MEMOIRS OF A PERSONAL JOURNEY THROUGH INDIAN ARBITRATION LAW

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Before being designated as a senior advocate in 1993, I gained invaluable experience of the discipline, precision and in-depth preparation involved in international commercial arbitration. In an arbitration located in London, a Danish firm Volund Milijotecknik ["*Volund*"] had sued the Government of India ["GoI"]. The latter had cancelled its contract with *Volund* for supply of a garbage incineration plant intended to convert Delhi's garbage into electricity.[1] Large amounts were paid to *Volund*, equipment was supplied but alas, not a single unit of electricity was ever generated. The reason was an elementary and striking one, but through the negligence of some GoI officers who had negotiated and evaluated the contract, had escaped the attention of GoI. The quality of Danish garbage was simply far superior to Indian garbage and was also carefully sifted by end consumers before dumping in Denmark, in stark contrast to India! Consequently, the calorific value required for incineration just did not exist in Delhi's garbage. Predictably, GoI lost the case since (a) *Volund* had drafted a one sided contract, in its own favour, which was signed hurriedly by GoI; (b) *Volund* had several disclaimers against GoI regarding prior due diligence; and (c) hardly any representation or warranty could be implied against *Volund*. A powerful and eminent arbitral panel, headed by Lord McKenzie Stuart, former President of the European Commission, held 2-1 against GoI (former Chief Justice of India R. S. Pathak, the GoI nominee, dissenting).

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Editor's Note: At the time of writing this memoir, the Arbitration and Conciliation (Amendment) Bill, 2015 had not been tabled and is therefore absent from the author's analysis.

[1] Available on file with the author. The arbitration has also been disclosed in Lok Sabha proceedings of August 20, 1991 as "A Refuse Incineration cum-Power Generation Plant, with research and development ramifications, was set up in Delhi in 1987 with Danish assistance. The project was installed on a turn-key basis by a Danish company who were responsible for the design, supply of plant and equipment, and providing the requisite technology. The company used its own experience and expertise in assessing the calorific value of Delhi's garbage and designing the plant. The turn- key contractor failed to demonstrate successful operation of the plant. In July, 1990, the Government decided to wind up the project, and compensation for the full project cost has been claimed from the Danish company. Arbitration proceedings have been initiated in the case.", *available at* http://parliamentofindia.nic.in/ls/lsdeb/ls10/ses1/03200891.htm.

Barely over 30 years old and opposed by an eminent silk from London, I learnt how true commercial arbitrations ought to be conducted and, more importantly, how everything I witnessed was either missing or observed in the breach, in Indian arbitrations.

These practices are known to everyone but sadly, 25 years later, are still missing in Indian arbitrations. They include sitting from 9 am to 5 pm; finishing final arguments in one go, in blocks of 1 or 2 weeks; never cancelling or changing a date; imposing strict time limits for each segment of oral arguments; invariably commencing oral arguments immediately after concluding witness examination; using computer technology, instant transcripts and steno typists whose shorthand simultaneously converts to readable text on screens; and, last, but not the least, costs being actual and real costs, of both the arbitral panel as also the winning side being borne by the losing party.

While I have waited unsuccessfully for these to happen in domestic Indian arbitrations over the last quarter century, the irony is that these practices are routinely observed even in India-located international arbitrations, frequently involving Indian judges and lawyers, working with foreigners. This shows that when the stakes are high and we are forced to work as per international standards, we can do it and do it quite well.

Undoubtedly, the costly nature of the aforesaid process itself generates discipline, commitment and a sense of responsibility among each stakeholder. Barely had the *Volund* arbitration started, the English silk opposing me told me during a lunch break that his name stood approved for High Court judgeship, which, even now, is a prestigious appointment in the UK and was much more so at that time. He told me that he had even risked losing the judgeship offer, though ultimately he managed to obtain a short deferment of his appointment, only so that he could complete the *Volund* case. Having invested so much time and money in it, he said, his client could not afford for him to walk away in its midst or alternatively, he could be sued for professional irresponsibility! Such a sense of professionalism is still absent in India's domestic arbitrations. The manner in which arbitration laws have been applied in Indian courts has posed further challenges to the efficacy of arbitration in the country.

Even before the aforesaid independent handling of an actual major international commercial arbitration, I was privileged to be associated with the second[2] and the final[3] ladders (six judgements in total, from the single judge bench of the High Court, to the Division Bench, and ultimately to the Supreme Court) in the series of litigation between Renusagar Power Company ["*Renusagar*"] and General Electric Company ["*GE*"]. As an assisting Counsel in a large team led by my father, Dr. L.M. Singhvi, representing *Renusagar*, we were opposed by eminent counsel like Mr. Nani Palkiwala and Mr. Shanti Bhushan.

In the first decision in the *Renusagar v. GE* series of cases,[4] it was held that the dispute was arbitrable and should go to the arbitral tribunal.[5] In *Renusagar II*, again involving 3 judgments, it was decided that interest upon interest compounded, as awarded to *GE* by the award, was not violative of Indian statutory law. Further, even if it did so violate, the Supreme Court held that that by itself this would not constitute a violation of Indian public policy under the prevailing Foreign Awards (Recognition and Enforcement) Act, 1961 ["FARE Act"]. Finally, in *Renusagar III*, after 3 more rounds of judgements, it was held that the obligation of *Renusagar* to make *GE* whole by making up all deficiencies in U.S. Dollar terms did not constitute a violation of the erstwhile Foreign Exchange Regulation Act and even if it did, it would not constitute a violation of Indian public policy under the FARE Act.[6] This would, it was hoped, "*mark the culmination of the protracted litigation arising out of a contract entered into by the parties on August 24, 1964 for the supply and erection of a thermal power plant at Renukoot in District Mirzapur, U.P.*"[7]

Renusagar lost all 3 rounds, totaling to 9 adverse judicial pronouncements. *First*, I believe that the *Renusagar v. GE* judgments constituted a classic case of 'hard cases allowed to make bad law'. Clearly, the then Indian common law on interest, and especially on interest upon interest, as contained in the Code of Civil Procedure of 1908 and the Indian Interest Act of 1978, either frowned upon interest upon interest

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[2] General Electric Co. v. Renusagar Power Co. Ltd., (1987) 3 S.C.R. 858 (India) [hereinafter "*Renusagar II*"].
[3] Renusagar Power Co. Ltd. v. General Electric Co., A.I.R. 1994 S.C. 860 (India) [hereinafter "*Renusagar III*"].
[4] Renusagar Power Co. Ltd. v. General Electric Co. & Anr., (1985) 1 S.C.R. 432 (India) [hereinafter "*Renusagar I*"].
[5] *Id.* at ¶ 64.
[6] *Renusagar III*, *supra* note 3, at ¶¶ 93, 99.
[7] *Renusagar III*, *supra* note 3, at ¶ 1, opening sentence by S. C. Agarwal, J.

compounded or provided for far more conservative interest regimes.[8] But the sequence of events in the *Renusagar v. GE* cases reflected the wilful defiance of *Renusagar* in paying any interest upon large sums of interest; the interest itself was withheld for decades by *Renusagar* from *GE*. However, the withheld sums were clearly limited to unpaid interest, and all principal had been paid. The Court viewed *Renusagar* as an empowered and wealthy entity who was violating commercial ethics by retaining large sums of *GE* money, which comprised accumulated unpaid interest, and not paying further interest on the latter. To punish *Renusagar* for its questionable conduct, the courts adopted an artificially narrow and high threshold for interpreting the phrase "public policy" and restricted it to the old classic unconscionable public policy heads, akin to prostitution, wagering and betting contracts, etc. Effectively, the judgments reduced the public policy exception to vanishing point under the FARE Act since hardly any commercial contract or arbitral award would involve that degree or nature of unconscionability as contemplated by *Renusagar II* and *Renusagar III*. *Second*, the decisions illustrated the general tendency of Indian courts to lean in favour of validity of international arbitral awards and limit substantive merit-based interference to a rarity. The Supreme Court set a different standard for the scope of 'public policy' in foreign awards by holding that:

> "*..even if it be assumed that unjust enrichment is contrary to public policy of India, Renusagar cannot succeed because the unjust enrichment must relate to the enforcement of the award and not to its merits in view of the limited scope of enquiry in proceedings for the enforcement of a foreign award under the Foreign Award Act.*"[9]

Ironically, the same principle of hard cases making bad law, manifested itself in the reverse direction in *ONGC v. Saw Pipes*[10] ["*Saw Pipes*"], a case with which I was not associated. The new Arbitration and Conciliation Act of 1996 ["1996 Act"] had come into force in India and at several arbitration conferences, I experienced a growing dissatisfaction with and criticism of the fact that while the old law permitted judicial scrutiny and rectification of suspicious (even tainted) awards arising out of the not so professional Indian arbitral structure, the 1996 Act, replicating the UNCITRAL model,

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[8] *See generally* The Interest Act, No. 14 of 1978, §3, INDIA CODE (1978); CODE CIV. PROC., §34.
[9] *Renusagar III*, *supra* note 3, at ¶ 93.
[10] O.N.G.C. v. Saw Pipes, A.I.R. 2003 S.C. 2629 (India).

imparted *undesirable* finality, conclusivity and unchallengeability even to such tainted and infirm awards.

Along came *Saw Pipes* and since Justice Shah felt uncomfortable with the award, he distinguished *Renusagar II* in the reverse direction. Since the phrase "public policy" in the old FARE Act was identical in all material respects with the relevant Section 34 of the Arbitration and Conciliation Act, 1996 ["new Act"], the identical phrase "public policy" could hardly be interpreted differently. But finding conclusivity of suspect awards to be indigestible and unacceptable, *Saw Pipes*, through Justice Shah,

(a) effectively interpreted the same phrase "public policy" radically differently for domestic arbitrations as opposed to foreign-seated international commercial arbitrations;

(b) achieved a result for domestic arbitrations diametrically opposite to the rationale for enacting the 1996 Act itself viz. highly circumscribed judicial scrutiny *even in domestic awards;*

(c) Brought in the same, if not the even more liberal regime of interference based upon "patent illegality", no different and perhaps even more liberal than the "error apparent on the record" bugbear which had plagued Indian arbitration for over 150 years and ultimately led to enactment of the 1996 Act.

The Court went beyond the standard in *Renusagar III* to hold that:

> "[…] *the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case, it is required to be held that the award could be set aside if it is patently illegal. Result would be - award could be set aside if it is contrary to: -*
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> *(a) fundamental policy of Indian law; or*
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> *(b) the interest of India; or*
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> *(c) justice or morality, or*
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> *(d) in addition, if it is patently illegal.*
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> *Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if*

it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."[11]

The first arbitration case actually argued by me in court, which got me name, fame (and some money), was *NTPC v. Singer* ["*NTPC*"].[12] *NTPC*'s entire case was that despite the parties having agreed to a London-based arbitration, Indian courts would have jurisdiction to pass orders controlling the arbitration even during on-going arbitral proceedings. This was built upon (a) the peculiar wording of the contractual clause in that case which said "*the courts of Delhi shall have exclusive jurisdiction*" and (b) the anachronistic and *sui generis* Section 9 of the FARE Act which read:

"*9. Saving. Nothing in this Act shall-*

(a) prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Act had not been passed; or

(b) apply to any award made on an arbitration agreement governed by the law of India."

Justice D.P. Wadhwa, sitting as in charge of the original side at Delhi High Court, after hearing my father (assisted by me) for *NTPC* and Mr. D.C. Singhania, for *Singer*, held that only English courts could interfere.[13]

By the time the matter reached the Division Bench, headed by Justice B.N. Kirpal, my father's multiple preoccupations led him to lose interest in the case and *NTPC* persisted with me alone. I argued the appeal for over two weeks and Justice Kirpal, though an aggressive and vocal judge, heard me patiently. He even commended the high quality of an article published by me at that time which espoused non-interference by Indian courts in the arbitral process. The article had been attached by Mr. Singhania to his written submissions! I could only plead that no estoppel can operate against counsel!

The clauses of the contract were loosely drafted and helped my case. However, since no court had till that time been able to digest the bizarre consequence that a

[11] *Id.*
[12] National Thermal Power Corporation v. The Singer Co., A.I.R. 1993 S.C. 998 (India); National Thermal Power Corporation v. The Singer Co., 1991 (1) Arb. L. R. 313 (Delhi) (India); National Thermal Power Corporation v. The Singer Co., 1990 (2) Arb. L.R. 1 (Delhi) (India).
[13] *Id.* at ¶¶ 24-26.

London located arbitration could be controlled, in all aspects of conduct of arbitral proceedings, by an Indian court, the Division Bench dismissed *NTPC*'s challenge.[14]

NTPC sought written opinions from Justice Deshpande and myself regarding feasibility of an appeal to the Supreme Court. Both opined in the affirmative, though I said that concurrent losses made success difficult and yet I felt it in my bones that the peculiar wording of the clause gave us a chance. Justice Deshpande, who had urged *NTPC* to engage my services for the case in the first place, insisted that I should be allowed to conduct even in the apex court. Barely over 31 years old, not a designated senior and with two losses under my belt, I was uneasy and queasy regarding attribution of a further failure in the apex court. So, I myself suggested having some eminent senior advocate lead the apex court battle and *NTPC* engaged Mr. Shanti Bhushan and me to conduct the case.

I distinctly remember that the matter was argued for over 2 days in Court No. 5 of the Supreme Court before a bench headed by Dr. Justice Thommen. Mr. S.K. Dholakia led Mr. Singhania and *Singer*. After Mr. Bhushan and Mr. Dholakia had finished, the case was evenly balanced. Only the afternoon session was remaining and Mr. Bhushan started his rejoinder since the case had to be closed by 4 p.m. that day. Sometime before 3 p.m., Justice Thommen, who had seen my active and vocal assistance of Mr. Bhushan over the last two days, said that since the bench had heard him (i.e. Mr. Bhushan) at length, they would not mind hearing the "young man" who had conducted the case before the Division Bench of the Delhi High Court. It was very gracious of the judges to do that and even more gracious of Mr. Bhushan to immediately agree and sit by my side, and encourage me as I wound up the case over the last hour.

The Bench reserved and, lo and behold, when the judgement came, it reversed both the prior orders. Justice Thommen pitched the decision on my central theme that arbitration cases have to be decided on the peculiar wording of the clause in each case and that the no-one-size-fits-all approach is appropriate.[15] He held that if the parties reposed faith in Delhi courts with such specific language, then they had to be relegated there and nowhere else.[16] He invoked Section 9 of the FARE Act strongly since, coupled with that contractual clause, it made the Delhi courts and Indian law the controlling law

[14] *Id.* at ¶¶ 36, 38.
[15] *Id.* at ¶¶ 14-17.
[16] *Id.* at ¶¶ 19, 42.

of the arbitration, irrespective of the *lex fori* i.e. irrespective of the law of the seat which was English law.[17] The Court found that the express intention to be bound by Indian law suggested that:

> "*the governing law of the contract (i.e., in the words of Dicey, the proper law of the contract) being Indian law, it is that system of law which must necessarily govern matters concerning arbitration, although in certain respects the law of the place of arbitration may have its relevance in regards to procedural matters*."[18]

A storm broke out and *NTPC v. Singer* was criticized severely by experts and learned authors everywhere. One such severe critic was Jan Paulsson, a renowned global arbitration expert. At a conference in Delhi, he and I had a face off. I consistently maintained that the approach of leaning in favour of judicial non-interference in the conduct of foreign located arbitrations is favourable *generally*, but is subject to the paramountcy of the intention of parties and said that *NTPC v. Singer* was a case where the court did nothing more than enforcing that intention.

At that time, Mr. P.C. Rao, then Law Secretary of GoI, and a relentless crusader for reform of arbitration law, found himself in a corner. Due to legislative delays, the new arbitration law was continuously struggling to be born while his retirement date was fast approaching (upon which he took up a post on the International Tribunal for the Law of the Sea w.e.f. October 1, 1996, where he still serves!)[19]. Just before his retirement, he got the 1996 Act promulgated through an Ordinance. Shortly before that, he telephoned me and sought my opinion about what to do with the *NTPC* decision, which he saw as a huge anomaly in his adoption of the UNCITRAL Model Law on International Commercial Arbitration, 1985.[20] I told him that he simply had to ensure that nothing resembling Section 9 of FARE Act should find its way into the new law.

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[17]The Foreign Awards (Recognition and Enforcement) Act, No. 45 of 1961, § 9, INDIA CODE (1961). "Nothing in this Act shall … (b) apply to any award made on an arbitration agreement governed by the law of India".

[18] *Supra* note 18 at ¶ 42.

[19] Profile of ITLOS Judge P. Chandrasekhara Rao, *available at* https://www.itlos.org/the-tribunal/members/judge-p-chandrasekhara-rao/.

[20] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985: WITH AMENDMENTS AS ADOPTED IN 2006 (Vienna: United Nations, 2008), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

Hence, the new Act brought forth the permanent exorcism of the Section 9 paradigm from Indian law.

Despite several other intervening arbitration cases, especially in the Delhi High Court, a troika of significant recent apex court judgements is all that I have space for in this personal journey. But prior to that, I played a role in *Dresser Rand v. Bindal Agro Chem.*[21] The case involved an interesting but badly drafted arbitration agreement, which ultimately yielded only a short working order of the apex court (but no legal principle) doing indirectly what Section 5 of the 1996 Act says should not be done directly i.e. it restrained parties from proceeding further with a Paris-based international arbitration while not directly injuncting the tribunal![22]

That is also the error which lies at the base of *Bhatia International v. Bulk Trading*[23] ["*Bhatia*"] (a case with which I was not associated), though it has been compounded manifold by a catena of High Court judgements misapplying *Bhatia*. I have always believed that the core of the *Bhatia* principle has validity and resonance i.e. that Indian court's interference under Part I of the 1996 Act[24] should be rare and limited to the temporary preservation of the subject matter of the arbitration to ensure that the arbitration itself and/or the resultant award does not become infructuous. *First*, the *Bhatia* principle was never intended to impede, obstruct or injunct the conduct of foreign-based arbitration itself. *Bhatia* itself involved such an injunction to prevent goods from being dissipated from an Indian port. *Second*, *Bhatia's* real ratio lies in paragraph 32 of the judgement, which holds that it is easy, not only expressly but also *impliedly,* to exclude Indian court jurisdiction. The Court found that:

> "*In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.*"

[21] Dresser Rand S.A. v. Bindal Agro Chem Ltd. and Anr., A.I.R. 2006 S.C. 871 (India).
[22] *Id.* at ¶¶ 28, 40.
[23] Bhatia International v. Bulk Trading S.A., A.I.R. 2002 S.C. 1432 (India).
[24] The 1996 Act is divided into two parts. Part I contains a complete code for arbitration based on the UNCITRAL Model Law. Part II is limited to enforcement of foreign awards.

Bhatia nowhere suggests that Indian courts, without regard for the need to preserve the subject matter, can or should give injunctions arresting or delaying the very conduct of foreign arbitrations.

Bharat Aluminium Co & Ors. v. Kaiser Aluminium Technical Service Inc .[25]["*BALCO*"] gave me a chance to expand on this theme before a Constitutional Bench of the Supreme Court and, as few realize, to *de facto* succeed only on this narrow thrust of my argument while losing the case *de jure*. I was the only counsel in *BALCO* who adopted a hybrid and nuanced stance. I said, *first*, that the core of *Bhatia*, as stated above, should be preserved and if limited to paragraph 32 as above, it should not be overruled. *Second*, I argued in the alternative, that even assuming *Bhatia* was decided wrongly, the Court in *BALCO* had to ensure that parties must be able to preserve the subject matter while arbitration is ongoing; else the final award may become unexecutable on account of acts and omissions which will remain unpoliced and unchecked during the arbitration process. I repeatedly gave the example of a hypothetical fort in Rajasthan. I said that if such fort was the subject matter of dispute, Indian courts must have the power to injunct its multiple sales in the interim while arbitration in relation to the fort is ongoing in London. *Third*, I added that it is practically unworkable and unfeasible to suggest that, to prevent such alienation and encumbrance, a party could *only* apply to an English court. By the time such an interim order will be obtained in the U.K. and brought for enforcement in India, the property would have been sold multiple times. I therefore propounded a nuanced restatement of *Bhatia*, not its whole scale rejection, to the effect that *even in foreign based arbitrations, Indian courts must be imparted some jurisdiction to preserve the subject matter, temporally and spatially limited in duration and scope, purely in aid of the main arbitration and never to delay, injunct or arrest the arbitral conduct itself, otherwise the arbitration itself would become futile and infructuous.*

Fourth, I argued, again in the alternative, that if Part I of the 1996 Act is excluded simpliciter, an aggrieved party would be rendered completely remediless while the subject matter of the arbitration itself could be dissipated or alienated under his nose. Hence, if the Constitutional Bench, I argued, intended to exclude Part I and overrule *Bhatia*, it must, on the principle of avoiding a remediless situation, allow a suit purely for interim relief to deal with the above specific paradigm. *Lastly*, and again in the alternative, I

[25] Bharat Aluminium Co. & Ors. v. Kaiser Aluminium Technical Service Inc., (2012) 9 S.C.C. 552 (India).

argued that if all the above is unacceptable to the Court, it should apply the doctrine of prospective overruling, since hundreds of cases and thousands of parties across India, had arranged their affairs on the basis of the prevailing *Bhatia* principle as followed by its manifold progeny. These parties, I argued, should not be penalized by the apex court's new-found wisdom in *BALCO*.

I have no doubt that the pragmatic force of the "remediless" paradigm affected and heavily influenced the apex court's ultimate decision. Though the judges felt that a suit for interim relief alone could open floodgates of litigation (and hence rejected my argument), they introduced an even more powerful caveat than that I had asked for i.e. they made the judgement not merely prospective but went as far as to apply it only to agreements entered into after the date of the judgement!

Renusagar III and *BALCO* both evocatively validate the "realism" theory of law, enunciated forcefully by American jurist Karl N. Llewellyn in his famous work "The Bramble Bush".[26] The theory is nothing but human psychology at work- that judges are humans first and judges later. They invariably first arrive at their sense of justice of the case and will thereafter, while stretching or adapting the law for consistency and future workability, ensure that the latter fits the former and not vice versa. *Renusagar III* and *BALCO* are clear and strong examples, amongst many others, of this overriding characteristic of judge-made law.

Enercon (India) Ltd. v. Enercon GMBH,[27] the second of the recent troika involving me (and the author of the troika, Justice Nijjar) was a half victory. It illustrated the basic principle that after decades of international arbitration jurisprudence, involving large teams of in-house personnel, outsourced experts and plenty of precedential guidance, arbitration clauses continue to be drafted most shabbily and clumsily. Witness this clause—

> "*All disputes, controversies or differences which may arise between the Parties in respect of this Agreement including without limitation to the validity, interpretation, construction performance and enforcement or alleged breach of this Agreement, the Parties shall, in the first instance, attempt to resolve such dispute, controversy or*

[26] KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES TO LAW AND LAW SCHOOLS (2008).
[27] Enercon (India) Ltd. & Ors. v. Enercon G.M.B.H. & Anr., A.I.R. 2014 S.C. 3152 (India).

difference through mutual consultation. If the dispute, controversy or difference is not resolved through mutual consultation within 30 days after commencement of discussions or such longer period as the Parties may agree in writing, any Party may refer dispute(s), controversy(ies) or difference(s) for resolution to an arbitral tribunal to consist of three (3) arbitrators, of who one will be appointed by each of the Licensor and the Licensee and the arbitrator appointed by Licensor shall also act as the presiding arbitrator."

Clearly a lesson in how arbitration clauses ought not to be drafted! I succeeded in the herculean task, on behalf of the foreign party, of persuading the apex court that sufficient and basic *intent to arbitrate* could be gleaned and extracted from this clause. However, on the second part we lost, viz., that though we were able, though just about, to spell out intent to arbitrate, there was no material to imply an exclusion of Part I, and hence Indian courts' jurisdiction could not be excluded. Given the bizarre language of the agreement and the fact that the agreement was pre-*BALCO*, I think the judgment is supportable. Shades of *NTPC v. Singer* are seen here, leading, not unjustifiably, to contractual text-based interpretation, even where the text is completely flawed!

Reliance Industries v. Union of India[28] ["*Reliance I*"] was the third of the recent troika and I enjoyed conducting it for the winning party. It definitively settled the Part I controversy and clearly held, perhaps for the first time, that designation of a foreign seat *automatically* excludes Part I altogether, rendering Indian courts completely without jurisdiction. The Court cited an amalgam of Section 9 (court ordered interim relief), Section 11 (appointment of arbitrator by courts) and Section 34 (setting aside of awards) cases, from *Dozco*,[29] *Videocon*,[30] *Yograj*[31] to *BALCO*, while distinguishing *Venture Global*[32] and succeeded in clearing several cobwebs.

GoI persisted, despite *Reliance I* having decided that the challenge to an arbitrability ruling of the arbitral panel before the Delhi High Court was without jurisdiction. GoI again filed a second Section 14 petition in the Delhi High Court

[28] Reliance Industries Ltd. v. Union of India, A.I.R. 2014 S.C. 3218 (India).
[29] Dozco India P. Ltd. v. Doosan Infracore Co. Ltd., (2009) 3 A.L.R. 162 (India).
[30] Videocon Industries Limited v. Union of India and Anr., (2011) 6 S.C.C. 161 (India).
[31] Yograj Infrastructure Limited v. Ssang Yong Engineering and Construction Co. Limited, (2011) 9 S.C.C. 735 (India).
[32] Venture Global Engineering v. Satyam Computer Services Ltd., (2008) 4 S.C.C. 190 (India).

questioning and challenging the continuance of the arbitral panel's mandate ["*Reliance II*"]. On appeal,[33] the Apex Court, in its most recent major judgement on international commercial arbitration, made short shrift of it and definitively enshrined the doctrine of automatic exclusion of Part I and Indian courts' jurisdiction by specification of a foreign seat. The Court also clarified that if Part I is excluded, it cannot be argued that some sections of Part I are not excluded (e.g. Section 14 as in *Reliance II*) while others are (like section 9, as in *Reliance I*).

This has been an interesting and intellectually invigorating journey and it is by no means nearing its end. There are several lessons to be drawn from my experience. *First,* it has taught me the importance and vital real life role of judicial realism, well beyond that of juristic principle or precedential discipline. *Second*, it reflects the need for careful Indian adaptation and alteration of foreign codes and models like UNCITRAL Model Laws, before their hurried or wholescale importation. A small but practically significant example shows that while the new 1996 Act was intended to give greater life and efficacy to international arbitral awards, loose drafting of Section 36 of the Act has judicially established that mere filing of section 34 objections, even without a court notice on those objections, stays the operation of the award *automatically*.[34] This is enormously ironical because even under the much-maligned Arbitration Act of 1940, there was no *automatic* stay of the award and the court had to specifically order stay on awards! Indeed, this aberration of the 1996 Act encourages award debtors to file objections, howsoever unnecessary or frivolous. *Third*, the correct way to rectify aberrations like *Bhatia* or *Saw Pipes* is focused legislative amendment but humongous Parliamentary delays compel intervening judicial rectification (as of *Bhatia* by *BALCO*), triggering of yet another chain of interpretive acrobatics and further judicial precedents. *Fourth*, the aforesaid principles of "patent illegality", introduced by the flawed *Saw Pipes* decision, and automatic stay of

[33] Union of India v. Reliance Industries, Special Leave Petition (Civil) No. 11396 of 2015 (India).

[34] *See* Fiza Developers and Inter-Trade Pvt. Ltd. v. A.M.C.I. Pvt. Ltd., 2009 (11) SCALE 371 (India). The Court found that: "Section 36 provides that an award shall be enforced in the same manner as if it were a decree of the court, but only on the expiry of the time for making an application to set aside the arbitral award under Section 34, or such application having been made, only after it has been refused. Thus, until the disposal of the application under Section 34of the Act, there is an implied prohibition of enforcement of the arbitral award. The very filing and pendency of an application under Section 34, in effect, operates as a stay of the enforcement of the award."

award flowing from Section 34 are crying out for urgent legislative reform. I look forward to being part of other challenging aspects of this interesting journey.