GIVING THE AWARD DEBTOR A "CHOICE OF REMEDIES" IN DOMESTIC INTERNATIONAL ARBITRATIONS: SHOULD INDIA GO THE SINGAPORE WAY?

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I. INTRODUCTION

Claims that the 21st Century is that of the Asians- the "Asian Century"- have been rife since the early 1980's.[1] Further, the Chief Justice of Singapore, Justice Sundaresh Menon, in a talk at the Supreme Court of Singapore on December 6, 2012 referred to the 21st Century as the "Asian age of arbitration".[2] It has been widely reported that Singapore has been making ample strides towards its aim to remain a favoured arbitration hub.[3] India too is believed to have begun its "pro-arbitration" stance[4] and has started paving its own way towards becoming an ideal seat for arbitration. This is particularly so in light of the Apex Court's decision in *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Service, Inc.*[5] These efforts have seen further concretisation in the form of the 246th Report of the Law Commission of India on "Amendments to the Arbitration and Conciliation Act, 1996"[6] in August 2014. The Report has been described as one having suggested "*key amendments required to make the law more relevant and help India become a preferred hub of arbitrations*".[7]

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[1] David P. Fidler, *The Asian Century: Implications For International Law*, 9 SG. YB. INT'L. L. 19, (2005), ("Analysis on the 21st century being the Asian century appears to have gained prominence first in the late 1980s and continued into the 1990s.") More recently, the concept found favour with Xi Jinping, the President of the People's Republic of China, on his three day visit to India in September, 2014 - "... the Asian century of prosperity and renewal will surely arrive at an early date..." *in* Xi Jinping, *Towards an Asian century of prosperity*, THE HINDU (Sept. 17, 2014), http://www.thehindu.com/todays-paper/tp-opinion/towards-an-asian-century-of-prosperity/article6417277.ece.

[2] *Singapore's Chief Justice Wants Asian Lawyers To Pull Their Finger Out On Arbitration Front*, SINGAPORE LAW WATCH, (Dec. 13, 2012), http://www.singaporelawwatch.sg/slw/headlinesnews/17813-asian-lawyers-urged-to-compete-with-west.html. ("We have journeyed far, from back in the mid-1980s to a point where we now speak in terms of an 'Asian' age of arbitration.")

[3] Linette Lim, *How Singapore became an arbitration hub*, CHANNEL NEWS ASIA (Sept. 03, 2014), http://www.channelnewsasia.com/news/business/singapore/how-singapore-became-an/1344660.html; Michael Pryles, *Singapore: The Hub of Arbitration in Asia*, SINGAPORE INTERNATIONAL ARBITRATION CENTRE – SIAC, http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/198-singapore-the-hub-of-arbitration-in-asia ((Last visited Sept. 30, 2014)).

[4] Ben Giaretta & Akshay Kishore, The *renewal of arbitration in India: BALCO -v- Kaiser Aluminium*, ASHURST INTERNATIONAL ARBITRATION GROUP, INTERNATIONAL ARBITRATION BRIEFING (Sept. 2012), http://www.ashurst.com/doc.aspx?id_Content=8246; Vivekananda N, *Lessons from the BALCO dicta of the Supreme Court*, SINGAPORE INTERNATIONAL ARBITRATION CENTRE, http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/196-lessons-from-the-balco-dicta-of-the-indian-supreme-court (Last visited Sept. 30, 2014); Arpinder Singh & Yogen Vaidya, *Column: Taking a pro-arbitration turn,* THE FINANCIAL EXPRESS *(*May 15, 2014), http://m.financialexpress.com/news/column-taking-a-proarbitration-turn/1250892.

[5] Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc., (2012) 9 S.C.C. 552 (India). [hereinafter BALCO].

[6] LAW COMMISSION OF INDIA, *Amendments to the Arbitration and Conciliation Act, 1996*, *246th Report* (August 2014), http://lawcommissionofindi.nic.in/reports/Report246.pdf. [hereinafter Report 246].

[7] *Roadmap ready to make India a 'hub for arbitration'*, THE TIMES OF INDIA, (Aug. 6, 2014), http://timesofindia.indiatimes.com/india/Roadmap-ready-to-make-India-a-hub-for-arbitration/articleshow/39718624.cms.

However, India still has a long way to go before becoming a chosen seat for arbitration for both its own enterprises[8] as well as its foreign investors, in other words, *à la* Singapore. A major difference between the Indian and Singaporean arbitration regimes, which this paper highlights and discusses, is with respect to what the Singaporean Court of Appeals termed as availability of a "*choice of remedies*"[9] for locally seated, *"international"* arbitral awards (or "domestic international awards"). This difference in acceptance of the existence of "choice" is the result of divergent interpretations and varied adoptions of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") into national legislations. Neither has "*choice of remedies*" been expressly available in the Indian adoption of the Model Law nor has it ever been enunciated by the courts. Thus, this paper brings out the reasons for this varied interpretation and looks at why it may be beneficial for India to adopt the Singaporean approach with respect to availability of remedies against the award.

Section I highlights the difference between the "challenge" and "enforcement" related provisions in both the Model Law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("The NYC, 1958"). Section II discusses the findings of the Singapore Court of Appeals in *Astro* and the legal position with respect to setting aside and enforcing awards. Section III offers an analysis of the relevant issue and builds a case in favour of the Singaporean approach and its desirability in India.

II. SECTION I. MODEL LAW AND NYC, 1958 - RECOURSES AGAINST AN ARBITRAL AWARD AND PERCEIVED EMPHASIS ON THE "SEAT" OF ARBITRATION.

The Model Law by the United Nation Commission on International Trade Law [Hereinafter, "UNCITRAL"] is one of the best results of an attempt at harmonizing arbitration laws. Scholars argue that its success can be attributed to its flexibility.[10] Thus, it is different from the NYC, 1958, which is a "take it or leave it" package.[11]

Article 34 of the Model Law provides for the option applying for *setting aside as the* ***exclusive recourse*** *against arbitral awards*,[12] i.e. Article 34 was intended to specify the exclusive and exhaustive list of grounds for annulment of an award. Under Article 34(2), an award may be annulled "only if" the party challenging the award establishes one of the six specific grounds set forth in the paragraphs,[13] ("*the active remedy route*" highlighted in the *Astro* decision, as discussed later in this paper). However, interestingly, the Article does not bar a party from seeking court interference against the award by way of defence in enforcement proceedings under Articles 35 and 36,[14] ("*the passive remedy route*"). It is further important to note that, the grounds for setting aside as laid out in Article 34(2) are almost identical to those for refusing recognition or enforcement as provided in Article 36(1). Nonetheless, an application for setting aside under Article 34 (2) may ***only be made to a court in the State where the award was made*** ["*the territoriality principle*"] whereas an application for enforcement might be made ***in a court in any***

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[8] Kian Ganz, *SIAC Mumbai Founder Vivekananda N Joins Allen Gledhill After 300% India-Singapore Arbitration Boom*, LEGALLY INDIA (Aug. 22, 2014), http://www.legallyindia.com/201408224987/Law-firms/siac-mumbai-founder-vivekananda-n-joins-allen-gledhill-after-300-arbitration-boom. ("India...the single largest source of cases for the Singaporean arbitration body...2013 saw a record 259 cases before SIAC, of which 85 involved Indian parties. This had grown from 49 Indian cases out of 235 in 2012, 33 out of 188 in 2011, 36 out of 198 in 2010, and 24 Indian cases in 2009....").

[9] PT First Media TBK v. Astro Nusantara International BV & Ors., [2013] SGCA 57 [hereinafter Astro].

[10] Richard *Garnet*, *International Arbitration Law*: *Progress. Towards Harmonisation*, 3 MELB. J. INT'L. L., 400 (2002); John Hannold, *The United Nations Commission on International Trade law: Mission and Methods*, 27 AM. J. COMP. L. 201 (1979).

[11] Gerold Herrmann, *The UNCITRAL Arbitration Law: A Good Model of a Model Law*, UNIF. L. REV. 483 (1998).

[12] Article 34, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006*. Application for setting aside as exclusive recourse against arbitral award
(1) Recourse to a court against an arbitral award may be made only by an application
for setting aside in accordance with paragraphs (2) and (3) of this article.
(2) An arbitral award may be set aside by the court specified in article 6 only if:....

[13] GARY B. BORN , INTERNATIONAL COMMERCIAL ARBITRATION, 3175 (2nd ed. 2014)

[14] UNCITRAL, 2012 DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985, WITH AMENDMENTS AS ADOPTED IN 2006), 134 (U. N. Publication, 2012) [hereinafter Digest 2012].

State.[15] The UNCITRAL Digest further explains that while the Model law may observe the *territoriality* principle for *purely domestic* awards, it does not distinguish the process available for domestically rendered international awards and foreign awards in the same manner.[16] Thus, the remedies under Articles 35 and 36 are available equally to both domestic international awards and foreign awards. This is touted as the "seat neutral" philosophy of the Model Law.[17] Thus, "*under Article 35(1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35(2) and of article 36 (the latter of which sets forth the grounds on which recognition or enforcement may be refused)*".[18]

On the other hand, the NYC, 1958 determines its scope of application by adopting a different kind of "territorial criterion". It applies to arbitral awards made in a State, other than the State in which enforcement is sought.[19] However, to protect, what is described as the Convention's "pro-enforcement" bias,[20] the territorial criterion has been further qualified and State signatories are given the leeway to determine which awards are not considered "domestic" within their jurisdiction,[21] such that States remain free to apply the provisions of the NYC to international awards rendered domestically.[22]

III. THE APPROACH TOWARDS REMEDIES IN SINGAPORE *VIS-A-VIS* THE INDIAN ADOPTION OF THE MODEL LAW

The flexibility which is inherent in the Model Law has resulted in its varied adaptation across different jurisdictions and divergent interpretation by courts. One such aspect, highlighted in this section is the approach adopted by India and Singapore towards the relevance of *seat* with special emphasis on recognition and enforcement. Singapore has adopted the Model Law specifically into its International Arbitration Act, with the exception of Chapter VIII, which incorporates the "seat neutral" provisions on enforcement in Articles 35 and 36.[23] However, Singapore has through its recent judgment,[24] tried to incorporate the Model Law's "seat neutral" philosophy,[25] which is to de-emphasize the importance of the arbitral seat.[26] This has been done keeping in mind that, its neighbour and "regional competitor"[27] - Hong

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[15] *Id.* at ¶ 2.

[16] Digest 2012, *supra* note 14 at p.167. "By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law distinguishes between "international" and "non international" awards instead of relying on the traditional distinction between "foreign" and "domestic" awards. This new line is based on substantive grounds rather than territorial borders. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration legally takes place. Consequently, the recognition and enforcement of "international" awards, whether "foreign" or "domestic", should be governed by the same provisions."

[17] Corey Whiting & Constantin Klein, *Singapore Court of Appeal Clarifies Right to Challenge Tribunal's Decision on Jurisdiction at the Enforcement Stage*, 4,6 ARB. Q. - Debevoise & Plimpton LLP, (Dec. 2013) at 5, 7.

[18] Digest 2012, *supra* note 14, at 168.

[19] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art. I(1), 10 June 1958, 330 U.N.T.S 338; *See also*, Loukas Mistelis & Domenico Di Petro, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention , 1958) in* CONCISE INTERNATIONAL ARBITRATION, 3, 1-32 (Loukas Mistelis ed., Kluwer Law International, 2010) [hereinafter Mistelis & Di Petro].

[20] *Id.*

[21] *See supra* note 19. ("..It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought")

[22] Mistelis & Di Petro, *supra* note 19.

[23] *See* Singapore International Arbitration Act 1994, § 3. Model Law to have force of law. 3 (1) Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.
(2) In the Model Law — "State" means Singapore and any country other than Singapore; "this State" means Singapore."

[24] Astro, *Supra* note 9

[25] *Supra* note 17.

[26] Nakul Dewan, *To Seat or Not to Seat: Art Thou Relevant!*, SINGAPORE INTERNATIONAL ARBITRATION CENTRE - SIAC, http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/326-to-seat-or-not-to-seat-art-thou-relevant. (Last visited Sept. 30, 2014) [hereinafter Dewan].

Kong, has explicitly incorporated the 'seat neutral' philosophy in its national legislation, in its own bid towards becoming a sought after arbitration venue. [28]

Indian courts have placed emphasis on the *territoriality principle* upon which the Indian arbitration act was enacted.[29] This is in keeping with the specific differences in Parts I and II of the Arbitration and Conciliation Act, 1996 ("A&C Act, 1996") and the Indian adaptation of the Model Law. Part I defines "international commercial arbitration" in Section 2(1)(f) and Section 2(7) goes on to provide that any award made under that part would be a domestic award, thus, identifying all awards rendered in arbitrations with their "place of arbitration in India," as domestic awards.[30] These awards can only be challenged "actively" by pursuing setting aside proceedings under Section 34. The "passive" route of resisting the enforcement of the award is available only against foreign awards,[31] i.e., awards made in a reciprocating territory of the NYC, 1958 under Section 48 of Part II of the Act.[32]

The primary difference between the approaches of the two jurisdictions can be identified through the factual differences that prevail in the *BALCO* and *Astro* decisions. However, this paper attempts to take it a step further and analyse two questions. *First*, to what extent are the two approaches in line with the philosophy of the Model Law? *Second*, what are the implications of these decisions towards fulfilling the Model Law's aim of harmonization? Thus, the piece undertakes both, a normative *and* descriptive analysis of the two positions.

A. THE SINGAPOREAN APPROACH IN *ASTRO*

The dispute arose out of a joint venture between Lippo Group [an Indonesian Conglomerate] and a Malaysian media group [The Astro Group]. The terms of the joint venture were contained in a subscription and shareholders agreement [hereinafter, "SSA"] dated 11 March, 2005. The terms of the conditions precedent were not fulfilled and by August 2007, it became fairly obvious to the parties that the joint venture would not eventually materialise. Nonetheless, Astro All Asia Networks PLC (the 6th Respondent), and All Asia Multimedia Networks FZ-LLC (the 8th Respondent), both Astro Group Companies, continued to provide funds and services. Lippo Group commenced court proceedings in Indonesia against entities that were both parties and non-parties to the SSA. Astro Group commenced arbitration against FM, Ayunda and DV [Lippo Group] and made an application to join other members

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[27] Ben Jolley, *Astro v. Lippo: Singapore Court of Appeal Confirms Passive Remedies to Enforcement Available for Domestic International Awards*, KLUWER ARBITRATION BLOG, (Nov. 29, 2013), http://kluwerarbitrationblog.com/blog/2013/11/29/astro-v-lippo-singapore-court-of-appeal-confirms-passive-remedies-to-enforcement-available-for-domestic-international-awards/.

[28] Section 86(2)(c) - *" (2) Enforcement of an award referred to in section 85 may also be refused if....*
(c) for any other reason the court considers it just to do so."
See also Dylan McKimmie & Meriel Steadman, *Parties choose your remedies: the Singapore Court of Appeal has spoken,* NORTON ROSE FULLBRIGHT, (Dec. 2013), http://www.nortonrosefulbright.com/knowledge/publications/109738/parties-choose-your-remedies-the-singapore-court-of-appeal-has-spoken.

[29] BALCO, *supra* note 5; *Shri Lal Mahal Ltd. v. Progetto Grano* Spa, Civil Appeal No. 5085 of 2013 (India) [hereinafter Lal Mahal].

[30] *See* Arbitration & Conciliation Act, 1996 § 2(2), (India) "This Part shall apply where the place of arbitration is in India".

[31] *Supra* note 29, Part II Enforcement Of Certain Foreign Awards, Chapter I, New York Convention Awards, § 44 In this Chapter, unless the context otherwise requires, **"foreign award**" means 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, made 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".

[32] *See supra* note 29, § 48. "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..."

of Astro group to the arbitration as well. The Tribunal assumed jurisdiction under Rule 24(b) of the SIAC Rules and this was not challenged by Lippo under Article 16(3) of the Model law. However, a jurisdictional challenge was raised after Astro tried to enforce the award passed in its favour.

The first question to be considered was whether the jurisdictional challenge was valid, considering Lippo had not challenged it under Article 16(3) which would be the "active remedy" here. The main contention of Astro was that Article 16(3) was the exclusive route to challenge the jurisdiction of the Tribunal. On the other hand, Lippo's principal submission was that there is a clear and indelible distinction between active and passive remedies which are encapsulated in the Model Law's policy of choice of remedies. The Court accepted Lippo's argument and held that even though the time for bringing a challenge under Article 16(3) or an application to set aside had elapsed [Active remedy], court review for recognition and enforcement was still valid [Passive remedy]. The Court relied upon documents from the UNCITRAL Working Group on International Contract Practices [The Working Group], practical reasons like protecting legitimate interests of parties not to antagonise the arbitrators from the outset and various scholarly interpretations of the Model Law and its Singapore adoption.[33] The Court noted that choice of remedies is not confined to foreign awards and extends to domestic awards as well. Furthermore, the Court surveyed the Sixth Session of the Working Group which had decided to consolidate separate Sections relating to recognition and enforcement of foreign and domestic awards into what became the present Article 35 of the Model Law.[34] The Court noted an observation in the Sixth Session to the effect that the rationale behind non-consolidation was that there were no cogent reasons for providing different rules for domestic awards and foreign awards.[35] With regard to the facts in the arbitration, the Court held that Tribunal had erred in assuming jurisdiction. However, the aspect that is relevant to this paper is the approach of the Court in allowing parties to challenge even a domestic award at the stage of enforcement, thus impliedly rejecting the seat theory. The Court saw this as an imperative of the Model Law to reduce emphasis on seat of arbitration.[36] In fact, the court even went a step ahead to accept the argument that, the Model Law's "seat neutrality" was so strong that in order to deny a party the choice of remedies, Parliament would have had to expressly legislate out of it.[37]

IV. RECAPITULATION OF THE INDIAN APPROACH AND MAKING A CASE FOR THE "CHOICE OF REMEDIES" APPROACH IN INDIA

There have been various Indian cases dealing with the relevance of the seat in arbitration. However, this paper discusses its relevance with regard to interim measures [*BALCO*] and scope of enforcement and recognition [*Lal Mahal*]. In *BALCO,* the decision came about in the context of a request for interim relief under Section 9 of the A&C Act, 1996 made by a party to an ICC arbitration seated in Paris.[38] The Supreme Court of India held that the omission of the word "only" did not mean that the Parliament intended to make Part I applicable to foreign-seated arbitrations.[39] The Court arrived at this conclusion based on the meetings of the drafters of Model Law,[40] *territoriality principl*e adopted in the Indian statute[41] and other sub-sections under section 2 of the A&C Act, 1996.[42]

Mr. Nakul Dewan in his article, succinctly points out the difference between *BALCO* and *Astro* to be factual; the former relates to the determination by the supervisory court and the latter to the choice of remedies.[43] While we do agree with the author on this point, we *disagree* with the observation that the

[33] Astro, *supra* note 9 at ¶ 23.
[34] Astro, *supra* note 9 at ¶ 58.
[35] Astro, *supra* note 9 at ¶ 59.
[36] Astro, *supra* note 9 at ¶ 22.
[37] Astro, *supra* note 9 at ¶ 23.
[38] Vivekananda N, *supra* note 4.
[39] BALCO, *supra* note 5 at ¶75
[40] BALCO, *supra* note 5 at ¶ 71.
[41] BALCO, *supra* note 5 at ¶ 89.
[42] BALCO, *supra* note 5 at ¶¶ 91-93.
[43] Dewan, *supra* note 26.

decision in *Astro* would have been different had they gone by the over-reaching seat theory in *BALCO*. The basis for our argument is not merely their factual differences but the underlying philosophy of the Model Law and the flexibilities it provides.

First, this paper identifies the implications *Astro* could potentially have on the Indian approach. In India, it is established that a domestic award is either recognized as final, binding and not set aside or it is not recognized as being final, binding and set aside. Thus, there is no scope for resisting enforcement of a domestic award. However, as elaborated earlier, *Astro* perused the *travaux preparatoires* of the Model Law to hold that a passive remedy in the form of enforcement is inherent in its scheme.[44] This was based on the Model Law's aim towards de-emphasizing the seat of arbitration. The argument that follows, when placing this conceptualisation in the Indian context, is that the over-reaching "seat theory" precludes a choice of remedies in domestic arbitration in India. Here, it is highlighted that the Apex Court in *BALCO* quoted the Holtzmann Guide[45] and highlighted that UNCITRAL in fact, had not adopted the "autonomy criterion" of the NYC, 1958.[46] Thus, it is important to note that the interpretation of Section 2(7) in *BALCO*, where the court held that an award from an international commercial arbitration in India is *not* a foreign award,[47] is the correct interpretation of the Model Law's transposition into the Indian A&C Act, 1996. However, the underlying philosophy of the Model Law as elaborated in *Astro* clearly provides (as noted above) that there is no need for differentiation between domestic international awards and foreign awards when it comes to the availability of a choice of remedies.

It also becomes pertinent here to highlight the difference in the approach towards the scope of "enforcement and recognition" of a foreign award taken in these two jurisdictions. In *Astro*, the Court refers to choice of remedies as *double control* which according to the court, is what *Lord Mace JSC* described in Dallal as "ordinary judicial determination" in the court of enforcement.[48] It means that it is for the enforcing court to determine for itself what weight and significance should be ascribed to the omission, progress or success of an active challenge in the court of the seat. However, the Court warns that this does not mean limitless powers to enforce. At paragraph 77, Sundaresh Menon CJ observes,

> *"The refusal to enforce awards* which have *not been set aside* at the seat may therefore constitute one of the *outer-limits of "double control.*"

Further, he observes that even the most extended form of double control cannot include enforcing an award that has been set aside, unlike France, which is a non-Model Law country.[49] This is very similar to the Indian court's interpretation of the scope of enforcement in *Lal Mahal.* Thus, in case of enforcement of foreign awards, the courts have stuck to a completely territorial approach.

Thus, it can be conclusively said that in all cases there is no deviation from the main philosophy of the Model Law which is to a great extent uniform in this matter:

[A] Delocalised approach in case of choice of remedies with respect to domestic awards - be they purely domestic, or domestic "international awards", and [B] Completely territorial approach in case of enforcement of foreign awards. Varying interpretations have only been due to the flexibility provided in the Model Law where it has remained seat neutral in certain cases.

What is therefore desirable in the Indian context is the adoption of this *seat neutral* approach with respect to domestic international awards. It is interesting to note that in both these jurisdictions, the aims for the law, as well as its judicial interpretation, remain the same, i.e., increased favourability as a "seat" of

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[44] Astro, *supra* note 9 at ¶ 23.
[45] HOWARD M. HOLTZMANN & JOSEPH E. BEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, LEGISLATIVE HISTORY AND COMMENTARY (1995).
[46] BALCO, *supra* note 5 at ¶ 71.
[47] BALCO, *supra* note 5 at ¶ 88.
[48] Astro, *supra* note 9 at ¶ 75-76.
[49] Jean-Christophe Honlet, et al., *Commercial Arbitration FAQs - France*, GLOBAL ARBITRATION REVIEW, http://globalarbitrationreview.com/know-how/topics/61/jurisdictions/28/france/. (Last visited Nov. 23, 2014).

arbitration. However the outcomes of the interpretations, and the means adopted in furtherance of these objectives, have remained vastly different. The decision of the Court of Appeals in *Astro* was believed to have provided "*a welcome clarification to practitioners of the availability of passive remedies to the enforcement of domestic international awards under the IAA...*" as in doing so it reversed "*....a first instance decision which has been seen by some as detrimental to Singapore as a seat of arbitration*."[50] On the other hand, in India we continue to harp on the seat-centric approach and the limitation of the remedies - setting aside to Part I and refusal to recognise in Part II. This difference has been further solidified by the proposed amendments in the 246th Report, wherein clarifications have been issued with respect to the "public policy" ground under Sections 34 and 48. The only consolation is that some distinction between *purely* domestic and domestic *international* awards has been identified in the proposed amendment to Section 34,[51] such that the "patent illegality" ground is not available for setting aside of domestic international awards. Also, the difference in *purely domestic* and *domestic international* awards is highlighted to an extent, already in Part I of the A&C Act, 1996, under Section 28. The section provides for a clear difference in the powers of an arbitrator, in case the parties have failed to choose the substantive law. For *purely domestic* arbitrations, the arbitrator has no choice, but to apply "*substantive law for the time being in force in India*"; however, "*failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.*" It is thus proposed here that, if this difference is recognized for the present version of Section 28, and the proposed Section 34, it shouldn't be too far-fetched to argue for an *Astro*-like interpretation to the *BALCO* understanding of the differences between *purely domestic*, *domestic international* and *foreign awards* is plausible. It is also prudent that India start recognising the "practical ramifications" and "potentially far-reaching implications on the practice and flourishing of arbitration..."[52] as were identified by the Court in *Astro* for arbitration in Singapore, if the parties in international arbitrations seated in India are precluded from raising passive challenges in enforcement proceedings and are compelled to follow the active route.

V. CONCLUDING REMARKS

Mr. Ben Jolly of Herbert Smith Freehills correctly pointed out the impact of the *Astro* decision– "*Although the decision is fairly unique to the interpretation of the IAA and may find limited direct application, the Court's detailed and through analysis of the travaux of the Model Law may be of use to practitioners in other jurisdictions should similar questions arise as to the "choice of remedies" in other Model Law jurisdictions.*"[53] Till date, a similar scenario of an award debtor from a domestic international arbitration in India seeking to resist enforcement has not come up for adjudication in India, but the findings in *Astro* have surely opened up the possibility of a beneficial interpretation to the Model Law in India. Further, with the new Bhartiya Janta Party government and its invitation to foreign enterprises to "Make in India",[54] international transactions and contractual relationships are bound to increase. And with arbitration being seen as the preferred method of contractual dispute resolution, and in keeping with the recent spate of "pro-arbitration" moves [judgments[55] and prospective legislative action[56]] undertaken in India, it is but a necessity that India be

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[50] Jolley, *supra* note 27.

[51] Report 246, *supra* note 6, at 55. "After the Explanation in sub-section (2), insert sub-section "(2A) An arbitral **award arising out of arbitrations other than international commercial arbitrations,** may also be set aside by the Court if the Court finds that the award is vitiated by patent illegality appearing on the face of the award.
Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence".

[52] Astro, *supra* note 9 at ¶ 90.

[53] Jolley, *supra* note 27.

[54] IANS, *PM Narendra Modi launches 'Make in India' campaign with portal, logo*, BUSINESS TODAY (Sept. 25, 2014), http://businesstoday.intoday.in/story/pm-narendra-modi-launches-make-in-india-campaign-portal-logo/1/210765.html.

[55] Reliance Industries Ltd. & Anr. v. Union of India, Civil Appeal No. 5765 of 2014, May 28, 2014 (India); Enercon (India) Ltd. v. Enercon GMBH, Civil Appeal No. 2006 of 2014, February 14, 2014 (India); World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte Ltd., Civil Appeal No.895 of 2014, January 24, 2014 (India); Arasmeta Captive Power Co. v. Lafarge India, Civil Appeal No.11003 of 2013, December 12, 2013 (India).

[56] Report 246, *supra* note 6.

more facilitative to international arbitrations within the country. Further, providing parties to such international commercial contracts, with the option of both active and passive remedies against arbitral awards, will surely act as a big step towards sealing India's future as an arbitration hub.