CHALLENGES OF FOREIGN ARBITRATION AWARD: FRUSTRATING THE OBJECTIVES OF THE ARBITRATION AND CONCILIATION ACT, 1996

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I. Introduction

The buzz word today is arbitration.[3] It is being promoted like a panacea for a number of evils having numerous advantages. Among the most cited advantages are its being cost effective, final binding decisions[4],

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3 The submission of a dispute to an unbiased third person designated by the parties to the controversy, who agree in advance to comply with the award—a decision to be issued after a hearing at which both parties have an opportunity to be heard. Arbitration is a well-established and widely used means to end disputes. It is one of several kinds of Alternative Dispute Resolution, which provide parties to a controversy with a choice other than litigation. Unlike litigation, arbitration takes place out of court: the two sides select an impartial third party, known as an arbitrator; agree in advance to comply with the arbitrator's award; and then participate in a hearing at which both sides can present evidence and testimony. The arbitrator's decision is usually final, and courts rarely reexamine it.
In theory, arbitration has many advantages over litigation. Efficiency is perhaps the greatest. Proponents say arbitration is easier, cheaper, and faster. Proponents also point to the greater flexibility with which parties in arbitration can fashion the terms and rules of the process. Furthermore, although arbitrators can be lawyers, they do not need to be. They are often selected for their expertise in a particular area of business, and may be drawn from private practice or from organizations such as the American Arbitration Association (AAA), a national non-profit group founded in 1926. Significantly, arbitrators are freer than judges to make decisions, because they do not have to abide by the principle of stare decisis (the policy of courts to follow principles established by legal precedent) and do not have to give reasons to support their awards (although they are expected to adhere to the Code of Ethics for Arbitrators in Commercial Disputes, established in 1977 by the AAA and the American Bar Association).http://legal-dictionary.thefreedictionary.com/arbitration, visited on 15.07.12.

4 Several dispute resolution alternatives to courts are available. Out of these arbitration is the most commonly used one. The reason lies in its final, binding decision. Other mechanisms like mediation, conciliation depend on the goodwill and the cooperation of the parties. A final and enforceable decision can generally be obtained only by recourse to the courts or by arbitration. Because arbitral awards are not subject to appeal, they are much more likely to be final than the judgments of courts of first instance. Although arbitral awards may be subject to being challenged, the grounds of challenge available against arbitral awards are limited. The award given by the arbitrator is equivalent to a decree of a court of

limited ground of challenge, award being equivalent to a decree of a court of law, international recognition[5], neutrality[6], confidentiality[7], specialized knowledge of arbitrators,[8] party autonomy[9] and being less time consuming[10].

In light of above mentioned advantages and other positive reasons[11] India enacted a new Arbitration and Conciliation Act in 1996 repealing all the previous statutes[12] herein after known as the Act[13]. The new Act has two

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law and the same can be executed directly, without making it a decree of the court

5 Arbitral awards enjoy much greater international recognition than judgments of national courts. About 120 countries have signed the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the "New York Convention". This Convention facilitates enforcement of awards in all contracting states. Besides the New York Convention, there are several other multilateral and bilateral arbitration conventions helping enforcement.

6 Arbitral proceedings are neutral as the parties are on an equal footing as regards place of arbitration, language used, procedure applied, nationality and legal representation. Parties are free to conduct the arbitral proceedings in any country, in any language with arbitrators of any nationality. Parties are completely free to structure out a neutral procedure.

7 Arbitration hearings are not public, and only the parties themselves receive copies of the awards.

8 In our traditional system of litigation, parties are not free to choose their own judges. In arbitration, parties can choose their judges. This makes it possible to refer the matter to persons having specialized knowledge of that field.

9 Party autonomy is paramount in arbitration under the Indian Arbitration & Conciliation Act, 1996. The courts have found that Chapters III to VI, specifically, Section 10 to 33 of Part 1 of the Act, contain curial or procedural law which parties would have autonomy to opt out from.

10 Arbitration is faster than litigation. Parties are free to set up proceedings in such a manner that the matter is quickly resolved. Quick resolution of the matter is also economically viable for the parties.

11 Arbitration is the preferred means of dispute resolution in commercial sphere for it is easier to enforce a foreign arbitral award than a judgment of the Court in international trade. With globalization, the amount of international trade being carried out and international commercial interactions increased calling for worldwide acceptance of arbitration as a means of resolving commercial disputes. India responded to this call by enacting The Arbitration & Conciliation Act, 1996 taking into account the model laws and Rules adopted by the United Nations Commission on international Trade Law (UNCITRAL)

12 Prior to January 1996, the law relating to arbitration was contained in three enactments. The Arbitration Act, 1940 dealt with domestic arbitration while The Arbitration (Protocol & Convention) Act 1937 gave effect to the Geneva Convention (The Convention on the Execution of Foreign Arbitral Awards, Geneva, 26 September 1927) and The Foreign Awards (Recognition & Enforcement) Act 1961 gave effect to the New York Convention (The

significant parts. Part I provides for any arbitration conducted in India and enforcement of awards there under. Part II provides for enforcement of foreign awards. Any arbitration conducted in India or enforcement of award there under (whether domestic or international) is governed by Part I, while enforcement of any foreign award to which the New York Convention or the Geneva Convention applies, is governed by Part II of the Act.

The aim and objective of this Act can be gathered from the Act itself which declares that the Act intends to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards besides providing for conciliation and other incidental matters taking into account the United Nations Commission on International Law (UNCITRAL) Model Law and UNCITRAL Conciliation Rules, 1980. Section 5 of the Act provides the extent of judicial intervention. It specifically states that in matters governed by part I, no judicial authority shall intervene except as provided by part I.

The Act draws a difference between 'Domestic Awards'[14] and 'Foreign Awards'[15], The Act provides that Part I applies when the venue of

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Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958)

[13] The Arbitration and Conciliation Act, 1996 hereinafter referred as ACA.

[14] Section 2(7) of ACA, provides that an arbitral award made under Part I shall be considered as domestic Award.

[15] Section 44 of ACA, defines "foreign award" under the New York Convention Awards to mean an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India on or after the 11th day of October, 1960-

(a) In pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

Section 53 of ACA, Interpretation-dealing with Geneva Convention Awards defines "foreign awards" to mean an arbitral award on differences relating to matters considered as commercial under the law in India made after the 28th day of July, 1924,---

(a) In pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and

(b) Between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and

(c) In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be

arbitration proceedings is in India while part II applies for enforcement of 'foreign arbitral awards'. This paper aims to look into the procedure for enforcement of foreign arbitral awards as envisaged under the Act and as it stands today after a host of judicial decisions altering the law drastically.

II. Procedure for enforcement of Foreign Arbitral Award under the Act

The Act provides the essentials which must be fulfilled before a foreign arbitral award is enforced in India. One of the chief prerequisites is that the foreign arbitral award must be given in a country which is a signatory to either the 1927 Convention on the Execution of Foreign Arbitral Awards or the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards i.e., the Geneva Convention or the New York Convention.[16] The Supreme Court has held that an arbitration award not made in a convention country will not be considered a foreign award.[17] The arbitral award besides being given in a convention country has to arise from a commercial dispute.[18] Further, the foreign arbitral agreement must be in writing, though it need not be in accordance with any particular format. The award must also be valid and should arise from an enforceable commercial

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territories to which the said Convention applies, and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

[16] Some of the countries which have been notified are Austria, Belgium, Botswana, Bulgaria, Central African Republic, Chile, Cuba, Czechoslovak, Socialist Republic, Denmark, Ecuador, Arab Republic of Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Hungary, Italy, Japan, Kuwait, Republic of Korea, Malagasy Republic, Mexico, Morocco, Nigeria, The Netherlands, Norway, Philippines, Poland, Romania, San Marino, Spain, Sweden, Switzerland, Syrian, Arab Republic, Thailand , Trinidad and Tobago, Tunisia, Union of Soviet Socialist Republics, United Kingdom, United States of America etc.

[17] Id. Bharat *Aluminum Co. v. Kaiser Aluminum Technical Service, Inc*., 2012 (9) SCC 552; *Anita Garg v. M/S. Glencore Grain Rotterdam B.V.*, 2011(4) ARBLR 59 (Delhi)

[18] In the case of *RM Investment & Trading v. Boeing*, AIR 1994 SC 1136, the Supreme Court observed that "While construing the expression "commercial" in Section 2 of the Act it has to be borne in mind that the "Act is calculated and designed to sub serve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction.".. The expression "commercial" should, therefore, be construed broadly having regard to the manifold activities which are integral part of international trade today." (Para 12)

agreement, besides being unambiguous.[19] Section 48[20] and 57[21] of the 1996 Act list down the grounds under which an Indian Court can refuse to enforce

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[19] In the case of *Koch Navigation vs. Hindustan Petroleum Corp*, AIR 1989 SC 2198, the Supreme Court held that courts must give effect to an award that is clear, unambiguous and capable of resolution under Indian law.

[20] Section 48 of ACA, Conditions for enforcement of foreign awards.- (1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that---

(a) The parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2)Enforcement of an arbitral award may also be refused if the court finds that-

(a) the subject- matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

[21] Section 57 of ACA, Conditions for enforcement of foreign awards. - (1) In order that a foreign award may be enforceable under this Chapter, it shall be necessary that--- (a) The award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto; (b) The subject-matter of the award is capable of settlement by arbitration under the law of India; (c) The award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure; (d) the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award the pending; (e) the enforcement of the award is not contrary to the public policy or the law of India. Explanation. ---Without prejudice to the generality of clause (e), it is hereby declared, for the avoidance, of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced

a foreign arbitral award. It includes the parties to the agreement being under some incapacity, the agreement being invalid, lack of proper notice of the appointment of the arbitrator or of the arbitral proceedings or being unable to present case, award dealing with a difference falling outside the arbitration agreement, composition of the arbitral authority or the arbitral procedure being contrary to the provisions of law, award being non-binding or being set aside or suspended by competent authority, subject matter of difference is incapable of being settled by arbitration in India and enforcement of the award being against the public policy of India.[22]

Section 47[23] and Section 56[24] lay down the documents which must be made available to the court of competent jurisdiction by the parties

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or affected by fraud or corruption. (2) Even if the conditions laid down in sub-section (1) are fulfilled, enforcement of the award shall be refused if the Court is satisfied that--- (a) The award has been annulled in the country in which it was made; (b) The party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented; (c) the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope for the submission or arbitration; Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the Court may decide. (3) If the party against whom the award has been made proves that under the law governing the arbitration procedure there is a ground, other than the grounds referred to in clauses (a) and (c) of sub-section (1) and clauses (b) and (c) of sub-section (2) entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

[22] The grounds on which a domestic award can be challenged are provided under Section 34 and are similar to the grounds listed under Section 48 of ACA.

[23] Section 47 of ACA, Evidence. - (1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court---- (a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made; (b) the original agreement for arbitration or a duly certified copy thereof; and (c) such evidence as may be necessary to prove that the award is a foreign award. (2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India. Explanation. ---In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include

seeking enforcement of a foreign award which includes the original/duly authenticated copy of the award; the original/duly authenticated copy of the agreement, and such evidence as may be necessary to prove that the award is a foreign award. On fulfilling the statutory conditions as provided under Part II of the Act, a foreign award will be deemed a decree of the Indian court enforcing the award and will be binding for all purposes on the parties subject to the award vide Section 49[25] and 58[26] of the Act. If we look into the grounds for enforcement of a foreign award, we find them to be as per the New York Convention. The only addition is in the form of an 'Explanation' to the grounds of public policy which provides that enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement is contrary to the fundamental policy of Indian law, the interests of India or justice or morality.[27]

So, let us consider two imaginary parties A and B, in countries India and C both of which are party to the New York Convention. A convention award made in country C, if sought to be enforced by B in India is a foreign

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any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

[24] Section 56 of ACA, Evidence. - (1) the party applying for the enforcement of a foreign award shall, at the time of application procedure before the Court---- (a) The original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made; (b) Evidence proving that the award has become final; and (c) Such evidence as may be necessary to prove that the conditions mentioned in clauses (a) and (c) of sub-section (1) of section 57 are satisfied. (2) Where any document requiring to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India. Explanation-In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

[25] Section 49 of ACA, Enforcement of foreign awards. - Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

[26] Section 58 of ACA, Enforcement of foreign awards. - Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the Court.

[27] Enforcement of foreign award- For enforcement of a foreign award, there is no need to take separate proceedings such as one for deciding enforceability of award to make rule of court or decree and other to take up execution thereafter; *Fuerst Day Lawson Ltd. v. Jindal Export Ltd*., AIR 2001 SC 2293.

award under the provisions of the Act. If B intends to enforce the award the laws applicable will be the Civil Procedure Code, 1906; Indian Evidence Act, 1872, The Limitation Act, 1963[28] and The Arbitration and Conciliation Act, 1996. After finding out the Court having jurisdiction (both pecuniary as well as territorial), B must file an application for enforcement.[29] While filing application B has to fulfill the conditions of Section 47 as discussed above. The court will send a notice to A. A can raise objections on the grounds mentioned under Section 48. If A challenges the enforceability of the award the burden of proof lies on A. If A does not challenge the award, the court will enforce the award. If there are no challenges to the award or if the challenges are not proved and the Court is of the opinion that the award ought to be enforced, it will enforce the award.[30] The execution of the award will be governed by Order 21, Rule 10 of the Civil Procedure Code, 1908 and a plea for it can be made in the application made to the Court for enforcement of the award.[31]

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[28] Section 43 of the ACA, provides that The Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Courts. A foreign award is treated as a decree. As the limitation period for execution of a decree is twelve years so the limitation period for the execution of a foreign award will be likewise twelve years.

[29] The Indian Supreme Court in *Brace Transport Corp of Monrovia v. Orient Middle East lines Ltd.* (1995 Supp (2) SCC 280) has held that enforcement proceedings can be brought wherever the property of the losing party may be situated.

[30] Awarded has been set aside- An interim award was made at London by an arbitral tribunal constituted by the international Chamber of Commerce. The agreement was made at New Delhi and agreement was governed by the law in force in India. Court held that the law expressly choosen by the parties in respect of all matters arising under their contract, which must necessarily include the agreement contained in the arbitration clause, being Indian law and the exclusive jurisdiction of the courts in Delhi having been expressly recognised by the parties to the contract in all matters arising under it, and the contract being most intimately associated with India, the proper law of arbitration and the competent courts are both exclusively Indian, while matters of procedure connected with the conduct of arbitration are left to be regulated by the contractually chosen rules of the ICC to the extent that such rules are not in conflict with the public policy and the mandatory requirements of the proper law and of the place of arbitration; *National Thermal Power Corpn. v. Singer Co*., AIR 1993 SC 998.

[31] Invalidity of the arbitration agreement- A foreign award will not be enforced if it is proved by the party against whom it is sought to be enforced that the parties to the agreement were, under the law applicable to them, under some incapacity, or, the agreement was not valid under the law to which the parties have subjected it, or, in the absence of any indication thereon, under the law of the place of arbitrations; or there was no due compliance with the rules of fair hearing; or the award exceeded the scope of the submission to arbitration; or the composition of the arbitral authority or its procedure was not in accordance with the agreement

III. Changes introduced by Judicial Interpretation

On January 10, 2008, the Supreme Court issued an important decision in the case *Venture Global Engineering v. Satyam Computer Services Ltd.*[32] regarding the enforcement in India of foreign arbitral awards. The case arose from a challenge in India by an *US company, Venture Global Engineering* (VGE) to set aside an award rendered against it in an arbitration proceeding in London under the rules of the LCIA. VGE's challenge asserted that the relief in the award violated certain Indian corporate and foreign investment statutes, specifically the Foreign Exchange Management Act, 1999, and therefore constituted a 'conflict with the public policy of India" pursuant to the general provisions contained in Section 34[33] of Part I

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of the parties, or, failing such agreement, was not in accordance with the law of the place of arbitration; or the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority or the country in which, or under the law of which, that award was made. The award will not be enforced by a court in India if it is satisfied that the subject matter of the award is not capable of settlement by arbitration under Indian law or the enforcement of the award is contrary to the public; *National Thermal Power Corpn. v. Singer Co.*, AIR 1993 SC 998.

[32] AIR 2008 SC 1061

[33] Section 34 of ACA, Application for setting aside arbitral award. - (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3). (2) An arbitral award may be set aside by the Court only if (a) The party making the application furnishes proof that (i) A party was under some incapacity, or (ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matter beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Past; or (b) the Court finds that------ (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or (ii) the arbitral award is in conflict with the public policy of India. Explanation. ---Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced of affected by fraud or corruption or was in violation of section 75 or section 81. (3) An application for setting aside may not be made

of the Arbitration Act. Elaborating upon why it is not contrary to law to set aside a foreign arbitral award, the court contended "in any event, to apply Section 34 to foreign international awards would not be inconsistent with section 48 of the Act, or any other provision of Part II as a situation may arise, where, even in respect of properties situated in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in India through personal compliance of the judgment-debtor and by holding out the threat of contempt as is being sought to be done in the present case. The Supreme Court upheld a challenge in India to a foreign arbitration award on the grounds that the relief contained in the award violated certain Indian statutes and was therefore contrary to Indian public policy pursuant to part I of India's Arbitration and Conciliation Act, 1996. In this case the Supreme Court ruled that the broadly interpreted public policy considerations which were previously grounds for challenging domestic arbitration awards would also apply to foreign arbitral awards. In such an event, the judgment-debtor cannot be deprived of his right under Section 34 to invoke public policy of India, to set aside the award. As observed earlier, the public policy of India includes- (a) the fundamental policy of India; or (b) the interest of India; or (c) justice or morality; or (d) in addition, if it is patently illegal. This extended the definition of public policy can be bypassed by taking the award to be foreign country for enforcement."[34]

The court based its decision on an earlier judgment in *ONGC v. Saw Pipes Ltd.*[35] (two judge's bench) wherein an award was challenged on the ground that the arbitral tribunal had incorrectly applied the law of the land in rejecting a claim for liquidated damages. The Supreme Court had expanded the concept of public policy to add that the award would be contrary to public policy if it was "patently illegal" and can be challenged on the ground that "the provisions of the Act (i.e. Arbitration Act) or any other substantive

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after three months have elapsed from the date on which the party making that application had received the arbitral award, or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months if may entertain the application within a further period of thirty days, but not thereafter. (4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

[34] Para 19, supra n. 29.

[35] AIR 2003 SC 2629.

law governing the parties or is against the terms of the contract". The court went ahead and decided the case on merits.

The ONGC judgment had been previously widely criticized[36] as being contrary to the ratio of *Renusagar Power Plant Co. Ltd. v General Electric Co.*[37] (three judge's bench) wherein the court had narrowly construed the expression "public policy" and had observed that "It is obvious that since the Act is calculated and designed to sub serve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration, any expression or phrase occurring therein should receive, consisting with its literal and grammatical sense, a liberal construction"[38], the Supreme Court distinguished SAW Pipes case from that of *Renusagar* case on the ground that the *Renusagar* case judgment was in the context of a foreign award, while the ratio of SAW Pipes would be confined to domestic awards only. This decision has created a new ground for challenge to a foreign award. A foreign arbitral award will have to pass the New York Convention grounds under Section 48 of the 1996 Act besides passing the expanded 'public policy' ground under Section 34 of the Act. As mentioned earlier, a very vital difference between domestic and foreign award is that there is no provision under the 1996 Act to set aside a foreign award. In relation to a foreign award, the Indian Courts may only enforce it or refuse to enforce it. They cannot set it aside. Further, the Act does not envisage inclusion of provisions for appeal against rejection of objections to the enforcement of the award by the court. The Act allows appeal only against court orders holding the award to be non-enforceable. However, the Court in Venture Global Case went ahead to hold that it is possible to set aside a foreign award in India applying the provision of Section 34 of Part I of the Act doing away with the fundamental difference between a domestic award and

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[36] Efforts to go for damage control was seen in the case of *McDermott International Inc vs. Burn Standard Co. Ltd*. (2006 (11) SCC 181 at 208, where it was held:

"…… The 1996 Act makes provision for the supervisory role of the courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only. The court cannot correct the errors of arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provisions aims at keeping the supervisory role of the court to the minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

[37] AIR 1994 SC 860

[38] It held that an award would be contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

a foreign award. The effect of this judgment is that statutory mechanism for enforcement of foreign awards is replaced by judge-made law. This decision is also against the spirit of *Renusagar* case which was a larger three bench decision besides violating the Saw Pipes decision which had restricted the expanded interpretation of public policy to domestic awards only. Besides the decision goes against the spirit of the court which has in an earlier decision given a broad meaning to the term "commercial relationship"[39] to accommodate more business relations within the net of arbitration, giving a boost to the country's financial system. After all the track record of a country's judiciary is a key factor in influencing decisions of investment in a country.

In *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*,[40] the Supreme Court discussed the concept of arbitrability in detail and held that the term 'arbitrability' had different meanings in different contexts: (a) disputes capable of being adjudicated through arbitration, (b) disputes covered by the arbitration agreement, and (c) disputes that parties have referred to arbitration. It stated that in principle, any dispute than can be decided by a civil court can also be resolved through arbitration. However, certain disputes may, by necessary implication, stand excluded from resolution by a private forum. Such non-arbitrable disputes include: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, or child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes. Also, the Supreme Court has held in *N. Radhakrishnan v. M/S Maestro Engineers*,[41] that, where fraud and serious malpractices are alleged, the matter can only be settled by the court and such a situation cannot be referred to an arbitrator. The Supreme Court also observed that fraud, financial malpractice and collusion are allegations with criminal repercussions and as an arbitrator is a creature of the contract, he has limited jurisdiction. The courts are more equipped to adjudicate serious and complex allegations and are competent in offering a wider range of reliefs to the parties in dispute.

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[39] In *R.M. Investments Trading Co. Pvt. Ltd. v. Boeing Co. & Anr*, AIR 1994 SC 1136, the court held "The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not..."

[40] 2011 (5) SCC 532.

[41] 2010 (1) SCC 72.

But the Supreme Court in *Swiss Timing Limited v. Organizing Committee, Commonwealth Games 2010, Delhi*,[42] and World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Ltd,[43] held that allegations of fraud are not a bar to refer parties to a foreign-seated arbitration and that the only exceptions to refer parties to foreign-seated arbitration are those which are specified in Section 45 of Act. For example in cases where the arbitration agreement is either firstly null or void; secondly inoperative; or thirdly incapable of being performed. Thus, it seemed that though allegations of fraud are not arbitrable in ICA's with a seat in India the same bar would not apply to ICA's with a foreign seat. Supreme Court in *A Ayyasamy v. A Paramasivam*,[44] has clarified that allegations of fraud are arbitrable as long as it is in relation to simple fraud. In A Ayyasamy, the Supreme Court held that: (a) allegations of fraud are arbitrable unless they are serious and complex in nature; (b) unless fraud is alleged against the arbitration agreement, there is no impediment in arbitrability of fraud; (c) the decision in Swiss Timing did not overrule Radhakrishnan. The judgment differentiates between 'simplicitor fraud' and 'serious fraud', and concludes while 'serious fraud' is best left to be determined by the court, 'simplicitor fraud' can be decided by the arbitral tribunal. However, in *Vimal Shah v Jayesh Shah*, the Supreme Court has held that disputes arising out of Trust Deeds and the Indian Trusts Act, 1882 cannot be referred to arbitration.[45]

IV. Amendment in Arbitration And Conciliation Act, 1996[46]

The Arbitration and Conciliation (Amendment) Act 2015 came into effect on 2016 introduces a paradigm shift in the mode and method of grant of interim measures in an arbitration proceeding. Recent judicial decisions[47] had held that Part I of the Act which, inter alia, includes provisions on seeking interim reliefs before a Court in India would not apply to foreign seated arbitrations. The Amendment Act 2016 has inserted a proviso to section 2 of the Act, whereby, sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of Section 37 (all falling in Part I of the Act) have been made applicable to international commercial arbitrations, even if the

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42 2014 (6) SCC 677.

43 AIR 2014 SC 968.

44 (2016) 10 SCC 386.

45 Civil Appeal No. 8164 of 2016 (Arising out of SLP (C) No. 13369 of 2013).

46 The Arbitration and Conciliation Act, 1996 ("Act") has been amended by the Arbitration and Conciliation (Amendment) Amendment Act 2016, 2015 ("Amendment Act 2016"), promulgated by the President of India on October 23, 2015. http://www.indiacode.nic.in/acts-in-pdf/2016/201603.pdf visited on 12.12.16.

47 *Bharat Aluminum Co v. Kaiser Aluminum Technical Services*, Supreme Court (2012) 9 SCC 552.

place of arbitration is outside India. As a result a party to an arbitration proceeding will be able to approach Courts in India for interim reliefs before the commencement of an arbitration proceeding, even if the seat of such arbitration is not in India.

Importantly, under the newly inserted section 9(3), a Court cannot, as a matter of course, entertain an application for interim measure once an arbitral tribunal has been constituted, unless the Court finds that circumstances exist which may not render the remedy available under section 17 of the Act, i.e. approaching the arbitral tribunal for interim measures, efficacious. The intention of the Legislature is to limit the involvement of Courts in an arbitration proceeding thereby making such proceedings swift and effective.

Another important change introduced by the Amendment Act 2016 is the power of an arbitral tribunal to grant interim reliefs. Though the original section 17 of the Act afforded an arbitral tribunal the power to grant interim measures, it definitely did lack the saber-tooth. In this regard the Supreme Court of India had held that though section 17 of the Act gave an arbitral tribunal the power to pass interim orders, but the same could not be enforced as an order of a Court[48]. The Amendment Act 2016 has substituted section 17 by a new section which ensures that an order passed by an arbitral tribunal under section 17 will now be deemed to be an order of the Court and shall be enforceable under the Code of Civil Procedure, 1908. Moreover, as discussed above, once the arbitral tribunal is constituted, all applications seeking interim measures would now be directed to it and not the Court.

In order to discourage litigants, who obtain an interim order under section 9 of the Act, but do not commence arbitration proceedings, for those cases a timeline of 90 (ninety) days to commence arbitration proceedings after obtaining an order under section 9 of the Act has been introduced. An application to set aside an arbitral award under Section 34 of the Act has to be disposed of by the Court within a period of 1 (one) year from its filing. The Amendment Act 2016 provides that the Chief Justice of the High Court or the Chief Justice of the Supreme Court of India, in an application for appointment of an arbitrator, can only confine themselves to ascertaining that a valid arbitration agreement exists. Such application is required to be disposed of within a period of 60 (sixty) days. As far as arbitration proceedings are concerned, newly introduced section 29A of the Act mandates completion of arbitration proceedings within a period of 12 (twelve) months of entering into a reference. Amended section 12 of the Act

[48] *M/s. Sundaram Finance v. M/s. NEPC India Ltd.*, AIR 1999 SC 565, and *M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.*, AIR 2004 SC 1344.

now requires an arbitrator to make a specific disclosure if there are circumstances which would affect his ability to complete the arbitration proceeding within the period of 12 (twelve) months.

Further, amended section 24 of the Act now empowers the arbitrator to impose exemplary costs on a party that seeks an adjournment before the arbitral tribunal without citing sufficient cause. The parties to an arbitration may, however, by consent, extend the period for making an arbitration award for a further period not exceeding 6 (six) months. In case of expiry of the extended period, the mandate of the arbitral tribunal will stand terminated, unless a Court grants a further extension of the period, upon an application of the parties to the arbitration proceeding. When the Court grants an extension of time as above, it may substitute some or all of the arbitrators. The Amendment Act 2016 introduces a fast track arbitration proceeding.

Newly introduced section 29B of the Act provides for an option whereby the parties to an arbitration agreement may mutually decide to appoint a sole arbitrator who decides the dispute on the basis of written pleadings, documents and submissions. Oral hearing and technical formalities may be dispensed with for the sake of an expeditious disposal. An award has to be rendered within a period of 6 (six) months of entering into a reference. Section 34 of the Act provides that an arbitral award may be set aside if it is contrary to 'public policy'. The Supreme Court of India in *ONGC v. Saw Pipes*[49] (2003) had expanded the test of 'public policy' to mean an award that violates the statutory provisions of Indian law or even the terms of the contract in some cases. Such an award would be considered as 'patently illegal' and therefore in violation of public policy. This interpretation practically afforded the losing party an opportunity to re-agitate the merits of the case. Though in a very recent judgment, the Supreme Court noted that while the merits of an arbitral award can be scrutinized when a challenge is made on grounds that an arbitral award has violated 'public policy, there were limitations as to the extent to which, such a re-evaluation can be conducted.

The Amendment Act 2016, however, clarifies that an award will be in conflict with the public policy of India, only in certain circumstances, such as if the award is induced or affected by fraud or corruption, or is in contravention with the fundamental policy of Indian law, or is in conflict with the most basic notions of morality or justice. Further, the Amendment Act 2016 provides that a determination of whether there is a contravention with the fundamental policy of Indian law cannot entail a review of the merits of the dispute. This amendment seeks to limit the re-appreciation of the merits of the dispute at the stage of challenge to the award before the

[49] Appeal (civil) 7419 (2001) of 518.

Court. Hence, the Legislature has fundamentally reduced the scope of the inquiry by the judiciary into the question of violation of 'public policy'.

The Amendment Act 2016 provides that the mere filing of an application challenging an arbitration award would not automatically stay the execution of the award. The execution of an award will only be stayed when the Court passes any specific order of stay on an application by a party to the proceeding. The Amendment Act 2016 gives foremost importance to the impartiality of an arbitrator. Original Section 12 of the Act necessitated an arbitrator to disclose in writing circumstances likely to give rise to justifiable doubts as to his independence or impartiality. The Amendment Act 2016 specifies in elaborate detail the circumstances which may lead to such justifiable doubts. The newly inserted fifth schedule of the Act lists 34 (thirty four) such grounds which shall act as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. It is now important to see how proximate the arbitrator is to a party to the proceeding and/or the party's lawyer.

In a very significant step, the Amendment Act 2016 provides a cap on the fees to be paid to an arbitrator, barring international commercial arbitrations and institutional arbitrations. The amendment to Section 11 of the Act empowers the concerned High Court to frame rules to determine the fees of the Arbitral Tribunal and the mode of such payment. The rates specified in the newly inserted fourth schedule have to be considered.

The Definition of 'Court' in Original Section 2(e) of the Act provided a single definition of "Court", which meant a District Court, or the High Court exercising its ordinary original civil jurisdiction, as the case may be. The Amendment Act 2016, however, bifurcates the definition and clearly specifies that unlike other arbitrations, in case of international commercial arbitrations; only a High Court exercising its ordinary original civil jurisdiction will qualify as a "Court".

V. Concluding remarks

Hopefully the amendment has made landmark changes to the 1996 Act and it will plug the loopholes which were there in the parent Act. From 2012 to 2016, the Supreme Court delivered various landmark rulings taking a much needed pro-arbitration approach such as declaring the Indian arbitration law to be seat-centric; removing the Indian judiciary's power to interfere with arbitrations seated outside India; referring non-signatories to an arbitration agreement to settle disputes through arbitration; defining the scope of public policy in foreign-seated arbitration; and determining that even fraud is arbitrable. As enumerated earlier, the purpose of the Act was to further the aims of domestic arbitration and international commercial arbitration besides providing for enforcement of foreign awards, conciliation

etc. A chief advantage associated with arbitration is its final, binding nature along with limited grounds of challenge. Acknowledgment of this advantage associated with arbitration had lead demands for a uniform legal system pertaining to arbitration, making India enact the 1996 Act. So any judicial interpretation of the provisions of the Act must keep this aim in mind. This aim calls for limited judicial scrutiny rather than going on to decide a case on merits broadening the frontiers of the acceptable grounds of supervision. The need of the hour is judicial restraint to harness India's image as an Investor friendly State.