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THE CHANGING STANCE OF THE INDIAN JUDICIARY TOWARDS DOMESTIC ARBITRATIONS WITH A FOREIGN SEAT

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Abstract

The principle of party autonomy upon which the Arbitration and Conciliation Act, 1996 is founded, allows parties the freedom to choose their seat of arbitration. The seat of arbitration determines the supervisory jurisdiction of courts during the arbitration proceedings. While the freedom to choose the seat of arbitration is unfettered for the International commercial arbitrations, as defined under the statute, the same does not apply for two or more Indian parties. The Indian courts have restricted domestic parties from choosing a foreign seat of arbitration, as that would allegedly allow domestic parties to circumvent the substantive Indian laws and thereby, derogate from the same. Thus, as a matter of public policy, domestic parties have often been disentitled from choosing a foreign seat of arbitration. In doing so, not only the courts have conflated the law of the seat with the substantive law of the arbitration agreement but have also put an unjustifiable restriction on autonomy of the domestic parties choosing a foreign seat of arbitration. However, this position so adopted by the courts, seems to be changing as was seen in the recent Delhi High Court judgment of GMR Energy Limited v. Doosan Power Systems India. This paper discusses the contentious issue of restricting domestic parties from choosing a foreign seat of arbitration on public policy grounds, using various case laws, including the latest Delhi High court judgment. The paper contrasts the Indian legal regime with the English, on domestic parties choosing a foreign seat of arbitration, to suggest some features of the English Arbitration Act that could be borrowed by its Indian counterpart. Given the wide

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scale cross-border investments in India, it is important to understand such restrictions and promote the principle of party autonomy, under the Indian Arbitration regime, in order to facilitate the international community invest and arbitrate in India.

I. INTRODUCTION:

The Arbitration and Conciliation Act, 1996 [the **"Act"**] has been subjected to various interpretations by the Indian judiciary throughout the development of the Indian Arbitration regime. These changing interpretations have been instrumental attempts in making India an arbitration friendly destination within the international arbitration landscape. These interpretations that have mostly been initiated by the judiciary's interpretive acts[1] have subsequently been incorporated into the Act vide legislative amendments.[2] Although there have been many such instances[3], this paper seeks to trace the trajectory of different interpretations resorted to by the Indian judiciary to resolve the contentious issue of prohibition on two or more Indian parties choosing a foreign seat of arbitration.

The foundational hypothesis of this paper is based on the recent change brought about by the Indian judiciary, allowing two or more Indian parties the freedom to elect to arbitrate outside of India.[4] Contrary to its earlier stand, there seems to be a change in the judiciary's approach to lifting the categorical ban that once prevented two or more Indian parties from choosing a foreign seat of arbitration.[5] The latest judgment by the Delhi High court needs to be appreciated given the time and the context in which it is delivered. The judgment clearly comes out in an atmosphere

[1] ONGC v. Saw Pipes, (2003) 5 S.C.C. 705.
[2] The Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of Parliament, 2015 (India).
[3] *Id*.
[4] GMR Energy Limited v. Doosan Power Systems India, (2017 SCC OnLine Del 11625).
[5] TDM Infrastructures v. U E Development India Pvt. Ltd., (2008) 14 S.C.C. 271.

where the Indian economy is seeking foreign investment and the most suitable method for dispute resolution in large-scale, cross-border financial transactions is arbitration itself. This change in approach by the judiciary is a welcome development, considering the trends in dispute resolution and India's commercial environment. However, such a development is not without flaws (refer to Part IV of the paper).

The paper is divided into five parts. While Part I is utilized to explain the concept of seat of arbitration and "domestic arbitration" as understood in India, Part II discusses the earlier interpretation as was adopted by the Indian judiciary that prevented the Indian parties from choosing a foreign seat of arbitration. It also delves into the "public policy" rationale that has been largely quoted as the rationale for such a prohibition. Part III of the paper discusses the emerging interpretation that allows the Indian parties to have a foreign seat of arbitration, which seems to be informed not only by the prevalent International standards for arbitration but also several earlier rulings of the Indian judiciary. An attempt has also been made to bring forth the issues that might arise in the light of this pro-arbitration judgment. Lastly, Part IV, discusses the position of Indian Law in contrast to the position in the United Kingdom ["**UK**"]. The fourth part seeks to provide an insight into the provisions of the English Arbitration Act and its stand on the issue of domestic parties choosing to arbitrate outside of the UK. The last part also contemplates incorporating of certain concepts, provisions and schemes from the English Arbitration Act into its Indian counterpart.

II. PART I

A. LAWS APPLICABLE TO THE ARBITRATION AGREEMENT: IMPLICATION OF THE LAW OF THE SEAT

An arbitration clause is usually incorporated under a commercial contract, or as a stand-alone agreement after a dispute arises[6]. However, the arbitration agreement is always severable and is independent of the main contract within which it is contained.[7] An arbitration agreement involves a complex interplay of different laws that determine the procedural and substantive aspects of arbitration. Typically, an arbitration agreement will deal with – law governing the arbitration agreement (*lex arbitri*), the law governing the contract/substantive law, procedural/curial laws, rules of conflict of laws, and the law governing the enforcement of awards.[8]

While the law governing the contract determines the rights and obligations of the parties under the main agreement, *lex arbitri,* determines the conduct of arbitration and the proceedings of the arbitral tribunal, whereby matters such as arbitrability of the subject matter of the dispute, intervention by the courts, collection of evidence and grant of interim measures, are governed.[9]

The concept of the seat of arbitration is intertwined with the *lex arbitri.* The territorial link between the seat of arbitration and the governing law of arbitration is now a well settled position in the International arbitration regime.[10] The seat basically ensures supervisory jurisdiction of the municipal or domestic courts of the seat over the arbitration proceedings. Moreover, choosing a seat provides an anchor for the arbitration proceedings, whereby the parties can take recourse to the domestic courts of the seat for issues such as – interim injunctions, collection of evidence

[6] MICHAEL L. MOFFITT AND ANDREA K. SCHNEIDER, DISPUTE RESOLUTION-EXAMPLES AND EXPLANATIONS, 141, 152, (Wolters Kluwer 2008).
[7] NIGEL BLACKABY, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 16, 159 (6th ed, Oxford 2015).
[8] *Id.*, 157.
[9] *Id.*, 168-170.
[10] *Id.*, 172

etc.[11] The seat provides the external aspects for the conduct of arbitration along with certain internal aspects, that come under the *lex arbitri as* matters related to commencement of proceedings, appointment of arbitrators, etc.[12] While the external aspects include the procedure and rules regarding seeking interim reliefs, mechanisms of enforcement of awards, etc; the internal aspects include the manner of conduct of the arbitration proceedings, the number of arbitrators appointed, the procedure for appointing arbitrators etc.

B. "SEAT" UNDER THE ARBITRATION AND CONCILIATION ACT, 1996

Although the seat of arbitration is an essential element of arbitration, one of the many problems with the Act is, its lack of any reference to the seat of arbitration. The Act, while divided into four parts (only the first two are relevant for our purposes), makes no mention of "seat". However, there is mention of "place" of arbitration under section 2(2) and 20 of the Act, which has been interpreted as "seat" of arbitration by the judiciary .

The first reference to "Seat" that falls under section 2(2) of Part I of the Act, determines the scope of Part I of the Act and establishes that Part I applies when the "place" of arbitration is in India. When the same is read using the interpretive tool of *expressio unius est exclusio alterius* (express inclusion of one means exclusion of another), it becomes clear that section 2(2) restricts the application of Part I of the Act to arbitration seated in India and thus, impliedly excludes arbitrations seated outside India from the purview of Part I. This implied exclusion of Part I in relation to

[11] Badrinath Srinivasan, *Arbitration and the Supreme Court: A Tale Of Discordance Between The Text And Judicial Determination*, 4 NUJS L. Rev. 639 (2011) (Feb. 22, 2019, 11:43 AM) http://nujslawreview.org/2016/12/03/arbitration-and-the-supreme-court-a-tale-of-discordance-between-the-text-and-judicial-determination/.
[12] Ibid, 170.

arbitrations seated outside India, was only appreciated and applied by the Supreme Court in *Union of India* v. *Reliance.*[13]

However, way before *Reliance*, the Supreme Court in its much-criticized judgment of *Bhatia International* v. *Interbulk Trading SA*[14], read section 2(2) of the Act, to be wide enough to make Part I of the Act applicable to arbitrations seated not only within but also outside India. In this case, one of the parties being Indian filed for interim relief under section 9 of the Act, while the other party contended that applicability of Part I would be ousted as the *place* of arbitration was outside India. The court held that since section 2(2) does not make the application of Part I of the Act exclusive to domestically seated arbitrations by using words such as "only"[15], the applicability of Part I, can be extended to arbitrations seated outside of India. The rationale behind such an extra-territorial application of Part I was to ensure that the Indian parties arbitrating outside of India are not without any remedy. [16]Thus, the court ruled that Part I will apply unless and until it is either expressly or impliedly excluded. However, the court never explained what would amount to implied exclusion, until *Reliance.*

The same judgment was followed in several Supreme Court judgments, such as in *Venture Global* v. *Satyam Computers*[17] to extend the jurisdiction of the Indian Courts where it did not originally lie[18]. The trend continued until *Bharat Aluminium Company* v. *Kaiser Aluminium Technical Services Inc.*[19] wherein the Supreme Court did not only overrule the decision under *Bhatia*

[13] Union of India v. Reliance Industries Ltd, (2015) 10 S.C.C. 213 (hereinafter *Reliance*).
[14] Bhatia International v. Interbulk Trading SA, (2002) 4 S.C.C. 105 (hereinafter *Bhatia International*).
[15] As is under the UNCITRAL Model Law on International Commercial Arbitration, 1985.
[16] Bhatia International v. Interbulk Trading SA, (2002) 4 S.C.C. 105.
[17] Venture Global v. Satyam Computers, (2008) 4 S.C.C. 190.
[18] Ibid.
[19] Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc., (2012) 9 S.C.C. 552 (hereinafter *BALCO*).

International, but also rejuvenated the distinction between venue and seat which was blurred under *Bhatia International*. The Court clarified that in context of section 2(2), 20(1) and 20(2), "place" was to be interpreted to mean "seat", while in the context of section 20(3), it would mean "venue". The court more significantly restricted the applicability of Part I of the Act and said that it would *not* be applicable to foreign seated arbitrations. The court also did away with the demand under *Bhatia International* to impliedly/expressly exclude Part I, to make it inapplicable.

While *BALCO* clarified that the applicability of Part I is restricted only to arbitrations seated in India, the Supreme Court in *Reliance*[20], reinstated the same and held that parties can impliedly exclude applicability of Part I by choosing a foreign seat of arbitration, and a foreign governing law. Therefore, choosing a seat of arbitration entitles the parties to arbitrate their dispute freely under the supervisory jurisdiction of the courts of the seat so chosen.

These judgments are conclusive evidence of the central role that the seat plays under the Act, whereby the seat determines the jurisdiction of the Indian courts. Given such a significant role that the seat of arbitration plays, the categorical ban on two Indian parties seeking to arbitrate their dispute in a foreign seat (a prohibition apparently solely based on the parties' nationality) presents itself as arbitrary and contrary to the spirit of the Act. Any preference to a seat outside India, essentially entails exclusion of Part I of the Act.[21] Thus, opting for a seat outside India, excludes Indian Courts from having such exclusive jurisdiction over the arbitral proceedings and awards.

The refusal by the courts to refer foreign seated arbitrations of Indian parties to their agreed foreign seat, acts as a deterrent for the parties to choose a foreign seat of arbitration. However,

[20] Reliance, 2015 10 S.C.C. 213.
[21] BALCO, 2012 9 S.C.C. 552.

several considerations go into choosing a seat of arbitration such as, the prevailing law of arbitration at the seat of arbitration, the legitimate scope of intervention by national courts of the place of arbitration, arbitrability of the subject matter and enforcement of awards.[22] There are certain jurisdictions which provide for friendly arbitration laws by minimizing Court's intervention and some which encourage the interventionist approach of the Courts.[23] Therefore, parties to an arbitration agreement, often make an informed decision in choosing their seat of arbitration.

By denial of reference to the seat of arbitration in foreign seated arbitration between Indian parties[24], the Courts do not only trample upon the autonomy of the parties but also overlook the convenience of the parties. Hence, by necessarily subjecting them to Part I, they defeat the intention of the parties to exclude applicability of the same.

C. DOMESTIC ARBITRATION AND INTERNATIONAL COMMERCIAL ARBITRATION

As the prohibition imposed on the Indian parties seeking to arbitrate outside India seems based only on nationality, it is important to understand the reasons underlying such a ban. It is noteworthy that the Act makes distinction based on the nationalities of the parties that are signatory to the arbitration agreement. While the arbitration agreement involving any "foreign element" automatically falls under section 2(1) (f) of the Act and becomes "international commercial arbitration", those

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[22] KWATRA G K, ARBITRATION AND ALTERNATE DISPUTE RESOLUTION, 98 & 135 (2008).

[23] Duncan Speller and Dharshini Prasad, *The Choice of a Foreign Seat In Domestic Disputes – An Opportunity For One More Step Forward In India'S Journey To Establish Itself As An Arbitration Friendly Jurisdiction?,* 6 IJAL 43 (2018) (Feb. 22, 2019, 01:07 PM), http://ijal.in/sites/default/files/IJAL%20Volume%206_Issue%202_Duncan%20Speller%20&%20Dharshini%20Prasad.pdf.

[24]The Arbitration and Conciliation Act, 1996, §45.

arbitrations only involving native/domestic/Indian parties, are not defined anywhere.

Hence, domestic arbitrations are understood through inferences drawn from the definition of "International Commercial Arbitration". The Supreme Court of India in *TDM Infrastructures* v. *U E Development India Pvt. Ltd.*[25], while distinguishing between 'International Commercial Arbitration" and Domestic Arbitration held that where all the parties to an arbitration agreement are either resident or domiciled in India, such would be a "domestic arbitration".[26] The single judge's obiter notes that "*Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country".* (refer to PART III below)

The reason for such an understanding based on the nationality of the party also stems from the definition of "International Commercial Arbitration" that involves a necessary presence of a foreign element for an arbitration to be termed as "International". The importance of this "foreign element" for an arbitration to be International Commercial Arbitration has been recognised by the Indian courts in *TDM, Sasan Power Limited* v. *North American Coal Corporation India Pvt. Ltd.*[27] and recently in *GMR* v. *Doosan.*[28] Thus, the understanding of domestic arbitrations is tainted with this definition as provided under the Act.[29]

However, another interpretation of Domestic Arbitration is to read section 2(2) with 2(7) of the Act, to understand the meaning of "domestic arbitration".[30] While 2(2) defines the scope of the

[25] TDM Infrastructures v. U E Development India Pvt.. Ltd., (2008) 14 S.C.C. 271 (hereinafter *TDM*).
[26] *Id.*
[27] Sasan Power Limited v. North American Coal Corporation India Pvt. Ltd., (2016) 10 S.C.C. 813.
[28] GMR Energy Limited vs Doosan Power Systems India, (2017 S.C.C. OnLine Del 11625) (hereinafter *GMR).*
[29]Arbitration and conciliation Act, 1996 §2(1)(f).
[30] INDU MALHOTRA, O P MALHOTRA ON THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION (3rd ed, Thomson Routers 2014).

applicability of Part I of the Act, 2(7) defines an award made under Part I of the Act as "domestic award". By reading these two provisions conjointly one gets the understanding that domestic arbitrations would be those that are held in India and whose award is rendered in India. Thus, such an interpretation should be supported given that the Act is a seat-centric one. Thus, the application of the Act should be based on the seat so chosen rather than the nationalities of the parties, which seems to have been the approach adopted prior to *GMR*.[31]

Hence, there exists a conflict in the interpretation of "domestic arbitrations" wherein one interpretation determines it based on the nationality of the parties whereas the other identifies domestic arbitrations as those that are seated in India.

To resolve this issue, the Law Commission of India, in its 176th report, had suggested the inclusion of a definition for what constitutes Domestic Arbitration within section 2 of the Act. It was recommended that this definition include, "International commercial arbitration, where the place of arbitration is in India"[32] within itself. Thus, on acceptance of such a suggestion, the prevalent understanding of domestic arbitrations on the grounds of nationality, would have changed permanently.

It is important to settle the issue of meaning of "domestic arbitration" as although the Act is seat-centric, often the obiter from *TDM* is invoked and nationality of the parties is deployed by the Indian courts to subject foreign seated arbitrations between two/more Indian parties, to Part I of the Act. While for foreign-seated international commercial arbitrations, the Indian Courts readily make a mandatory reference of the dispute to the seat of arbitration under section 45 of the Act, however, for

[31] GMR, 2017 S.C.C. OnLine Del 11625.
[32] Law Commission of India, One Hundred and Seventy Sixth Report on the Arbitration and Conciliation (Amendment) Bill, 2001 (Ministry of Law and Justice).

foreign-seated "domestic arbitrations" such mandatory reference is often denied. Often the grounds for such denial is upholding the "public policy" by preventing Indian parties from derogating from Indian law. Such reasoning resonates with the obiter of *TDM*. Such "public policy" considerations often disregard the autonomy of the parties which goes against the cornerstone of the Arbitration Act. (refer PART IV below).

III. PART II

In India, the foreign seated Domestic Arbitration i.e., arbitration involving only Indian parties with a foreign seat of arbitration, often suffer from erosion of the much-revered principle of party autonomy[33] although the same principle is encompassed within the scheme of the Act, as held by the Supreme Court of India in *SVG Molasses Co. B.V* v. *Mysore Mercantile Co. Ltd.*[34] Clearly, this bar imposed by the Indian courts upon the domestic parties despite their having an express agreement to the effect of having a foreign seat of arbitration and/or a foreign governing law, goes against such principle of party autonomy.[35] The restraint on the autonomy of the domestic parties to choose a foreign seat, is imposed on grounds of public policy whereby the Indian parties are not to undermine the Indian laws by making their arbitration proceedings subject to foreign laws.

The implication of choosing a foreign seat is not only loss of jurisdiction of the Indian Courts over the Indian parties choosing a foreign seat but the same could also entail that the governing law of the agreement might also change to that of the seat. Which is what, the courts have thus far held to be opposed to the public policy. However, the courts have failed to account for the difference between the substantive law that's applicable and the

[33] Aadhar Mercantile v. Shri Jagdamba Agro Exports (2015) S.C.C. OnLine Bom 7752; Sasan Power Limited v. North American Coal Corporation India Pvt. Ltd (2016) 10 S.C.C. 813.
[34] SVG Molasses Co. B.V vs Mysore Mercantile Co. Ltd 2007 9 (SCALE) 89.
[35] *Supra* note 33.

law of the seat. While the former is usually different than the latter, in the absence of substantive law being explicitly recognised, the presumption follows that the law of the seat is the substantive law so applicable. However, this is only a rebuttable presumption.[36] This presumption is based on the test of "closest and most intimate connection" that the law of the seat has with the substantive law as opposed to other laws that become applicable in an arbitral proceeding.[37]

A. THE MISTAKEN USE OF OBITER TO SUBJECT PARTIES TO PART I OF THE ACT

The trend of denying such right to the Indian parties began with the controversial obiter given in the judgment of *TDM*. Although the contention in the case was concerned with the appointment of arbitrators in cases of arbitrations seated within and outside India under section 11 of the Act, nonetheless the single judge bench opined that:

"*Section 28 of the 1996 Act is imperative in character. The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country."*[38]

Although this obiter has often been referred by the Indian Courts[39], it is pertinent to mark that these observations were made by the court strictly to determine the court's jurisdiction under section 11 of the Act, as clearly mentioned in the judgment itself. Moreover, the applicability of section 28 of the Act to such

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[36]Alastair Henderson, *Lex Arbitri, Procedural Law And The Seat Of Arbitration: Unravelling The Laws Of The Arbitration Process,* 26 SAcLJ 886-910 (Feb. 21, 2019, 12:30 PM) https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/335/Citation/JournalsOnlinePDF.

[37] Centrotrade Minerals & Metal Inc. v. Hindustan Copper Limited*.,* (2017) 2 S.C.C. 228.

[38] TDM, (2008) 14 S.C.C. 271.

[39] *Supra* note 33.

matters, is erroneous, as the very first line of the section itself reads, "*where the place of arbitration is situate in India*"[40] [sic] i.e., it is exclusively applicable to arbitrations seated in India. Thus, the bearing of such an obiter and the section itself on domestic parties with a foreign seat of arbitration is almost nil. However, there are several examples wherein the same obiter and the section have been utilized to prevent domestic parties from having a foreign-seated arbitration.

One such example is the case of *Aadhar Mercantile* v. *Shri Jagdamba Agro Exports*[41] where the seat of arbitration was undecided, and could either be India or Singapore, but the English law was certainly the governing law of the arbitration agreement. The court took it as intention of the parties to not exclude India as the seat of arbitration, yet it failed to acknowledge the choice of governing law as another determinant of intention of the parties to exclude applicability of Part I of the Act, as ruled in *Reliance.*[42]. Therefore, in 2015, the Bombay High court, in the light of the obiter in *TDM*, held that Indian parties derogating from Indian law, would be against the public policy of India. Here, the implied exclusion of Part I of the Act, as held by the court in *Reliance,* was clearly not upheld.

B. THE EVASIVE ATTITUDE OF THE SUPREME COURT ON THE ISSUE; AND THE RESULTANT EFFECT

Although the issue of Indian parties choosing to arbitrate outside of India has arisen at several instances, it is only at a very limited number of times that the Indian Judiciary has taken the issue head on. The reluctance of the Indian Supreme Court to decide upon this disputed issue became apparent in the case of *Sasan Power*

[40] Arbitration and Conciliation Act, 1996 § 28(1).
[41] Aadhar Mercantile v. Shri Jagdamba Agro Exports (2015) S.C.C. OnLine Bom 7752.
[42] Reliance, 2015 10 S.C.C. 213

Limited v. *North American Coal Corporation India Pvt. Ltd.*[43] ("**Sasan**")

A full judge-bench of the Supreme Court, in 2016, evaded the issue of arbitration between domestic parties with a foreign-seat of arbitration, by including a "foreign element" to the arbitration agreement. While originally the arbitration agreement was between the appellant and an American Company (NAC), all the rights and obligations of the NAC were assigned to its Indian subsidiary NACC (the respondent), under the assignment and assumption agreement. The appellant contended the invoking of the arbitration clause by the respondent company, NACC was against the public policy of India. The appellant relying upon the obiter dicta of *TDM,* asserted that two Indian parties cannot have a foreign seat of arbitration in derogation of the Indian laws. The Supreme Court, by making the NAC a third party to the agreement, introduced a foreign element, whereby the nature of arbitration changed from domestic to International commercial arbitration, thusly, allowing for foreign seated arbitration. To understand the lacunae in the Supreme Court judgment, it is important to appreciate the Madhya Pradesh High Court's judgment on *Sasan*[44], discussed below.

The High Court of Madhya Pradesh, exercising its original jurisdiction in the same case ruled in favour of the respondent and allowed for the foreign seated arbitration between the two Indian parties, much like the Supreme Court, but on entirely different grounds. The High Court, unlike the Supreme Court, did not brush aside the main issue, but addressed the issue with full vigour, and ruled that two Indian parties *can* have a foreign seat of arbitration, and none of the provisions in the Indian laws would bar Indian parties to choose their seat of arbitration. The

[43] Sasan Power Limited v. North American Coal Corporation India Pvt. Ltd (2016) 10 S.C.C. 813.
[44] *Id.*

High Court also duly noted the misapplication of the *TDM* obiter. Apart from making this significant observation, the court also remarked that the objective of the Arbitration Act itself is to minimize the Court's interference in arbitral proceedings. Therefore, the interventionist approach of the court in matters concerning arbitration between two Indian parties, seems to go against the objectives of the Act. Most importantly, the High Court referred to the first case on the issue, called the *Atlas Export Industries* v. *Kotak & Company*[45] **("Atlas")** in deciding the issue.

The Supreme Court of India in *Atlas* had held that arbitration between two Indian parties with a foreign seat of arbitration was not opposed to the public policy of India. That is, by excluding Part I of the Act, the Indian parties were not derogating from Indian law in their choosing of a foreign seat. A two-judge bench of the apex court in this case, where the parties were Indian, but with a foreign seated arbitration (in Hong Kong) decreed that,

"The case is clearly covered by exception (1) to section 28 of the Indian Contract Act…..Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement."[46]

Thus, the court clarified that such is not against the public policy of India and in a reasoned judgment, upheld the principle of party autonomy which is the cornerstone of arbitration.

Curiously, the *Atlas* judgment has not been referred anywhere else for the said issue. It was only in the case of *Sasan,* that this case was brought to the court's attention. The appellant in the High Court, raised the objection that the judgement fell under the Arbitration and conciliation Act, 1940, and was thus irrelevant for deciding the case at hand. However, the respondents, convincingly chalked out numerous similarities between the 1940

[45] Atlas Export Industries v. Kotak & Company (1999) 7 S.C.C. 61.
[46] *Id.*

and 1996 Acts, and the High Court observed that the Act's predecessor was not that different to make *Atlas a* bad law. Nonetheless the Supreme Court, by introducing a "foreign element", failed to put a rest to this much disputed issue. Hence, by evading the issue, the court retained the authority to subject domestic parties to Part I of the Act, despite their having an agreed foreign seat of arbitration. In order to understand the earlier approach of the court to subject domestic parties to Part I of the Act, it is important to appreciate the much-cited rationale of "public policy".

C. THE PUBLIC POLICY ARGUMENT

Hence, the Indian judiciary had cultivated the practice of disallowing for arbitration between Indian parties to be seated abroad, on grounds of public policy. However, it is important to note that this ground of upholding the public policy by preventing derogation of Indian laws by Indian parties, is not that strong an argument to cite.

It is noteworthy that "Public policy" finds its mention only in section 34 and 48 of the Act, which are concerned with enforcement of awards. Public policy is thus a ground to challenge the enforcement of an award (domestic or foreign) and not categorical statutory prohibition on the Indian parties from opting a foreign seat of arbitration. Interpreting choice of a foreign seat, as a derogation from the Indian laws and thus, against public policy of India, is therefore, a judicial construction that warrants change.

Further, the public policy grounds have been invoked by the courts under section 28 of the Act for disallowing Indian parties from derogation from Indian "substantive" laws by choosing a foreign seat of arbitration (see Aand B). There are two observations that must be made here to debunk the misapplication of public policy rationale. Firstly, it is important to note that in addition to falling under Part I of the Act, section 28

explicitly clarifies the scope of its application as being restricted to situations "where the *place* of arbitration is *situate* in India.[47] Secondly, it is essential to understand the conflating of the concepts of "substantive law applicable to arbitration" and the law of the seat.

By imposing the prohibition on the Indian parties from choosing a foreign seat of arbitration on grounds that such would lead to derogation from Indian laws, indicates confusion in understanding of these two distinct yet often interrelated concepts.[48] This confusion was also seen on other occasions where the substantive law was taken to mean the law of seat for the purposes of exclusion of Part I of the Act.[49]

While choosing a foreign substantive law would indeed amount to derogating from the Indian law, merely choosing a foreign seat does not lead to derogation as the substantive law applicable to the arbitration agreement would still be different. However, in the absence of any explicit mention of the applicable substantive law, the same can be inferred to the same as the law of seat (see paragraph before A).

Perhaps the omission by the parties of not specifically mentioning the same has led the courts to conflate these two separate concepts. Nonetheless, such an error on part of the courts has only needlessly fuelled the blanket prohibition on Indian parties to arbitrate outside of India, wherein such an averment that such

[47] Arbitration and Conciliation Act, 1996 §28(1)(a).
[48] Duncan Speller and Dharshini Prasad, *The Choice of a Foreign Seat In Domestic Disputes – An Opportunity For One More Step Forward In India'S Journey To Establish Itself As An Arbitration Friendly Jurisdiction?* 6 IJAL 43 (2018) (Feb. 22, 2019, 01:07 PM), http://ijal.in/sites/default/files/IJAL%20Volume%206_Issue%202_Duncan%20Speller%20&%20Dharshini%20Prasad.pdf.
[49] Videocon Industries Limited v. Union of India and Anr. (2011 6 SCC 161).

choices of domestic parties are against public policy, only resulted in making their arbitration agreements invalid.[50]

Moreover, it is clear as the court in *Atlas* remarked, contracting for a foreign seat of arbitration by domestic parties, would be covered under the exception to section 28 of the Contract Act. Under this exception, the parties are allowed to restrict the enforcement of the rights of their counterpart by the usual means of approaching the court, when there exists an arbitration agreement to the effect. The court in *Atlas* also held that choosing a foreign seat would not be in derogation of the Indian laws and thus, would not be against public policy. Therefore, when the law itself allows for such recourse, the imposition categorically on the domestic parties on the grounds of derogating from Indian laws, seems baseless and arbitrary.

Therefore, the practice of the Indian courts barring the Indian parties from arbitrating outside India, seemed without any foundation. The judiciary, by subjecting Indian parties to Part I of the Act, retained its authority over the Indian parties even at the cost of overriding their decision.

The curtailing of party autonomy in arbitration involving domestic parties, by the judiciary was because of the dreaded implications of the Indian parties choosing a foreign seat of arbitration, which implies loss of judicial supervision over Indian parties by the national courts of India and because of the mistaken understanding and application of the doctrinal concepts of "seat" and substantive laws applicable to arbitration.

A similar approach has been adopted by the courts in US and in China. While US has a statutory provision to the effect, china wants to retain the judicial sovereignty over its nationals and thus subjects them to their national arbitration legislation.[51] However,

[50] Indian Contract Act, 1872 §23.

[51] Duncan Speller and Dharshini Prasad, *The Choice of a Foreign Seat In Domestic Disputes – An Opportunity For One More Step Forward In India's*

India seems to be moving progressively towards an approach that is much more internationally accepted.

IV. PART III

A. THE PRO-ARBITRATION APPROACH TO THE ISSUE

Although there have been judgments such as *Atlas* that have given pro-arbitration decisions in favour of the Indian parties choosing a foreign seat of arbitration, the significance of *GMR v. Doosan*[52] is particularly important to recognise and appreciate. This is because while the judgment in *Atlas* is a Supreme court judgment, it is based on the Arbitration and Conciliation Act of 1940, whereas the GMR judgment albeit only a Delhi High court judgment is nonetheless, the latest law on the subject.

In this case, four different parties were involved. While Doosan Power Systems India Private Limited (Doosan) had signed various memorandums of understanding (MoUs) with GMR Energy Limited, it had signed corporate guarantee agreements with GMR Infrastructure Limited and GMR Chhattisgarh Energy Limited. Moreover, Doosan had entered into various EPC agreements with GMR Chhattisgarh Energy Limited.

The MoUs and the corporate guarantee contained the arbitration clause that said that the arbitration proceedings were to be conducted as per the SIAC (Singapore International Arbitration centre) rules and the place for arbitration was to be Singapore. Doosan, invoking these arbitration agreements sent notice of arbitration to the three companies of the GMR group. SIAC

Journey To Establish Itself As An Arbitration Friendly Jurisdiction? 6 IJAL 43 (2018) (Feb. 22, 2019, 01:07 PM), http://ijal.in/sites/default/files/IJAL%20Volume%206_Issue%202_Duncan%20Speller%20&%20Dharshini%20Prasad.pdf.

[52] GMR, (2017 SCC OnLine Del 11625).

under its institutional arbitration rules proceeded to appoint the arbitrator to resolve the dispute among the parties.

However, GMR Energy Limited instituted the present suit seeking anti-arbitration injunction against Doosan, alleging that (i) Doosan cannot proceed with the arbitration with Singapore as the seat of arbitration as all the parties to arbitration were Indian, therefore, Part I of the Act would be applicable and (ii) GMR Energy limited is not a party to any agreement that contains such an arbitration clause and thus cannot be subjected to the same.

Although the greater part of the judgment covers the second issue of alter ego and whether a non-signatory can be made party to the arbitration agreement, the Court clarified that Doosan and GMR, despite their Indian nationalities, could arbitrate in Singapore, which was the chosen seat of arbitration. While the issue of alter ego has already been taken care of[53], this judgment marks another progressive step of allowing Indian parties to choose a foreign seat of arbitration.

The Court in giving this judgment, remarked the centrality of section 11 of the Act in *TDM* and observed that the distinction between International Commercial Arbitration and arbitration between two parties of Indian nationality, in that case was specifically for the purposes of section 11 of the Act. Therefore, the court ruled that the same cannot be utilized for other purposes, such as for determining whether the Indian parties can choose a foreign seat of Arbitration.

More significantly, the court while deciding this issue relied on *Atlas*[54] and *Sasan*[55] to conclude that two Indian parties can choose to arbitrate outside of India. The court reaffirmed that the same would not be in contravention of the public policy as it would not

[53]Chloro Controls India (P) Ltd. v. SevernTrent Water Purification Inc., (2013) 1 S.C.C. 641.
[54] *Supra* note 45.
[55] *Supra* note 43.

be in derogation of the Indian laws. The court reemphasizing the exclusion of Part I by implication when a foreign seat of arbitration is chosen said that any subsequent award in relation to the same would fall under Part II of the Act for its enforcement.

B. IMPLICATIONS OF GMR AND THE WAY AHEAD

Although this judgment is in conformity with the international standards, wherein all successful arbitration regimes allow their domestic parties to arbitrate in a foreign seat of arbitration, it can lead to potential loss of domestic arbitrations within India, as now the Indian parties have the mandate to choose a foreign seat of arbitration.

The judgment might prove to be more detrimental for India than beneficial as one of the factors for seeing the pro-arbitration attitude of a country could also be the confidence of its populace in its arbitration regime. Although this is a progressive change according to the international standards, the increased reference to arbitration with a foreign seat of arbitration by the Indian parties could lead to the inference of disillusionment of the domestic parties in their own arbitration regime. Thus, the implication of this decision could also create a pitfall in the success story of Indian arbitration regime.

Further, this is only a High Court judgment, backed by an old apex court case law. The possibility that *GMR* might meet the same fate as that of *Atlas,* wherein it would not be a bad law, but nonetheless left unutilized, is something that cannot and should not be discarded. Therefore, the urgent need of the hour is to have an authoritative decision by the apex court on the matter that would settle this contentious issue once and for all. Until then, the fate of *GMR* can only be decided when another case of this sort arises.

V. PART IV

A. THE ARBITRATION ACT (OF ENGLAND), 1996:

It is essential to have a comparison of India with a foreign jurisdiction in order to borrow some features from such a regime to ours and to put the reasoning of the Indian judiciary behind such a prohibition on Indian parties arbitrating outside India in perspective.

The law governing arbitration in the UK is the English Arbitration Act, 1996 ("**English Act**") whose scheme, language, logical organisation and clarity makes the cardinal principles of "party autonomy" and "judicial non-intervention" easily realisable.[56]

It is noteworthy that the English Arbitration Act, under its Part I, provides for a definition of the seat of arbitration which is defined as "the juridical seat of the arbitration" under section 3 of the Act. One of the instances where the English Act explicitly upholds the party autonomy is under this section wherein the parties are granted full discretion to determine their seat of arbitration.[57] Although the concept of the seat is pivotal to English arbitration law, the adoption of delocalized arbitrations, whereby the parties would not be bound by the procedural laws of the law of the seat, seems to be gaining strong foothold in the English arbitration regime.[58]

The prevalent position of confusion among these doctrinal concepts persist in the Indian courts because of the ambiguity and absence of any guidance in relation to meaning or implications of choosing a "*seat*". Perhaps the Indian position on barring the

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[56] ENID A MARSHALL, GILL: THE LAW OF ARBITRATION, 3 (4th ed, Sweet and Maxwell 2001).

[57] lakunle Olatawura, *Delocalized Arbitration Under The English Arbitration Act 1996: An Evolution Or A Revolution?* 30 Syracuse J. Int'l L. & Com, 49 (2003) (Apr. 10, 2019, 09:30 PM) https://heinonline.org/HOL/Page?handle=hein.journals/sjilc30&div=8&g_sent=1&casa_token=&collection=journals.

[58] *Id.*

Indian parties from choosing a foreign seat of arbitration would not have been so, had the legislation clearly laid down these basic tenets of arbitration whereby the misplaced application of case laws and provisions would have easily been avoided. It is the cogent structure, brevity of language and clarity of policy underpinnings within the English Act[59], that the Indian legislature needs to borrow and implement in the Indian arbitration regime. Doing so, would not only lead to removal of inconsistent case laws based on various contradictory interpretations but it could also attract many to choose India as a seat for their arbitral proceedings, instilling faith in the Indian arbitration regime

Under Part II, the English Act, defines "domestic arbitration agreements" as those where none of the parties are a foreign entity *and* under which the seat of arbitration is in the UK.[60] The understanding of international arbitration is thus based on the inference that in any arbitration, if either of these two requirements are lacking, the arbitration would be an International arbitration. Although this seems like the approach of understanding international and domestic arbitrations under the Indian counterpart and does create a distinction between domestic and international arbitration, the difference of course comes in the phraseology of the definition of domestic arbitration[61].

Clearly, the definition is two-fold whereby not only the requirement for an arbitration to a domestic one is limited to the parties' nationality but the same extends to the seat being within the UK, which is absent from the Indian legislation and common law understanding of domestic arbitration. This observation is

[59] Thomas E. Carbonneau, *A Comment On United Kingdom Arbitration Act* , 22 Tulane Maritime Law Journal 131 (1997) (Apr. 10, 2019, 10:30 PM) https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1307&context=fac_works.

[60] The Arbitration and Conciliation Act (of England), 1996 §85.

[61] The Arbitration and Conciliation Act (of England) 1996 § 85(2),§85(3).

only ironic because the Indian legislation (Act) happens to be seat-centric.

Although the English Act seems to be granting same level of autonomy to parties involved in international and domestic arbitration, it is important to note that section 85 to 87, that deal with domestic arbitration agreements were never enforced and are still ineffective.[62] This is to maintain parity between international and domestic arbitrations. For instance, in domestic matters the courts in England had the discretion to grant stay of court proceedings if any party sought to evade their arbitral obligations or in international arbitration cases, some subject matters under the Consumer Arbitration Act, could not be arbitrated by domestic arbitrations and could only be settled by international arbitrations.[63] Thus, to strike a balance between the two forms, the explicit difference as provided for between these two kinds of arbitrations, under the earlier legislations, was abolished.

In the case of *Phillip Alexander Securities and Future's limited* v. *Bamberger*[64]*,* where the dispute arose under the Consumer Arbitration Agreements Act, 1988, the Court of Appeal found that the distinction between the domestic arbitrations and international ones was inconsistent with the purpose of the EC treaty obligation of the UK wherein all member states were to be treated equally. It was the claim of the German party to the arbitration agreement (counterpart being English) that had this

[62] ENID A MARSHALL, GILL: THE LAW OF ARBITRATION, 2 (4th ed, Sweet and Maxwell 2001).

[63] Jonathan Hill, *Some Private International Law Aspects Of The Arbitration Act 1996*, 46 International and Comparative Law Quarterly 274 (1997) (Mar 21, 2019, 11:09 AM) https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9DE5BDF78B7833115252BA0FA85184E7/S0020589300060449a.pdf/some_private_international_law_aspects_of_the_arbitration_act_1996.pdf.

[64] Phillip Alexander Securities and Future's limited v. Bamberger [1996] CLC 1757.

been a domestic arbitration, the agreement would have been rendered unenforceable and this was their justification for approaching the court rather than resorting to arbitration in the face of a dispute.[65] Thus, had the distinction continued, there would have been serious undermining of English arbitration whereby every domestic arbitration in relation to the Consumer Arbitration Agreements Act, 1988, would have always preferred court proceedings or arbitration even when there existed an arbitration agreement, depending on their whims.

Therefore, the provisions that differentiate between the domestic and international arbitrations were never enforced. Thus, the general provisions automatically became applicable to domestic and international arbitrations alike.

The lesson for India here is the importance given to party autonomy which has resulted in abolishing the distinction between international and domestic arbitrations. The Indian position of prohibiting the Indian parties from choosing a foreign seat of arbitration, as elaborated above (see Part II and III) stems from wanting to subject domestic parties to the supervisory jurisdiction of the national/municipal courts, which as the English example shows is rather an unjustified imposition on the parties. It is logically and philosophically inconsistent with the fundamental principle of party autonomy, which should be upheld by Indian arbitration regime at all costs, if India wants to be recognised as a pro-arbitration regime in International arbitration.

Hence, there exists no difference between the domestic and international arbitration in the law of arbitration of England.

In relation to the central role of party autonomy under the English Act, it is essential to point out that this primary principle that has been so carefully preserved and practiced in English

[65] *Id.*

arbitration regime is not absolutely unfettered. Although the English Act does not interfere with the exercise of the rights of the parties to determine the applicable laws to their arbitral proceedings, yet it retains the power of intervention when there is a matter of general public importance, wherein it is pertinent that the court should determine such a question despite the parties having agreed to settle the same through arbitration.[66] Such matters usually come to light at the enforcement stage and can lead to invalidating an arbitral award if such award is found to be against the "public policy". Although such ground of public policy is also available under the Indian law whilst challenging the arbitrability of an award, the distinction comes in the scope and application of this ground.

The public policy ground in England is often invoked when the enforcement of an award is challenged[67], whereby if there's a "serious irregularity" i.e., substantial injustice that might result as a consequence of enforcing the said award, the courts would set that award aside, send the award back to the tribunal for reconsideration or declare the arbitration award to be not binding.[68]

It is to be noted that the public policy grounds of refusal to enforce an award are merely exceptions that require proof that if recognition and enforcement is made it would be contrary to the interest of public at large.[69]

In the case of *Soleimany* v. *Soleimany*[70], the Court of Appeal refused to enforce the foreign award on grounds that it was made based

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[66] *Id.*
[67] The Arbitration Act 1996 (of England), §68.
[68]Veena Anusornsena, *Arbitrability And Public Policy In Regard To The Recognition And Enforcement Of Arbitral Award In International Arbitration: The United States, Europe, Africa, Middle East And Asia,* Theses and Dissertation (Golden Gate University School of Law 2012).
[69] *Id.*
[70] Soleimany v. Soleimany (1998) 3 WLR 811 (C.A.).

on a contract that was illegal in England. Under this agreement the parties were the son and father who were both British (domestic parties). Broadly, the trade they were engaged in involved smuggling and later the arbitration proceedings arose in such a context. The English court ruled that the award was unenforceable on grounds of illegality and was thus contrary to public policy.

This case is peculiar and important for this discussion as while the court only ruled upon the invalidity of the award because of non-arbitrability of the subject matter, there is uncertainty as to how the courts would have reacted if they had considered the issue that the arbitration was between two domestic parties with a foreign seat and award.[71]

Thus, the scope of invoking the public policy grounds is narrow and restricted to situations that strictly lead to harming the public interest.[72] In contrast to this, the understanding of public policy in India, is a rather expansive concept that the judiciary has only widened[73] through its various interpretations and usage of the phrase.

Perhaps reading the prohibition into the public policy ground is prima facie justiciable given the broad interpretation afforded to the same. However, it is the logical, legal and doctrinal justification that is clearly lacking when Indian parties are barred from choosing a foreign seat of arbitration based on their convenience, merely on the grounds that the supervisory role of the Indian judiciary should not be disturbed.

VI. CONCLUSION

[71] JULIAN D AND OTHERS, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, 724-725. (Kluwer law International 2003).
[72] Sulbha Rai, *How Do or Should Arbitrators Deal with Domestic Public Policy or Regulatory Issues. Does It Affect Arbitrability?* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1433799.
[73] ONGC v. Saw Pipes, (2003) 5 SCC 705.

The principle of autonomy is of paramount importance in arbitration. Not only is this only an internationally acclaimed principle but the Arbitration and conciliation Act, 1996, also works on the principle of autonomy of the parties as is specified under its objectives. Therefore, the imposition on the Indian parties to not choose a foreign seat of arbitration, seems only contrary to this foundational aspect of arbitration. This is especially problematic when there exist no real grounds for such an imposition. Moreover, the fact that other jurisdictions such as the UK provide lesser interventionist approach towards arbitration, only make them more attractive destinations for arbitration rather than India. Thus, the Indian arbitration regime should allow the parties to choose their seat for arbitration, regardless of their nationality and implications of the same on the authority of the municipal courts.