituted tribunal, there was real doubt whether an order or award of an emergency arbitrator was enforceable. This is therefore a welcome clarification. One significant consequence is that orders by an emergency arbitrator will be recognised and enforced by the Singapore courts, whether such orders are made in Singapore or abroad.

2. Relaxing the requirement that arbitration agreements be in writing The definition of “arbitration agreement” is to be broadened so that it includes agreements made by any means, provided that the agreement is recorded. It would cover, for example, agreements made orally or by conduct and subsequently recorded in writing (including by email), or by audio recording.

3. Giving the courts power to review negative jurisdictional rulings. Previously the Singapore courts could only review positive jurisdictional rulings by tribunals -
that is, rulings where a tribunal accepts that it has jurisdiction to hear a dispute. The Act extends the Singapore courts’ powers to reviewing a tribunal’s decision to refuse jurisdiction. This is in line with the position in other jurisdictions such as England and France.

4. Clarifying the tribunal’s power to award interest The Act provides that tribunals are able to award simple or compound interest on both the principal claim and on costs awards.

To supplement the efficacy of the said Amendment Act, one more independent legislation Foreign Limitation Periods Act 2012 is also enacted to clarify the limitation laws that apply to international disputes heard in Singapore.

Foreign Limitation Periods Act 2012: The second Act is the Foreign Limitation Periods Act. This clarifies which country’s limitation laws will apply to international disputes (both court proceedings and arbitration) heard in Singapore. It provides that the limitation laws will be those of the law governing the substantive dispute. By way of example, if a contract provides for English law as the governing law but the arbitration proceedings take place in Singapore, the relevant limitation periods will be determined by English law.

1. The purpose of the Act is to clarify the uncertainty currently existing under common law, where the limitation period can be determined by the seat of the arbitration (where limitation is considered a matter of procedural law) or by the governing law (where limitation is considered a matter of substantive law).

2. The Act also sets out two exceptions to the general rule. The first is where the application of the rule would conflict with public policy. The Act indicates when such a conflict would arise, being where application of the rule would cause undue hardship to a person who is, or might be, a party to the action. The second exception is that any provision of the applicable law which provides for a limitation period to be extended or interrupted during the absence of a party from any specified jurisdiction will be disregarded. This second exception will not apply if its application would conflict with public policy or cause undue hardship.
If refer to the statistics, find that since 2000, new cases referred to SIAC have more than tripled, up from 58 in 2000 to 188 in 2011. As per the stated aims of the Singapore Ministry of Law, the latest changes are aimed to ensure that Singapore remains an attractive venue for international arbitrations. They have been broadly welcomed by the arbitration community in Singapore.

The Acts bring Singapore’s arbitration framework largely in line with those of the leading arbitration jurisdictions and organisations. Some aspects are potentially controversial, including the amendments relating to emergency arbitrators. However, this concept was recently introduced into the ICC Arbitration Rules. Other changes, such as the clarification of what constitutes an arbitration agreement and the tribunal’s powers to award interest, are more straightforward but nonetheless necessary to reflect current arbitration practices and commercial realities, and emergency arbitrator as a regular tribunal 627.

These developments over the course of last decade underscore the significance an institutional arbitration proceeding has acquired in a commercial dispute, where expediency and final determination is of a great value. India or elsewhere, the business people want to do business, instead of loitering around court corridors and arbitration proceedings. At the same time, the commercial relationships can never be completely free from dispute. It is incumbent on the legal community to free the business people to do business, at least by meaningful and fast dispute resolution process. The growth story of SIAC can be clearly traced with advantage of timing, geographical proximity and other external factors, but in view of 2010 amendment to the SIAC Rules and Amendment Act of 2012, one has to acknowledge how SIAC has constantly stepped in to take positive steps to bridge a vacuum Indian judiciary and alternative dispute resolution mechanisms have left. 628

7.2. INDIAN JUDICIARY AND COMMERCIAL ARBITRATION:

Indian Judicial wisdom attests the virtues of settlement of disputes within the conventional system and outside the conventional system that is Public Justice System.

627 www.hfw.com/...2012/international-arbitration-quarterly-june-2012-.. visited on 22-7-2012
628 Abhishek Singh, Senior Associate with the Corporate and Disputes Team of PXV Law Partners. He can be reached at abhishek.singh@pxvlaw.com)
Our ancient Village Panchayats stand as the immortal foundations for Justice delivery system. The decisions given by the Village Panchayat as regarded as equally just, fair and reasonable in relation to dispensation of justice and the modern ADR system is a replica of our ancient part process towards resolution of disputes. That’s why the statutory provisions of the Arbitration and Conciliation Act provided for recognition and enforcement of foreign Awards and Domestic awards. Apart from the present day judicial philosophy to encourage settlement of disputes through ADR methods and the judicial restraint from intervening into the decisions of Arbitral Awards

7.2.1. Domestic Award and Foreign Award:

The Arbitration and Conciliation Act, 1996 comprehends both Domestic Arbitration and International arbitration. The arbitration which takes place in India between parties both of whom are citizens of India or one of whom is citizen of India, or both of whom are foreign citizens – is Domestic Arbitration. It is the place where the arbitration takes place that determines the arbitration as being domestic or foreign. Consequently, the award also takes the name in relation to the place of arbitration. The award given in Domestic Arbitration is called Domestic Award. An International Commercial Arbitration is 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:

a) An individual who is a national of, or habitually resident in, any country other than India, or
b) A body corporate which is incorporated in any country other than India, or
c) A company or an association or a body of individuals whose central management and control is exercised in any country other than India, or

If such arbitration takes place in India it comes under domestic arbitration and the award given in such arbitration shall be treated as domestic award. If International agreement does not specify the venue of arbitration, the law applicable to domestic
arbitration applies. If in an international arbitration, both the parties belong to same foreign nationality, the Chief Justice of India can appoint a person of their nationality. The question of appointing the arbitrator of a different nationality will arise only if the parties in international arbitration belong to different nationalities, while in case of domestic arbitration the law applicable is the substantial law for the time being in force in India, in case of international arbitration, the law applicable is the law chosen by the parties and in doing so, it will not enter the field of the conflict of laws.

Where the parties have not chosen any law, the law applicable shall be the law which the arbitrator follows as appropriate to the circumstances of the dispute. However, the arbitration should bear in mind that he should decide the issues in dispute in accordance with the terms of the contract and in accordance with the usages of the trade and custom applicable to the transaction. When both the parties are Indian nationals and the place where arbitration should take place or taking place is India, the parties have no choice. The law applicable to the transaction in India only is applicable.

FOREIGN ARBITRATION:

The arbitration which takes places in a country other than India between nationals both of whom are foreigners or one of whom is an Indian is known as Foreign Arbitration. The award of the arbitration of that country is Foreign Award. Where a foreign citizen is employed as an expert and he is also given certain managerial functions, the arbitration clause makes the contract commercial and also the expert being a foreigner, the arbitration becomes International Arbitration.

The Domestic Award is final and becomes absolute after the time fixed for taking recourse against it expires or if any such recourse is taken the same is disposed off and it can be executed through a civil court as if it is the decree of the court. The foreign award becomes executable only after the court in India holds as enforceable in proceedings filed for its execution in Indian Courts. Under the Geneva Convention, Indian Courts recognise the agreement for arbitration made between the parties both of whom are foreigners and also the awards made in pursuance of such agreements by the arbitration

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630Comed Chemicals Ltd. Vs. C.N.Ramchand (AIR 2009 SC 494 ; 2008(4) Arb.L.R. 207.)
conducted abroad. Under New York protocol, Indian courts recognise the agreements on arbitration made between the parties one of whom is an Indian National and also the awards in pursuance of such agreements by arbitration conducted abroad.

**EXECUTION OF FOREIGN AWARD:**

The foreign award is as much final and binding on the parties to it as the domestic award. In the case of domestic award it is directly executable as a decree in the civil court having jurisdiction. But in the case of foreign award, the court executing the award has to first record a finding that the award is enforceable in India. It is only after the court finds it as executable, the court proceeds to execute the award as if it is a decree of its own. The previous procedure of getting the foreign award recognised by the High Court in the first instance and thereafter only the award so recognised becomes executable as a decree is now changed under the new Act. The executing court itself has jurisdiction to hold whether the foreign award is enforceable or not. The circumstances under which the foreign award may be refused enforcement in India are:

1. That the parties to the arbitration agreement are under some incapacity, or the said agreement is not valid under the law to which they have subjected themselves or where they have not chosen the law applicable, the law of the country where the award is made.
2. That the party against whom the award is made is not given proper notice of the appointment of arbitrator or of arbitral proceedings or was otherwise unable to present his case.
3. That the award deals with matters beyond the scope of or beyond the matters contemplated in the arbitration.
4. That the composition of the arbitral tribunal or the procedure adopted by the tribunal is not in accordance with the agreement or the law of the country where the arbitration took place.
5. That the award has not become final and binding or is set aside or otherwise suspended.

The enforcement may be refused also if the Indian court finds that the subject matter of the difference is not capable of settlement by arbitration under the law of India and that the enforcement of foreign award would be opposed to public policy of India.
If the foreign award is the subject matter of proceedings for its setting aside or for its suspension is pending in the foreign court, the hearing on application for enforcement may be postponed after taking suitable security from the party seeking deferment. Here Public Policy means the public policy of India. The expression ‘public policy’ includes wide range of topics such as trading with the enemy in times of war, stifling prosecutions, champerty and maintenance. It also means whatever tends to perpetuate injustice, enforces a restraint on liberty, free trade and commerce and such other natural and legal rights. Also whatever trends tend to violate the statute and whatever is against good morals such as those intended to promote corruption and prostitution are opposed to public policy. In addition, if the foreign award is found to be induced or affected by fraud or corruption then also it is not enforceable in India on grounds of public policy.

**LIMITATION ON ENFORCEMENT:**

The Indian Arbitration Act, 1996 states under Sec-43 that the Indian Limitation Act, 1963 applies to arbitrations under which 12 years are prescribed for enforcement of a decree. Since Sec-43 is in Part-I of the 1996 Act, it applies only to domestic arbitration 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. Sec-2(5) of the Act which extends in applicability to all arbitrations, may however, lead to Sec-43 becoming applicable as was held to be the case for the applicability of the 1940 Act in the case of *Raunaq International (COSID Inc. vs. Steel Authority of India).*

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. 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 Sec-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 in *Vulcan Insurance Co. vs. Maharaj Singh.*

**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

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631 AIR 1986 (Delhi High Court. P.8,13,16
632 (1976) 2 SCR 62.
protection under Sec-9 of the 1996 Act. Doubts were raised in respect of Sec-9 which is incorporated under Part-I of the Act regarding its application to commercial arbitration which held outside Indian because Sec-2(2) of the 1996 Act states the “the 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 arise 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 Sec-9 would not be available to him. The UNCITRAL Model Law however, expressly provided in Art 1(2) that Article 9 (parallel to Sec-9) would apply even when the place of arbitration is outside the state.633

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.634 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. vs. AdamouskeStrojirny As635 the High Court of Delhi interpreted Sec-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 OlexFocas Pvt. Ltd. Vs. Skoda Export Co. Ltd.636 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 Sec-2 is an inclusive definition and it does not exclude the applicability of Part I to this arbitration which is not being held in India. In an earlier but similar case i.e. KitechnologyNv Vs. UnicorGmbh637 another single judge of the High Court of Delhi had a different opinion when he held, that in view of sub-section (2) of Sec-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

633(Prof. Dr. S.Dwarakanath, Enforcement of Foreign Awards under Indian Arbitration and Conciliation Act, 1996 – Recent Developments, 2012, AILD September,2012.)
635(1997 (2) Arb.I.R. 335),
636 2000(1) AD(DEL),527 2000 AIR (Del.161 1999 (5) Arb L.R.533
637(1999 (1) Arb. I.R. 452),
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 Marriott International Inc. Vs. Ansal Hotels Ltd.\textsuperscript{638} 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 Sec-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 Vs. Bulk Trading SA\textsuperscript{639} where it affirmed the decisions in Dominant and OLEX Focus cases and held that Sec-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 to the 1996 Act. In subsequent cases such as –

Inventa FischerGmbh& Co. vs. Polygenta Technologies Ltd.\textsuperscript{640}

Trusuns Chemical Industry Ltd. Vs. Tata International Ltd.\textsuperscript{641}

Bharat Aluminium Com. Ltd. Vs. Kaiser Aluminium Technical Services\textsuperscript{642}

Bulk Trading SA vs. Dalmia Cement (Bharat) Ltd.\textsuperscript{643}

The various High Courts in India held a similar view except the Gujarat High Court in Nirma Ltd. Vs. LurgiEnergie Und EntsorgungGmbh, Germany\textsuperscript{644} took a different view.

The Supreme Court very recently in Venture Global Engineering Vs. Satyam Computers Services Ltd.\textsuperscript{645} 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

\textsuperscript{638}(AIR 2000 Delhi 377)
\textsuperscript{639}(2002 (4) SCC 105)
\textsuperscript{640}(2005(2) Bom CR 364);
\textsuperscript{641}(AIR 2004 Guj. 274);
\textsuperscript{642}(AIR 2005 Chhatt.21);
\textsuperscript{643}(2006) 1 ArbLR 38(Del),
\textsuperscript{644}(AIR 2003 Guj 145),
\textsuperscript{645}(2008) 4 SCC 190.
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 Sec-34 to foreign international awards would not be inconsistent with Sec-48 of the Act, or any other provision of Part-II. In the above case, the enforcement of a foreign awards 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 Sec-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 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 Ltd. Vs. U.O.I.\textsuperscript{646} 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 in decision in BHATIA where it is said Part I would apply even to international commercial arbitration 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 Handy Oil and Gas Co. vs. Hindustan Oil Exploration Co. Ltd.\textsuperscript{647} in which the parties had clearly mentioned that 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 implied excluded by the parties. Similarly in the present case, the court concluded that a petition under Sec-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. Vs. Stang Yong Engineering And Construction Ltd.\textsuperscript{648} 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

\textsuperscript{646} (2011 (5) SCALE 678),
\textsuperscript{647} (2006) 1 GLR 658,
\textsuperscript{648} (2011 (9) scale 567)
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. 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 Sec-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. Art-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, Art-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 from approaching the Indian Courts under Sec-9 of the Act 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 Sec-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 stake 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.  

7.2.2. CONFLICT OF LAWS:

The term ‘conflict of laws’ does not apply to commercial transactions. It applies only to the personal laws or other laws which are not commercial. Hence, conflict of laws is not relevant in international commercial transactions. Accordingly, this question does not arise in any domestic arbitration taking place in India on international commercial transactions. Just because the arbitrator hold sitting in England that by itself does not make the award a foreign award. It is executable and can be enforced in India under Sec-31. It is not open to the parties to adduce any oral evidence at the stage of hearing of objections on the enforcement of the foreign award. Enforcement of foreign award can be at the place where the petitioner has branch office and having bank account for day-to-day commercial transaction. During the pendency of the execution of foreign award, the court dealing with the matter can grant any interim relief at the instance of either party. Foreign award can be enforced without taking out proceedings for determination of their enforceability. Part-I of the Act applies to international arbitrations also taking place outside India, and accordingly application for interim measures can be made in cases where arbitration proceedings are taking place outside India. Execution of Foreign award – Whether new Act applies.

In Forest Day Lawson Ltd. Vs. Jindal Exports Ltd., the question was whether the foreign award issued under the old law could be enforced under the new Act 1996. The

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650 Held in AIR (2005) Cal. 133
651 Held in (AIR 2005 Del 95)
652 Held in (AIR 2004 Guj 274).
653 Held in (AIR 2004 Cal. 142)
654 Held in (AIR 2002 Bom 447)
655 Held in (AIR 2002 SC 1432)
petitioner filed straight away an execution petition in the form prescribed under Order-21 of C.P.C. treating it as an award for which new Act 1996 applies. The respondent contends that no foreign award can be straight away executed without it being recognised by the court if the old law applies. Similarly, if the new Act applies, then also foreign award cannot be enforced straight away without first getting it declared by the court as enforceable. In either case, execution of the foreign award straight away treating it as a decree is impermissible in law. The court while upholding the objections dismissed the execution petition and refused to convert the application as an appropriate proceeding under the old Act.

The court held that “if a particular act is required to be done in a particular manner, the same should be done in that manner alone. If a statute has conferred power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of that act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.”

APPOINTMENT OF ARBITRATOR – NON-NATIONAL OF EITHER OF THE PARTIES:

In Dolphin International Ltd. Vs. Ronak Enterprises Inc., in an international commercial arbitration, one party belongs to India and another to USA. A person belonging to either of the nationalities cannot be appointed as arbitrator. One party suggested International Chamber of Commerce, Paris should be the person to conduct arbitration. Another party suggested Dr. Nasim Hasan Shah, retired Chief Justice of Pakistan, and may be appointed as arbitrator. While rejecting to appoint International Chamber of Commerce, Paris the court held, “in my view it will be too much expensive for the parties to get their disputes arbitrated at Paris. I therefore reject this suggestion of the learned counsel for respondents. Under these circumstances I allow this application and appoint Dr. Nasim Hasan Shah, Retd. C.J. of Pakistan to act as arbitrator.”

656 RAJ 266 Del, E.A. 347/1998 dt. 19.02.1999,
657 AIR 1964 SC 358)
Application of Savings Clause – Foreign Award.

In Western Ship Breaking Corporation Vs. Clare Haven Ltd. U.K.⁶⁵⁸ a foreign award was made on 25-02-1996 i.e. after the new Act of 1996 came into force on 25-01-1996. Award was filed in court for execution. The question was whether the new Act will apply to the execution of the award. The Court found that the new Act only will apply to the execution of the award. The court held that – “By sub-clause (a) of sub-section-2 of Sec-85, all arbitral proceedings commenced prior to enforcement of the Act shall be deemed to have been saved. In this case, admittedly, as arbitral proceedings commenced prior to the enforcement of the Act, shall be deemed to have been saved and provisions of the old Act shall apply It is true that saving clause save arbitral proceedings commenced before the ordinance came into force. But at the same time, mere commencement does not confer or invest any right upon any of the parties. According to the saving clause, what is saved and preserved is the right accrued at a particular time. In this case; we are mainly concerned with the execution. The right of execution always depends upon the existence of an award. But in this case such an award was never in existence on the date of commencement.”

Verification of Genuiness, Executability and Enforceability of Foreign Award in Indian Courts:

Where the award is a foreign award, the Indian courts have to arrive at satisfaction about its genuineness and authenticity and for that purpose the original award or authenticated copy and the original agreement as well as such evidence as may be necessary should be produced along with translations into English duly certified by Consulates, before the Court orders its execution. Even after the genuineness is established the judgment debtor has a right to raise objections in the proceedings about its executability in India including that the foreign award is opposed to the public policy in India. The question is whether the judgment debtor shall take separate proceedings against the execution of a foreign award in India.

⁶⁵⁸ 1998 Raj. 367, Gujarat CRA No. 99/1997 dt. 21-4-1997,
In Western Ship Breaking Corporation Ltd. Vs. Clare Haven Ltd.\textsuperscript{659} U.K., the court held that – “if an object can be achieved in the same proceedings why go for a separate procedure leading to multiplicity of litigations? It is abundantly clear that a foreign award and a decree of Indian civil court are executable under the same provisions and if there is satisfaction about the enforceability of a civil decree can be achieved in the same proceedings why there should be any discrimination and adopt a separate procedure for foreign award? Order-21 of Civil Procedure Code does not make any such distinction and discrimination. If this view is not accepted the interpretation would lead to absurdity which can never be the intention of the legislature.”

Under Sec-48 a duty is cast upon the judgment debtor against whom award operates can be treated as rebuttal evidence so as to challenge the presumption. This can be adduced in the same proceedings and not by initiating separate proceedings, as is done in the case of ordinary civil litigation.” The submission that the execution petition could not be permitted to be converted an application under Sec-47 is technical and is of no consequence in the view taken by court. Thus, for enforcement of foreign award, there is no need to take separate proceedings one for deciding the enforceability of award, to make rule of the court and the other to take up execution thereafter. In one proceeding, the court enforcing a foreign award can deal with the entire matter. If two steps are required to be taken, one for deciding upon the enforceability of award and other for its execution the very purpose of the act in regard to speedy and effective execution of foreign award would be defeated\textsuperscript{660}.

7.2.3. INJUNCTION WHERE FOREIGN ARBITRATION BEING HELD ABROAD:

In OlexFocas Pvt. Ltd. Vs. Skoda Export Co. Ltd.\textsuperscript{661} There was an agreement between two foreign companies one a Chech and another of Australia (the contractor and sub-contractor of works in India contained an arbitration clause. The venue of arbitration was Switzerland and the law applicable was Swiss law. The arbitration clause was invoked.

\textsuperscript{659} 1998(Supp)Arb LR 53 (Guj)


\textsuperscript{661} AIR 2000 Delhi 161. (OMP 232 of 1997 dt. 5-11-1999).
Pending arbitration proceedings in Switzerland, one of the parties filed an application at Bombay High Court under Sec-9 of the 1996 Act. The question is whether the Indian Court has jurisdiction to grant interim relief in respect of an arbitration pending between two foreigners at a place outside India. Answering in the affirmative, the Hon’ble judge held that -

“I have considered the rival contentions advanced by the learned counsel for the parties. I have also considered the cases which have been cited at the bar. A careful reading and scrutiny of the provisions of 1996 Act, leads to the clear conclusion that sub-section (2) of Sec-2 is an inclusive definition and it does not exclude the applicability of Part-1 to this arbitration which is not being held in India. An appropriate case can grant interim relief or interim injunction. A close reading of relevant provisions of the Act of 1996 leads to the conclusion that the courts The other clauses of Sec-2 clarify the position beyond any doubt that this court in have been vested with the jurisdiction and powers to grant interim relief. The powers of the court are also essential in order to strengthen and establish the efficacy and effectiveness of the arbitration proceedings. Those powers, then in some cases it can lead to grave injustice.

The Arbitrators perhaps cannot pass orders regarding the properties which are not within the domain of their jurisdiction and if the courts are also divested of those powers, then in some cases it can leads to grave injustice. Arbitration proceedings take some time and even after an award is given, sometime is required for enforcing the award. There is always a time lag between pronouncement of the award and its enforcement. If during that interregnum period, the property/funds in question are not saved, preserved or protected, then in some cases the award itself may become only a paper award or a decree. This can of course, never be the intention of the legislature. While interpreting the provisions of the Act the intention of the framers of the legislation has to be carefully gathered.”

Indian Law can be Applied Even Where Arbitration Takes Place Abroad:

In Bharat Aluminium Co. Ltd. Vs. Kieser Aluminium Technical Services Inc.\textsuperscript{662} an agreement provided that it should be governed by the Indian Law but the

\textsuperscript{662} AIR 2005 Chatisgarh 21)
arbitration would be held as per English Law. Award is made in accordance with the later provision in England. The question is whether an appeal against the award lies in the Indian courts. The court held that the application for setting aside under Sec-34 in India against an award made in England is not maintainable.

ARBITRATION AND COURTS

Law courts all over the world play an important role in the smooth and expeditions conduct of arbitration proceedings and in the implementation of arbitration awards. It is interesting and useful to know how courts act and react when parties approach them for different reliefs during arbitration proceedings and after the award. In Pressteels&Fabrications (P) Ltd. vs. Chief Engineer, Electricity (Projects), where in case of a Government contract, a clause in standard general conditions of contract says that any dispute arising from the contract will be decided by the courts or tribunals in Hyderabad and Secunderabad cities, that does not mean that only the civil court has the jurisdiction to decide the dispute and not the arbitrator.

7.3. **RENDITIONS OF PERMANENT COURT OF ARBITRATION:**

Permanent Court of Arbitration: Established by treaty at the First Hague Peace Conference in 1899, the Permanent Court of Arbitration is the oldest global institution for the settlement of international disputes. The Court offers a wide range of services for the resolution of international disputes which the parties concerned have expressly agreed to submit for resolution under its auspices. Unlike the International Court of Justice, the Permanent Court of Arbitration has no sitting judges: the parties themselves select the arbitrators. Another difference is that sessions of the Permanent Court of Arbitration are held in private and are confidential. The Court also provides arbitration in disputes between international organizations and between states and international organizations. Working in close co-operation with the Permanent Court of Arbitration, the Hague Justice Portal has digitalized a number of the Court’s historic international arbitral awards, making them available for the first time in electronic format. This is the first stage of an ambitious project, which began in early 2006, to fully digitalize the awards rendered under the auspices of the PCA, established in The Hague in 1899. The Hague Justice Portal is a free and publicly accessible gateway to information and research.

materials emanating from Hague-based legal institutions. The online availability of these awards, which is of great significance to the development of international law and dispute resolution, will allow jurists, lawyers, scholars, researchers and students free and convenient access to documents that previously only had limited availability.

7.3.2. CASES SETTLED BY PERMANENT COURT OF ARBITRATION:
Some important cases settled by the P.C.A. are listed below:-

- Radio Corporation of America v. China (1935)
- Preferential Treatment (Germany, Great Britain and Italy v. Venezuela, 1904)
- The Pious Funds of Californias (U.S.A.v. Mexico, 1902)
- The Manouba Case (France v. Italy, 1913)
- Russian Claim for Indemnities (Russia v. Turkey, 1912)
- Canevaro Claim (Italy v. Peru, 1912)
- Arrest and Restoration of Savarkar (France v. Great Britain, 1911)
- Deserters of Casablanca (Germany v. France, 1909)
- Muscat Dhows Case (France v. Great Britain, 1905)
- Japanese House Tax (Germany, France and Great Britain v. Japan, 1905)
- The Grisbådarna Case (Norway v. Sweden, 1909)
- The North Atlantic Coast Fisheries Case (Great Britain v. U.S.A., 1910)
- The Orinoco Steamship Company Case (U.S.A. v. Venezuela, 1910)
- The "Carthage" Case (France v. Italy, 1913)
- Boundaries in the Island of Timor (The Netherlands v. Portugal, 1914)
- The Island of Palmas Case (or Miangas) (The Netherlands v. U.S.A., 1928)
- Romak S.A. (Switzerland) v. The Republic of Uzbekistan (2009)
- Centerra Gold Inc. &Kumtor Gold Co. v. Kyrgyz Republic (2009)
- Ireland v. United Kingdom (MOX Plant Case) (2008)

- **Saluka Investments B.V. v. Czech Republic** (2008)
- **Guyana v. Suriname** (2007)
- **Barbados v. Trinidad and Tobago** (2006)
- **Telekom Malaysia Berhad/Government of Ghana** (initiated 2003)
- **Malaysia v. Singapore** (initiated 2003)
- **Belgium v. Netherlands** (Iron Rhine Arbitration, 2005)
- **Netherlands v. France** (2004)
- **Ireland v. United Kingdom** (OSPAR Arbitration, 2003)
- **Larsen v. Hawaiian Kingdom** (2001)
- **Eritrea v. Yemen** (1998 and 1999)
- **Radio Corporation of America v. China** (1935)
- **Island of Palmas (or Miangas)** (United States/Netherlands, 1928)
- **Norwegian Claims Case** (United States/Norway, 1922)
- **Island of Timor** (The Netherlands/Portugal, 1914)
- **French Postal Vessel "Manouba"** (France/Italy, 1913)
- **The "Carthage"** (France/Italy, 1913)
- **Russian Claim for Indemnities** (Russia/Turkey, 1912)
- **Canevaro Claim** (Italy/Peru, 1912)
- **Arrest and Restoration of Savarkar** (France/Great Britain, 1911)
- **The Orinoco Steamship Company** (Venezuela/United States, 1910)
- **North Atlantic Coast Fisheries** (United States/Great Britain, 1910)
- **The Grishådarna Case** (Norway/Sweden, 1909)
- **Deserters of Casablanca** (France/Germany, 1909)
- **Muscat Dhows** (France/Great Britain, 1905)
- **Japanese House Tax** (Japan/Germany, France and Great Britain, 1905)
- **Preferential Treatment of Claims of Blockading Powers against Venezuela** (1904)
- **The Pious Fund of the California** (USA/Mexico, 1902)
Pending cases:

**The Republic of Ecuador v. The United States of America.**
On June 28, 2011, the Republic of Ecuador instituted arbitral proceedings concerning the interpretation and application of Article II (7) of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, 27 August 1993 (US-Ecuador BIT), pursuant to Article VII of the US-Ecuador BIT. The Permanent Court of Arbitration acts as Registry in this arbitration.

**Arbitration Between The Republic of Croatia and The Republic of Slovenia.**
On 4 November 2009, the Government of the Republic of Croatia and the Government of the Republic of Slovenia signed an agreement to submit their territorial and maritime dispute to arbitration. The Permanent Court of Arbitration acts as Registry in this arbitration.

**The Republic of Mauritius v. The United Kingdom of Great Britain and Northern Ireland**
Pursuant to Article 287 and Annex VII, Article 1 of the United Nations Convention on the Law of the Sea, on 20 December 2010 the Republic of Mauritius instituted arbitral proceedings concerning the establishment by the United Kingdom of a Marine Protected Area around the Chagos Archipelago.

**Indus Waters Kishenganga Arbitration (Pakistan v. India)**
On May 17, 2010, the Islamic Republic of Pakistan instituted arbitral proceedings against the Republic of India under Paragraph 2(b) of Annexure G to the Indus Waters Treaty 1960. A Court of Arbitration composed of seven members has been constituted pursuant to Annexure G. The Permanent Court of Arbitration acts as Secretariat to the Court of Arbitration pursuant to Paragraph 15(a) of Annexure G.

**Bangladesh v. India**
**OAO Gazprom v. The Republic of Lithuania**

The PCA is providing administrative support in this arbitration, which is being conducted under the 1976 UNCITRAL Arbitration Rules pursuant to the Agreement Between the Government of the Russian Federation and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of Investments of 29 June 1999.

**Guaracachi America, Inc. (U.S.A.) and 2. Rurelecplc (United Kingdom) v. Plurinational State of Bolivia**

The PCA is providing administrative support in this arbitration, which is being conducted under the UNCITRAL Arbitration Rules 2010 pursuant to the Treaty between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments. China Heilongjiang International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd., and QinhuangdaoshiQinlong

**International Industrial Co. Ltd. v. Mongolia**

The PCA is providing administrative support in this arbitration, which is being conducted pursuant to the Agreement between the Government of the Mongolian People’s Republic and the Government of the People’s Republic of China concerning the Encouragement and Reciprocal Protection of Investments dated 26 August 1991.

**European American Investment Bank AG v. The Slovak Republic**

The PCA is providing administrative support in this arbitration, which is being conducted under the UNCITRAL Arbitration Rules pursuant to the Agreement between the Republic of Austria and the Czech and Slovak Federal Republic Concerning the Promotion and Protection of Investments.

**Chevron Corporation and 2. Texaco Petroleum Company v. The Republic of Ecuador (PCA Case No. 2009-23)**

The PCA is providing administrative support in this arbitration, which is being conducted under the UNCITRAL Arbitration Rules pursuant to the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment.
The PCA is providing administrative support in this arbitration, which is being conducted under Chapter Eleven of the North American Free Trade Agreement (NAFTA).

*Achmea B.V. (formerly known as "Eureko B.V.") v. The Slovak Republic.*
The PCA is providing administrative support in this arbitration, which is being conducted under the UNCITRAL Arbitration Rules pursuant to the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and The Czech and Slovak Federal Republic.

**Past cases (Partial List)**

The PCA provided administrative support in this arbitration, which was conducted under Chapter Eleven of the North American Free Trade Agreement (NAFTA).

The PCA provided administrative support in this arbitration, which was conducted under the UNCITRAL Arbitration Rules pursuant to the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment.

*HICEE B.V. v. The Slovak Republic*(2011)
The PCA provided administrative support in this arbitration, which was conducted under the UNCITRAL Arbitration Rules pursuant to the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic.

The PCA served as registry in this arbitration, which was conducted under the UNCITRAL Arbitration Rules.

*Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*(2010)
The PCA provided administrative support in this arbitration, which was conducted under Chapter Eleven of the North American Free Trade Agreement (NAFTA).

*Eurotunnel*(2010)

*1. The Channel Tunnel Group Limited*

The PCA acted as registry in an arbitration concerning alleged breaches of a Concession Agreement entered into by two entities of the Eurotunnel group and the British and French Governments for the construction of a fixed link between France and the United Kingdom. In accordance with Article 19 of the Treaty between the French Republic and the United Kingdom of Great Britain and Northern Ireland Concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link Signed at Canterbury on February 12, 1986, an arbitral tribunal was constituted and consisted of the following members. 666

7.3.2. PERMANENT COURT OF ARBITRATION BRANCH IN INDIA:

There is a proposal to establish a regional branch of the Permanent Court of Arbitration (PCA) for South Asia in New Delhi in recognition of the contributions made by India to the cause of peaceful settlement of disputes through strict adherence to international law, a policy that India has vigorously and faithfully pursued over the years. The regional facility as an organ of the PCA is potentially capable of providing the same services as PCA headquarters in The Hague, the Netherlands. The mission of the facility will be to promote the use by States, non-State parties and private parties in South Asia of the PCA’s mechanisms of dispute resolution cited in the United Nation’s Charter and to extend its facilities to cases involving non-State parties. The PCA thus occupies a singular place at this juncture between public and private international law.

The modalities were being worked out for the setting up of the regional facility in the capital. In recent decades, States had become as savvy as international commercial private parties in their choice of dispute resolution mechanism to solve complex disputes within the realm of international law. The rapid growth of economic interchange between the States favoured a whole generation of laws in which settlement of disputes using arbitration and other mechanisms cited in the U.N. charter played a central role.

The renewed confidence in arbitration could provide an incentive to the States to facilitate the resolution of disputes in public and private spheres.

Moreover, the inclusion of arbitration clauses in public contracts was crucial in confidence building for public and private corporate investors in South Asia and would help create a positive effect on the stability and economic growth in South Asia. The continued use of PCA’s arbitration and conciliation rules of procedure and of the Regional facility as the forum of choice could improve the perceived investment climate in certain countries of South Asia. It would enhance the image of transparency, predictability and reliability in the administration of justice in those countries. The setting up of the regional facility would help in cost control and reduction in travel time.  

7.4. ROLE OF I.C.A.D.R. AND INDIAN COUNCIL OF ARBITRATION:

In most of the industrialised countries, central or national arbitral organisations have been established which provide facilities for arbitration of commercial disputes. They enjoy unique prestige and confidence of the trade and industry. In India, the Indian Council of Arbitration established in 1965 is the apex arbitral organisation at the national level.

The main objective of the Council is to promote the amicable and quick settlement of industrial and trade disputes by arbitration. The Government of India, the Federation of Indian Chambers of Commerce and Industry, the other important Chambers of Commerce and trade associations in India as well as export promotion councils, public sector undertakings, companies and firms are in its membership. The Council provides facilities for settlement of international commercial disputes also by arbitration. Its Rules of Arbitration have recently been revised based on the Arbitration and Conciliation Act, 1996. These Rules are of international standard and they provide a guarantee wished for by the trade for quick and just settlement of the dispute. It maintains a panel of arbitrators consisting of Retired Judges, Advocates, Shipping Experts, Chartered accountants, Chartered Engineers, Businessmen, Foreign Nationals and Executives having specialization in more than 20 fields. The Council has entered into arbitration service

agreements with important foreign arbitral institutions in more than 30 countries to administer arbitrations under their rules if arbitration is held in India.

The Council also provides arbitration services for settlement of maritime disputes arising out of charter party contracts and it has framed maritime arbitration rules for such disputes. The Ministry of Surface Transport, Government of India has recommended the use of the ICA arbitration clause in the charter party contracts so that dispute, if any, can be settled under the ICA maritime arbitration rules. To provide technical knowledge on Arbitration Laws and Alternative Dispute Resolution procedure, the Council organises Conferences/training programmes (National and International), publishes literature and provides advisory services to business organisations and arbitration practitioners on trade terms and arbitration clause.

7.4.1. RULES OF ARBITRATION FOR INDIAN COUNCIL OF ARBITRATION:

The ICA has framed its rules of arbitration comparable to international standards for conduct of arbitration proceedings. The 1996 Act provides statutory recognition to conciliation as a distinct mode of dispute settlement and contains detailed procedure governing arbitration and conciliation proceedings. Under the rules of arbitration of the ICA, either a sole arbitrator or three arbitrators may be appointed. Where the claim is below rupees one crore, a sole arbitrator is appointed, unless the two parties agree that three arbitrators should be appointed for the particular case. For claims above rupees one crore, three arbitrators are appointed, unless the parties agree that a sole arbitrator may be appointed. The sole arbitrator is appointed by consent of the parties and, failing such consent, the Council appoints the sole arbitrator. Where three arbitrators have to be appointed, each of the parties appoints one arbitrator and the Council appoints the third arbitrator who acts as the Presiding Arbitrator of the arbitral tribunal.

Under institutional arbitration in India, the parties are free to choose their arbitrators from panel of arbitrators established by the institution. The panel of arbitrators maintained by the ICA includes about one thousand five hundred persons from various professions and businesses, lawyers, chartered accountants, engineers etc. They are put on the list by the Arbitration Committee after the latter is satisfied about their competence, integrity and impartiality to act as arbitrators. The list also includes foreigners.
ICA Arbitration Clause:

The Ministry of Commerce and the Department of Public Enterprises had issued circulars to Central Public Undertakings, Govt. Departments, from time to time recommending use of ICA arbitration services and its clause in agreements entered into by them with private parties. As a result, many disputes involving foreign parties have already been referred to the Council and the awards given. Still a large number of public undertakings and Govt. departments have evolved their own system for settlement of disputes by appointing officials of the same department as arbitrators. The Ministry of Commerce, Government of India has addressed a communication to all departments of the Government of India, Public Sector Undertakings (PSUs), Export Promotion Councils (EPCs), commodity boards and apex chambers of commerce and industry, recommending them to consider use of ICA’s services and its arbitration clause (Office Memorandum No. 37(1)/98-TPD dated 1st June, 1999 issued by the Ministry of Commerce, Government of India, is reproduced at the back inside cover). Following is the arbitration clause recommended by the Council for inclusion in all commercial contracts by the parties:

"Any Dispute or differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of this contract or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the Award made in pursuance thereof shall be binding on the parties."

Fast Track Arbitration:

The special feature of the rules of arbitration of the Council is the fast track arbitration under which parties may request the arbitral tribunal before the commencement of the arbitration proceedings to settle disputes within a fixed time frame of 3-6 months or any other time frame agreed by the parties. Under fast track arbitration, the arbitrators have to decide the matter within the time frame on written submission without oral hearings. This will inspire confidence in the foreign investors who want to dispose of the matter in a minimum timeframe to reduce the number of hearings and ultimate reduction of substantial cost, which is the objective of arbitration.

Network of ICA Service Agreements with Foreign Arbitral Organisations:
In order to provide arbitration services under the Rules of Foreign Arbitral Organisations, the Council has entered into arbitration service agreement with important arbitral organisations including international in different parts of the world viz. USA, UK, Russian Federation, Canada, Italy, Germany, Singapore, Australia etc. Some agreements provide for conduct of arbitration proceedings by the Council under the rules of respective foreign arbitration organisations, if the arbitration hearings are held in India.

The Council has a special website on Internet called ICANET to provide information on Arbitration and Commercial Laws. This website has been developed and hosted on behalf of the Council by BISNET INDIA, the business information services network of FICCI. This website provides complete information about the New Arbitration Law and Rules as well as the services of the Council. Members can obtain from this website, updated information about the activities of the Council. The Council is making efforts to compile information about arbitration law and procedures in different countries through this website.

7.4.2. REGIONAL AND STATE-LEVEL OFFICES OF ICA:

The Council has developed its infrastructure facilities and has its regional offices at Kolkata, Chennai and Mumbai and also state-level offices of Ahmedabad, Bangalore, Bhubaneswar, Hyderabad, Pune, Cochin, Guwahati, and Jaipur in order to cater to the needs of users of arbitration in respective regions and to generate awareness about the advantages of arbitration in trade disputes.668

The I.C.A set up under the Societies Registration Act, promotes arbitration as a means of setting commercial disputes and popularise the concept of arbitration among the traders, particularly those engaged in international trade. The council, a non-profit service organisation, is a grantees institution of the Department of Commerce and is eligible for assistance under the Market Development Assistance (MDA) scheme of the Department.

The main objectives of the Council are to promote the knowledge and use of arbitration and provide arbitration facilities for amicable and quick settlement of commercial disputes with a view to maintaining the smooth flow of trade, particularly,

export trade on a sustained and enduring basis. The Indian Chamber's Council of Arbitration (ICC Council of Arbitration) is a specialized body which provides institutional arbitration services for settlement of domestic as well as commercial disputes for the last eight decades. Over the years, the ICC Council of Arbitration (ICCA) has gained recognition as one of the renowned arbitral institutions in the country. The Chamber has framed rules for disposing disputes within a fixed time frame and improved its infrastructure facilities to international standards to provide the best services to the business community at large. This apart, and more importantly, ICCA has a panel of competent arbitrators experienced in different lines of trades and profession. ICCA also provides administration and secretarial services to arbitration cases under the Rules of Arbitration of the Indian Council of Arbitration, whose Eastern Regional Office operates from the Indian Chamber of Commerce.

ICCA recommends the following arbitration clause for the parties, desirous of making reference to arbitration of ICCA, in their contracts/agreements/invoice: “Any dispute or difference or controversy or claim arising under, out of, or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, interpretation, performance, shall be referred to and finally decided by arbitration in accordance with the Rules of the Indian Chamber Council of Arbitration, Kolkata, and the award made in pursuance thereof shall be binding on the parties”. Public Law Remedy vis-à-vis the Arbitration and Conciliation Act, 1996. “Constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities.

Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution”, thus held the Supreme Court in Union of India v. Tantia Construction Pvt. Ltd. The brief facts of the Tantia Construction case are that, in 2007 the petitioner Central Railway) awarded a project for the construction of a rail over-bridge to the respondent, pursuant to which an agreement was entered into between the parties. The agreement contained an arbitration clause. Subsequently, due to an alteration of the layout and plan for

669 http://www.tedo.biz/export-support/indian-export-support-organizations/indian-council-arbitration(visited on 3-4-11) 670 (East 128. (2011) 3 SCC 697
construction, the respondent was instructed by the petitioner to execute additional work at the originally agreed contractual price instead of a revised appreciated price.

Aggrieved, and notwithstanding the arbitration clause present in the agreement, the respondent filed a writ petition under Article 226 of the Constitution of India (“the Constitution”) before the high court, asking that a writ of certiorari be issued quashing the petitioner’s order through which the High Court had rejected the respondent’s claim for additional costs and further asking that a writ of mandamus be issued directing the petitioner to allow the respondent to complete only the original work and not carry out any additional work. The respondent succeeded in the writ petition, and hence the petitioner appealed to the Supreme Court arguing inter alia, that the courts could not interfere in the dispute as there was an arbitration clause in the agreement.

While dismissing the petition, the Supreme Court endorsed the view of the High Court that notwithstanding the provisions relating to the arbitration clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the writ petition filed by the respondents. This judgment of the Supreme Court raises a very important question as to what is the test or the basis on which courts should refrain from exercising their writ jurisdiction, because of the presence of an arbitration clause in the agreement. This article proposes to examine this issue further and initiate a debate.

In State of Himachal Pradesh v. Gujarat Ambuja Cement Ltd, a three judge bench of the Supreme Court while deciding the question as to whether the High Court should interfere under Article 226 of the Constitution, when an alternative remedy was available, held that, “the power relating to alternative remedy is a rule of self-imposed limitation.

It is essentially a rule of policy, convenience and discretion and never a rule of law”. It was also held that despite the existence of an alternative remedy it is within the discretion of the High Court to grant relief under Article 226 of the Constitution, though, it should not interfere if an adequate efficacious alternative remedy was available. Similarly, in Harbanslal Sahnia v. Indian Oil Corp. Ltd., the Supreme Court,

671 (2005) 6 SCC 499
672 (2003) 2 SCC 107 (“Harbanslal case”)
relying on Whirlpool Corporation v. Registrar of Trade Marks, Mumbai\textsuperscript{673} held that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. It was observed that in an appropriate case in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies:

(i) where the writ petition seeks enforcement of any of the Fundamental Rights;

(ii) where there is failure of principles of natural justice or,

(iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

In yet another interesting judgment of the Supreme Court in Sanjana M Wig (Ms) v. Hindustan Petroleum Corporation Ltd.,\textsuperscript{674} the Supreme Court laid down that notwithstanding an arbitration clause in the agreement, access to justice by way of public law remedy would not be denied when a case involves public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief. Further, it was held that a writ petition will also be entertained when it involves a question arising out of public law functions on the part of one of the parties.

While in the aforesaid Harbanslal judgment, the Supreme Court held that the presence of an arbitration clause in the agreement is not an absolute bar from invoking the writ jurisdiction of the court in Titagarh Paper Mills v. Orissa State Electricity Board,\textsuperscript{675} the Supreme Court held that, where the parties have chosen a forum for adjudication of their disputes, in such cases the court may not entertain a writ application. It was further observed that there was no reason why the appellant should not pursue the remedy of arbitration which it had solemnly accepted under the agreement, rather than invoking the extraordinary jurisdiction of the high court under Article 226 of the Constitution to determine questions which really formed the subject matter of the arbitration agreement. Though, the aforesaid decisions have been handed down in keeping with the intent that injustice, whenever and wherever it takes place, has to be

\textsuperscript{673} AIR 1999 SC 22,
\textsuperscript{674} 2005) 8 SCC 242
\textsuperscript{675} (1975) 2 SCC 436
struck down, these decisions raise some fundamental questions vis-à-vis the sanctity of the contract between the parties which has an alternative dispute resolution mechanism.

When a dispute arises between the parties under such a contract, which requires adjudication of disputed question of facts, wherefore the parties are required to lead evidence both oral and documentary, which have to be determined by a domestic forum chosen by the parties, is it appropriate for a court to entertain a writ application in such circumstances? It is to be noted that the Arbitration and Conciliation Act, 1996 (“the 1996 Act”) was enacted for party autonomy and maximum judicial support with minimum judicial intervention. Section 5 of the 1996 Act, provides that all other laws for the time being in force have been excluded from operation in so far as they relate to intervention by any judicial authority.

Additionally, any judicial authority faced with a matter that is the subject of an arbitration agreement is statutorily mandated by section 8 of the 1996 Act to refer the parties to arbitration. Hence, with due respect, it is time that the Supreme Court while taking into consideration the provisions laid down in the 1996 Act lays down clear exceptions or rules on when a court should exercise its writ jurisdiction under Article 226, especially when the parties have chosen an alternative mode of dispute resolution and have agreed to resolve their disputes through arbitration.676

This chapter presents a balanced evaluation of performing roles of judiciary and arbitration institutions dealing with the emerging conflicts with regard to jurisdiction and enforcement of awards etc. A new trend in national law courts appears to have emanated which runs counter to the object and philosophy of international arbitration bringing into conflict the enforcement of foreign arbitral awards in contracting States on the ground of ‘Public Policy’ which should not be considered as an unruly horse. This view is sought to be in consonance with the spirit of UNCITRAL Model Law universally acknowledged.

676 M. Rishi Kumar, Advocate, Madras High Court (http://www.icaindia.co.in/Jan-March12.pdf) (visited on 2-2-2010)