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GATEKEEPERS OF GLOBAL COMMERCE
INTERNATIONAL COMMERCIAL ARBITRATION AND THE ENFORCEMENT OF FOREIGN AWARDS UNDER INDIAN LAW

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ABSTRACT

This article examines the statutory framework and judicial interpretation of international commercial arbitration and enforcement of foreign awards under the Arbitration and Conciliation Act, 1996. It analyses key provisions including the definition of international commercial arbitration, applicability of Part I, appointment of arbitrators, seat and venue determination, party autonomy, and the grounds for enforcement and refusal of foreign awards. The article draws upon landmark judgments of the Supreme Court of India to elucidate the evolving jurisprudence in this field.

INTRODUCTION

International commercial arbitration has emerged as the preferred mechanism for resolving cross-border commercial disputes, offering parties neutrality, flexibility, and enforceability across jurisdictions. India's legislative framework, primarily the Arbitration and Conciliation Act, 1996 ("the Act"), implements the UNCITRAL Model Law and the New York Convention to facilitate international commercial arbitration and ensure the enforcement of foreign awards. This article provides a comprehensive analysis of the statutory provisions and judicial interpretations governing this area of law.

STATUTORY FRAMEWORK

The Act provides a comprehensive statutory framework for international commercial arbitration and enforcement of foreign awards. Key provisions include Section 2(f) defining 'International Commercial Arbitration', Section 2(2) addressing applicability of Part I, Section 11 concerning appointment of arbitrators, Section 20 regarding place of arbitration, Section 28

on applicable law, Section 29A prescribing time limits, and Sections 44–60 dealing with foreign awards.[1]

DEFINITION OF INTERNATIONAL COMMERCIAL ARBITRATION

LEGAL RELATIONSHIP

Section 2(f) of the Act defines international commercial arbitration by reference to disputes arising out of legal relationships, whether contractual or not, considered commercial under Indian law. In *Vidya Drolia v. Durga Trading Corp.*,[2] the Supreme Court expounded on 'legal relationship', holding that it means a relationship giving rise to legal obligations and duties conferring rights, which may be contractual or non-contractual. The Court observed that non-contractual disputes require a separate submission of arbitration agreement based on causes of action arising in tort, restitution, breach of statutory duty, or other non-contractual causes.[3]

COMMERCIAL RELATIONSHIP

In *RM Investment & Trading Co. (P) Ltd. v. Boeing Co.*,[4] the Supreme Court held that the expression 'commercial' should be construed broadly, having regard to the manifold activities integral to international trade. The Court drew assistance from the UNCITRAL Model Law, which includes commercial representation, agency, and consulting within the ambit of commercial relationships.[5]

FOREIGN-SEATED ARBITRATION BETWEEN INDIAN PARTIES

A significant development occurred in *Pasl Wind Solutions v. GE Power Conversion*,[6] where the Supreme Court addressed whether two Indian companies could choose a foreign seat of arbitration and whether such an award constitutes a 'foreign award' enforceable under Part II of the Act. The Court answered affirmatively, relying on (i) party autonomy;[7] (ii) Section 44's

[1]Arbitration and Conciliation Act, 1996, §§ 2(f), 2(2), 11, 20, 28, 29A, 44–60 (India).

[2](2021) 2 SCC 1, cited with approval in *Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd.*, (2022) 1 SCC 753.

[3]*Id.*

[4]*RM Investment & Trading Co. (P) Ltd. v. Boeing Co.*, (1994) 4 SCC 541.

[5]*Id.* at paras. 12, 14.

[6]*Pasl Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd.*, (2021) 7 SCC 1.

[7]*Id.* at paras. 88–91.

reference to 'persons' without nationality restrictions; and (iii) the absence of any prohibition on Indian parties adjudicating disputes through foreign-seated arbitration. However, the Court clarified that awards contrary to India's fundamental policy would not be enforced under Section 48.[8] This decision must be contrasted with *TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.*,[9] where the Court held that Indian nationals cannot derogate from Indian law.

APPLICABILITY OF PART I TO INTERNATIONAL COMMERCIAL ARBITRATIONS

Section 2(2) of the Act provides that Part I applies only to arbitrations where the place of arbitration is India, subject to the proviso added on 23 October 2015. The judicial journey concerning this provision is instructive.

The Bhatia International Era

In *Bhatia International v. Bulk Trading,*[10] the Supreme Court held that Part I would apply even to foreign-seated arbitrations, adopting a literal interpretation that avoided 'hardship, serious inconvenience, injustice, absurdity'. This decision occupied the field until 2012.

The Balco Overruling

In *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services* ('*Balco*'),[11] a larger bench overruled *Bhatia International*, holding that Section 9 is limited to arbitrations taking place in India. The Court reasoned that parties choosing a foreign seat understand the consequences, including the supervisory jurisdiction of foreign courts.[12] The law was applied prospectively.

Legislative Intervention

The 2015 amendment added a proviso to Section 2(2), legislatively nullifying *Balco* to the extent that Sections 9, 27, and 37(1)(a) and (3) apply to international commercial arbitrations even with a foreign seat, subject to contrary agreement. In *Heligo Charters Private Ltd. v.*

[8]*Id.* at para. 86.

[9]*But see TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.*, (2008) 14 SCC 271 (holding that Indian nationals cannot derogate from Indian law by choosing a foreign seat).

[10]*Bhatia International v. Bulk Trading SA*, (2002) 4 SCC 105.

[11]*Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, Inc.*, (2012) 9 SCC 552 [hereinafter *Balco*].

[12]*Id.* at paras. 158, 172–75.

Aircon Feibars FZE,[13] the Bombay High Court held that interim relief under Section 9 is available for foreign-seated arbitrations without waiting for the award or the filing of execution proceedings.

Appointment of Arbitrators

Section 11 of the Act governs appointment of arbitrators. In *Malaysian Airlines v. STIC Travels*,[14] the Supreme Court held that appointing an arbitrator of a nationality different from the parties is not mandatory, though it enhances independence and neutrality. Subsequently, in *Reliance Industries Ltd. v. Union of India*,[15] the Court held that in international arbitration, the surest method of ensuring neutrality is appointing a sole or third arbitrator from a different nationality. This was reiterated in *Lombardi Engineering Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.*[16]

SEAT AND VENUE OF ARBITRATION

Section 20 distinguishes between 'place of arbitration' (Section 20(1)) and venue for hearings, witness examination, or inspection (Section 20(3)). In *Mankastu Impex (P) Ltd. v. Airvisual Ltd.*,[17] the Supreme Court explained that the seat determines applicable law, procedure, and judicial review. The Court held that 'seat' and 'venue' cannot be used interchangeably, and the mere expression 'place of arbitration' does not determine the seat; intention must be ascertained from other clauses and conduct.[18] In *Enercon (India) Ltd. v. Enercon GmbH*,[19] where the parties agreed to Indian law but designated London as the place, the Court held that India was the seat and London merely a venue. *BBR (India) (P) Ltd. v. SP Singla Constructions (P) Ltd.*[20] established that once the seat is fixed under Section 20(2), it remains static, while the venue

[13]*Heligo Charters Private Ltd. v. Aircon Feibars FZE*, 2018 SCC OnLine Bom 1388 (Bom. H.C.).

[14]*Malaysian Airlines v. STIC Travels (P) Ltd.*, (2001) 1 SCC 509.

[15]*Accord Reliance Industries Ltd. v. Union of India*, (2014) 11 SCC 576 (holding that appointing a sole or third arbitrator of a different nationality is the surest means of ensuring neutrality).

[16]*Accord Lombardi Engineering Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.*, (2024) 4 SCC 341.

[17]*Mankastu Impex (P) Ltd. v. Airvisual Ltd.*, (2020) 5 SCC 399.

[18]*Id.*

[19]*Enercon (India) Ltd. v. Enercon GmbH*, (2014) 5 SCC 1.

[20]*BBR (India) (P) Ltd. v. SP Singla Constructions (P) Ltd.*, (2023) 1 SCC 693.

may change without altering the seat.[21] *BGS SGS Soma JV v. NHPC Ltd.*[22] described the seat as the 'centre of gravity', permitting hearings at convenient locations without changing the seat, particularly in international arbitrations involving diverse nationalities.

PARTY AUTONOMY

Party autonomy, though not expressly used in the Act, is its guiding spirit. In *Balco*,[23] the Court held that parties are free to agree on the law governing the contract, the arbitration agreement, and the conduct of the arbitration. However, *Lombardi Engineering Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.*[24] laid down limits, holding that party autonomy cannot violate fundamental constitutional rights. The Court approved *Lite Bite Foods Pvt. Ltd. v. Airport Authority*,[25] where a precondition of depositing 7% of the claimed amount before invoking arbitration was held arbitrary and unjust. Similar observations appear in *ICOMM v. Punjab State Water Supply*[26] and *SK Jain v. State of Haryana*.[27]

LAW GOVERNING THE ARBITRATION

Section 28(b) addresses applicable substantive law. Section 28(b)(i) respects party designation; Section 28(b)(ii) construes references to a legal system as substantive law, excluding conflict rules; and Section 28(b)(iii) empowers the tribunal to apply appropriate law absent designation.

In *Yograj Infrastructure Ltd. v. Ssang Yong Engineering & Construction Co. Ltd.*,[28] the Court distinguished the 'proper law' of the contract from the 'curial law' governing arbitration. Where the parties agreed to SIAC Rules, those rules constituted the curial law. *Mankastu Impex*[29] reiterated that the seat determines applicable law, procedure, and judicial review. *National Thermal Power Corp. v. Singer Co.*[30] applied the 'closest and most intimate

[21] *Id.* at para. 30.

[22] *BGS SGS Soma JV v. NHPC Ltd.*, (2020) 4 SCC 234.

[23] *Balco*, *supra* note 11, at para. 5.

[24] *Lombardi Engineering Ltd.*, *supra* note 16.

[25] *Lite Bite Foods Pvt. Ltd. v. Airport Authority*, 2020 SCC OnLine Ker 4736 (Ker. H.C.).

[26] *Accord ICOMM Tele Ltd. v. Punjab State Water Supply & Sewerage Board*, (2019) 4 SCC 401.

[27] *See also SK Jain v. State of Haryana*, (2009) 4 SCC 357.

[28] *Yograj Infrastructure Ltd. v. Ssang Yong Engineering & Construction Co. Ltd.*, (2012) 12 SCC 359.

[29] *Mankastu Impex*, *supra* note 17.

[30] *National Thermal Power Corp. v. Singer Co.*, (1992) 3 SCC 551.

connection' test under the 1940 Act, holding that the proper law of arbitration is normally the same as the contract's proper law, with a rebuttable presumption that the law of the arbitration seat governs. However, *Arif Azim Co. Ltd. v. Micromax Informatics*[31] held that the 'closest connection' test is no longer viable, and the *Shashoua* principle[32] applies: where a venue is designated without contra-indication, the venue constitutes the seat.

ENFORCEMENT OF FOREIGN AWARDS

INGREDIENTS OF A FOREIGN AWARD

Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd.[33] identified six ingredients for a foreign award: (i) an award on differences between persons arising from legal relationships; (ii) differences that are contractual or non-contractual; (iii) a commercial legal relationship under Indian law; (iv) an award made on or after 11 October 1960; (v) a New York Convention award made pursuant to a written agreement; and (vi) an award made in a territory notified by the Central Government.[34]

PREREQUISITES FOR ENFORCEMENT

The prerequisites include producing the original award or an authenticated copy, the original arbitration agreement or a certified copy, and evidence proving that the award is foreign.[35] The words 'furnished proof' in Section 48 include documentary evidence, not merely oral testimony, so as to promote expeditious disposal.[36]

PRO-ENFORCEMENT BIAS

The New York Convention, as adopted by the Act, carries a 'pro-enforcement bias'. Grounds under Sections 48(1)(a)–(e) must accordingly be construed narrowly, not expansively.[37]

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[31] *But see Arif Azim Co. Ltd. v. Micromax Informatics FZE*, 2024 SCC OnLine SC 3212 (holding that the "closest connection" test is no longer viable).

[32] *See Shashoua v. Sharma*, [2009] EWHC 957 (Comm) (Eng.).

[33] *Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd.*, (2022) 1 SCC 753.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

PUBLIC POLICY

Shri Lal Mahal Ltd. v. Progetto Grano SpA[38] addressed whether the wider meaning of 'public policy' under Section 34 (per *ONGC Ltd. v. Saw Pipes*[39]) applies to Section 48. The Court referred to *Renusagar Power Co. Ltd. v. General Electric Co.*[40] and held that the narrow meaning applies to Section 48, since Section 34 tests an award's sustainability while Section 48 tests only its enforceability.

RESIDUAL DISCRETION AND EXHAUSTIVE GROUNDS

In *Balco,*[41] the Court held that 'may be' in Section 48 indicates a residual discretion to enforce an award despite objections if overall justice has been done.[42] The grounds for refusal are exhaustive.[43] The curial law is determined by the seat, with the seat courts exercising supervisory jurisdiction and the enforcement courts exercising secondary jurisdiction.[44] Merely because a foreign award was upheld by the seat courts does not preclude Indian courts from examining public policy objections.[45]

CLASSIFICATION OF GROUNDS

Vijay Karia v. Prysmian[46] exhaustively analysed Section 48, holding: (i) the fundamental policy test does not entail a merits review;[47] (ii) patent-illegality grounds are outside the scope of international commercial arbitration awards;[48] (iii) grounds are classified into jurisdictional, party-interest, and public-policy categories, with the available discretion varying

[38]*Shri Lal Mahal Ltd. v. Progetto Grano SpA*, (2014) 2 SCC 433.

[39]*ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705 (adopting the wider meaning of "public policy" under Section 34).

[40]*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644.

[41]*Balco*, *supra* note 11.

[42]*Id.* at para. 83.12.

[43]*Id.* at para. 83.13.

[44]*Id.* at para. 92.3.

[45]*Id.* at para. 94.

[46]*Vijay Karia v. Prysmian Cavi E Sistemi S.r.l.*, (2020) 11 SCC 1.

[47]*Id.* at para. 42.

[48]*Id.* at para. 43.

accordingly;[49] (iv) the grounds are watertight;[50] (v) 'may' can mean 'shall' or connote a residual discretion depending on context;[51] and (vi) 'unable to present his case' is a facet of natural justice breached only by denial of a fair hearing.[52]

LIMITATION AND SCOPE

Union of India v. Vedanta Ltd.[53] held that the limitation period for enforcement is governed by Article 137 of the Limitation Act (three years).[54] Indian courts cannot set aside foreign awards; they can only refuse enforcement under Section 48.[55]

ENFORCEMENT PROCEEDINGS

The enforcement court exercises 'secondary' jurisdiction, examining challenges under Section 48 without being bound by the seat court's findings.[56] The merits of an award are not open to review; errors of judgment are insufficient grounds for refusal.[57] The onus lies on the party resisting enforcement.[58]

Section 46 mandates that foreign awards are binding for all purposes.[59] The Act prescribes a specific mode of enforcement, requiring satisfaction that the award is enforceable under Sections 46–49.[60]

GROUNDS FOR REFUSAL

Section 48(1) permits refusal where (i) a party was under incapacity or the agreement was invalid; (ii) there was improper notice or an inability to present one's case; (iii) the award deals

[49] *Id.* at paras. 58–59.

[50] *Id.* at para. 51.

[51] *Id.* at paras. 52–57, 59.

[52] *Id.* at para. 81.

[53] *Union of India v. Vedanta Ltd.*, (2020) 1 SCC 1.

[54] *Id.* at para. 76.

[55] *Id.* at para. 83.11.

[56] *Vijay Karia*, *supra* note 46.

[57] *Id.*

[58] *Id.*

[59] Arbitration and Conciliation Act, 1996, § 46 (India).

[60] *Id.* §§ 46–49.

with differences beyond the submission; (iv) the composition or procedure was not in accordance with the agreement; or (v) the award is not binding, or has been set aside or suspended. Section 48(2) permits refusal where the subject matter is not arbitrable or enforcement would conflict with public policy, including on grounds of fraud or corruption.[61]

PUBLIC POLICY DOCTRINE

Public policy is a branch of the common law governed by precedent, invoked only in clear cases of harm to the public.[62] Mere contravention of law does not attract the bar; the award must be contrary to the fundamental policy of Indian law, the interests of India, or justice and morality.[63]

CONCLUSION

The Indian legal framework for international commercial arbitration and the enforcement of foreign awards has evolved significantly through judicial interpretation and legislative amendment. The Act, implementing the UNCITRAL Model Law and the New York Convention, provides a robust mechanism while respecting party autonomy and maintaining narrow grounds for refusal. The jurisprudence balances a pro-enforcement bias with public-policy considerations, ensuring that India remains an arbitration-friendly jurisdiction while protecting fundamental legal principles.

[61] *Id.* § 48.

[62] *Vijay Karia*, *supra* note 46.

[63] *Id.*