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EXTRA-TERRITORIAL ARBITRATION: INDIAN PARTIES ARBITRATING ABROAD

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Abstract

Supreme Court's judgment in PASL Wind Solutions v. GE Power Conversion India discusses the implications of "extra-territorial" arbitration, i.e., Indian parties arbitrating abroad. Beyond just a case analysis, the real implication of this judgment is far-reaching, and parties will want to consider this seemingly fancy option with some care and consideration. Accordingly, the article begins with legal implications in the governance of extra-territorial arbitration. It then narrows down to the potential legal concerns, followed by the practicalities that are likely to pass unnoticed in all the excitement of choosing extra-territorial arbitration. Hence, the article helps parties take a thoughtful approach and make an informed choice. Finally, it is worth considering if extra-territorial arbitration reflects the condition of domestic arbitration and the need among users to look beyond borders for a better seat to arbitrate.

I. Introduction To Extra-Territorial Arbitration

Domestic parties choosing a seat of arbitration abroad, on the sheer force of 'party autonomy,'[1] to exclude the applicability of the domestic arbitration law is a startling choice because a seat outside their home jurisdiction is an agreement that the foreign law (*lex arbitri*)[2] relating to the conduct and supervision of arbitrations will apply to the proceedings. For ease of reference, the author refers to it as 'extra-territorial arbitration.'

Freedom to contract is one of the pillars of arbitration,[3] and stretching it to such limits to go beyond borders was finally inquired and settled by the Supreme Court in *PASL Wind Solutions Pvt. Ltd.* v. *GE Power Conversion India Pvt. Ltd.* ["**PASL**"].[4] It is widely accepted that the term "International Commercial Arbitration" in Part I of the Arbitration & Conciliation Act 1996 ["**Arbitration**

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1 JULIAN D. M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 75 (1978) ("There is the movement towards the rule allowing the parties to choose the law to govern their contractual relations. This development has come independently in every country and without any concerted efforted by the nations of the world; it is the result of separate, contemporaneous and pragmatic evolutions within the various national systems of conflict of laws.").

2 Smith Ltd. v. H. International, [1991] 2 Lloyd's Rep. 127, 130 (U.K.) ("It is … a body of rules which sets a standard … for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures … the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties … and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitration.").

3 ALAN REDFERN & MARTIN HUNTER, INTERNATIONAL ARBITRATION 71 (2015) [*hereinafter* "REDFERN & HUNTER"] ("The agreement to arbitrate is the foundation stone of international arbitration. It records the consent … that is indispensable to any process of dispute resolution outside national courts.").

4 PASL Wind Solutions v. GE Power Conversion India, (2021) SCC OnLine SC 331 [*hereinafte*r "PASL"].

Act"] refers to parties, whilst in Part II, it relates to geography. Therefore, under Part II of the Arbitration Act, "extra-territorial arbitration" between two Indian parties would be considered international commercial arbitration (i.e., the resulting award would be a foreign arbitral award under Part II).

But before PASL, courts in India were split about the validity of an 'extra-territorial arbitration.' The opposing school of thought suggested that parties could not be allowed to derogate from Indian law. The essence is that parties could not override the mandatory rules of their home country—an interpretation derived from Section 2(6) read with Section 28 of the Arbitration Act.[5] The nerve of the issue before PASL was if the public policy of India would allow domestic parties to choose a seat abroad and then enforce the award made abroad in India. To which their answer was negative, given the reluctance to afford such freedom to parties for reasons of law and policy (and perhaps the unconventional outlook of such practice).

Indeed, the question of whether a state's public policy would allow its nationals to contract a foreign seat of arbitration would depend on what its public policy states in this regard. But PASL cleared the way for parties to select a foreign seat rightfully, based on the considerations that suit them. The concept is truly fascinating; that parties can designate a foreign seat of arbitration, even in the complete absence of any nexus to that foreign state where the seat lies. The topic assumes importance because if domestic parties can enjoy arbitration abroad, an entire paradigm shift in the world of arbitration is waiting around the corner—one that will indeed have a significant impact on domestic arbitration in India (i.e., arbitrations other than international commercial under Part I of the Arbitration Act). It is the dawn of an age that embraces a greater degree of party autonomy and globalizing arbitrations between domestic/Indian parties at a whole new level. We are now in the era of 'extra-territorial arbitrations.

This paper delves into the intricacies of extra-territorial arbitrations by tracking the development in views taken by the Indian courts. The author tries to explain the following concepts in this paper. Section [II] discusses the PASL Case, including the issues in the case, factual matrix, application of the concepts, TDM case, and lastly, a recapitulation of the whole case. Section [III] discusses the legal effects of arbitration governance, including rules governing court assistance, rules governing court supervision, and rules governing procedure and due process. Section [IV] discusses potential legal concerns, including arbitrability issues in light of competition law, reception by foreign courts, and lex arbitri issues. Section [V] discusses the practicality of arbitrating extraterritorially, including access to specialist courts or advanced court systems, taking advantage of international public policy, and other practical considerations.

[5] Arbitration and Conciliation Act, No. 26 of 1996, § 28 (India) [*hereinafter* "Arbitration Act"].

II. The PASL Case: Settling the Law

A. Issue

In PASL, the Supreme Court addressed whether two Indian companies (incorporated in India) can choose a seat outside India and whether that award would be subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"], can be considered a 'foreign award' under Part II of the Arbitration Act and, accordingly, enforced. In other words, it was considered whether two Indian parties could exclude the application of the Arbitration Act and go abroad to a different forum to arbitrate their dispute (an extra-territorial arbitration).[6]

B. Factual Matrix and Procedural Posture

In this case, the parties entered into a settlement agreement in 2014 after some disputes arose regarding some purchase orders for certain converters. The arbitration clause in the settlement provided the following:

> "*6. Governing Law and Settlement of Dispute*
>
> *6.1 Any dispute or difference arising out of or relating to this agreement shall be resolved by the Parties in an amicable way. (A minimum of 60 days shall be used for resolving the dispute in amicable way before same can be referred to arbitration).*
>
> *6.2 In case no settlement can be reached through negotiations, all disputes, controversies or differences shall be referred to and finally resolved by Arbitration in Zurich in the English language, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, which Rules are deemed to be incorporated by reference into this clause. The Arbitration Award shall be final and binding on both the parties.*
>
> *6.3 The Agreement (together with any documents referred to herein) constitutes the whole agreement between the Parties and it is hereby expressly declared that no variation and/or amendments hereof be effective unless mutually agreed upon and made in writing.*"
>
> (emphasis supplied)

Eventually, disputes arose between the parties regarding the settlement. The Appellant claimed that the warranties were not provided for the converters as promised under the settlement, whereas the Respondent argued that the warranties covered only certain delta modules and not the converters.[7]

The Appellant issued a request for arbitration to the International Chamber of Commerce ["**ICC**"]. In 2017, a sole arbitrator was appointed by the ICC. Parties agreed that the substantive law applicable to the dispute would be Indian law.[8] But a preliminary objection was filed by the Respondent challenging the arbitrator's jurisdiction on the ground that two Indian parties could not have chosen a foreign seat of arbitration. The Appellant opposed the said application and asserted that there was

6 PASL, (2021) SCC OnLine SC 331, ¶ 2.
7 PASL, (2021) SCC OnLine SC 331, ¶ 3.2.
8 PASL, (2021) SCC OnLine SC 331, ¶ 3.3.

no such bar under the law. However, the sole arbitrator dismissed the objection after relying on Indian case laws[9]. Hence, the sole arbitrator found that the arbitration clause in the settlement agreement is valid and proceeded to apply the Swiss Act because the seat of the arbitration was Zurich, Switzerland. Though, for cost-saving purposes, the venue of the arbitration was Mumbai.[10]

The final award was rendered, and the Respondent called upon the Appellant to pay the awarded amount. However, the Appellant failed to oblige, and the Respondent initiated enforcement proceedings under Sections 47 and 49 of the Arbitration Act[11] before the Gujarat High Court, within whose jurisdiction the assets of the Appellant were located. In a complete *volte-face*, the Appellant asserted that the seat of arbitration was Mumbai, where all the hearings of the arbitral proceedings took place. Accordingly, the Appellant applied Section 34 of the Arbitration Act[12] before the Small Causes Court in Ahmedabad, later transferred to the Commercial Court in Ahmedabad. In response to the Section 34 application, the Respondent moved under Order 7 Rule 11 of the Code of Civil Procedure, 1908 ["**CPC**"][13], which got rejected by the Commercial Court.

After various other procedural maneuvers, the proceedings under Section 34 of the Arbitration Act for challenging the award and the Respondent's application under Order 21 of the CPC for the execution of the final award was stayed, while the Supreme Court heard the appeal.

C. Discussion and Application

The Supreme Court took a step-by-step approach to deal with the issue. It first determined that the seat of arbitration was indeed Zurich (and not Mumbai).[14]

i. Exclusivity of Parts I and II

Next, it considered the exclusivity of Parts I and II of the Arbitration Act and observed no permeation between the two Parts[15] based on the principle of territoriality.[16] This needed to be investigated because the Respondent submitted that the expression "unless the context requires otherwise" used in Section 44 necessarily imported the definition of 'international commercial arbitration' contained in Part I when the context requires,[17] namely, that Indian parties have agreed to a seat outside India.

The Court first iterated that Section 2(2) of the Arbitration Act[18] (the only permissible application interface between the two Parts) uses the expression 'international commercial arbitration' in the context of the 'place of arbitration' being outside India. In contrast, 'international commercial

9 Reliance Industries Limited v Union of India, (2014) 7 SCC 603; Sasan Power Ltd. v North American Coal Corporation (India) (P) Ltd (2016) 10 SCC 813; Atlas Export Industries v Kotak & Co. (1999) 7 SCC 61; GMR Energy Ltd. v Doosan Power Systems (India) (P) Ltd. (2017) SCC OnLine Del 11625.

10 PASL, (2021) SCC OnLine SC 331, ¶ 3.4.

11 Arbitration Act, No. 26 of 1996, §§ 47, 49 (India).

12 Arbitration Act, No. 26 of 1996, § 34 (India).

13 Order VII Rule XI, Civil Procedure, No. 5 of 1908 (India).

14 PASL, (2021) SCC OnLine SC 331, ¶¶ 30-33.

15 PASL, (2021) SCC OnLine SC 331, ¶¶ 34-37.

16 Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552, ¶ 124.

17 PASL, (2021) SCC OnLine SC 331, ¶ 24.

18 Arbitration Act, No. 26 of 1996 (India).

arbitration' contained in Section 2(1)(f) of the Arbitration Act[19] is in the context of such arbitrations seated in India, and the definition there is party-centric. It boiled down to this: 'international commercial arbitration' is primarily a place-centric idea under Part II of the Arbitration Act (as provided under Section 44 of the Arbitration Act), which means an arbitration between any two parties seated outside India, to which the New York Convention applies.

ii. Party-oriented v. seat-oriented ideas

Further, the Court ventured to set out the ingredients of a foreign arbitral award sought to be enforced under Part II of the Arbitration Act. Section 44 of the Arbitration Act[20] (ratifying Article I of the New York Convention) defines a foreign arbitral award using four ingredients:[21]

> "*(i) the dispute must be considered to be a commercial dispute under the law in force in India,*
>
> *(ii) it must be made in pursuance of an agreement in writing for arbitration,*
>
> *(iii) it must be disputes that arise between 'persons' (without regard to their nationality, residence, or domicile), and*
>
> *(iv) the arbitration must be conducted in a country which is a signatory to the New York Convention*."

The Court found that ingredients (i) and (ii) were effortlessly satisfied. It also found that ingredients (iii) and (iv) were sufficiently satisfied, given that the dispute was indeed between two persons, i.e., two India-incorporated companies, and that the arbitration is conducted at a juridical seat in Switzerland, which is a signatory to the New York Convention. This framework of analysing an arbitration drew an essential distinction between a 'foreign arbitration' and 'international arbitration – that they are not the same creature.'[22]

> "*1.4.1 Foreign arbitration and international arbitration are not the same. An arbitration that takes place in State A is a foreign arbitration in State B. It does not matter whether the arbitration is commercial or non-commercial or whether the parties are from the same country, from different countries or that one or all are from State A. Since even a domestic arbitration in State A is a foreign arbitration in State B, the courts of State B would be called upon to apply the New York Convention to enforcement of a Clause calling for arbitration in State A and to the enforcement of any award that would result*."
>
> (emphasis supplied)

Hence, any award made in a State other than the State of the recognition or enforcement court would fall within the scope of the New York Convention, i.e., it would be a foreign award.[23] In that, the parties' nationality, domicile, or residence would not be relevant because the determinative factor

19 Arbitration Act, No. 26 of 1996 (India).
20 Arbitration Act, No. 26 of 1996, § 44 (India).
21 PASL, (2021) SCC OnLine SC 331, ¶ 45.
22 UNCTAD Commentary, Dispute Settlement, 5.1, International Commercial Arbitration, ¶ 1.4.1.
23 ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, III. 1.1.

under the New York Convention is only the place of arbitration, nothing else. Accordingly, the Court rendered:

> "*25. We have already seen that the context of Section 44 is party-neutral, having reference to the place at which the award is made. For this reason, it is not possible to accede to the argument that the very basis of Section 44 should be altered when two Indian nationals have their disputes resolved in a country outside India*."[24]
>
> (emphasis supplied)

The Court opined that the expression "*unless the context otherwise requires*" could not be considered to undo the very basis of Section 44 by transforming it from its seat-oriented provision to a party-oriented provision as under Part I of the Arbitration Act. More so because the opening words of Section 44 itself say "*[i]n this Chapter*," which is Chapter I of Part II of the Arbitration Act. No canon of interpretation would allow such transboundary application of definition when expressly limited to apply in circumscription.[25]

iii. Reliance on the 'Atlas' case

To further its conclusions above,[26] the Court in PASL referred to *Atlas Exports Industries Ltd.* v. *Kotak & Co.* ["**Atlas**"],[27] which had considered the following arbitration clause:

> "*27. Arbitration.--(a) Any dispute arising out of or under this contract shall be settled by arbitration in London in accordance with the arbitration Rules of Grain and Food Trade Association Limited, No. 125 such Rules forming part of this contract and of which both parties hereto shall be deemed to be cognisant.*
>
> *(b) Neither party hereto, nor any persons claiming under either of them, shall bring any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal, as the case may be, in accordance with the arbitration Rules and it is expressly agreed and declared that the obtaining of the award from the arbitration, umpire or Board of Appeal, as the case may be, shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute*."

In that case, the final award was delivered in 1987 under the Rules of GAFTA, London. As the award was not complied with, the award creditor moved an application under Sections 5 and 6 of the erstwhile Foreign Award Act, 1961 ["**FAA**"][28] before the Bombay High Court. The award was made a Rule of the Court, followed by a decree. The award debtor preferred a Letters Patent Appeal on the grounds that since both the parties were Indian, the award could not be enforced as contrary to

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24 PASL, (2021) SCC OnLine SC 331, ¶ 49.
25 PASL, (2021) SCC OnLine SC 331, ¶ 26.
26 PASL, (2021) SCC OnLine SC 331, ¶¶ 53-55.
27 Atlas Exports Industries Ltd. v. Kotak & Co., (1999) 7 SCC 61.
28 The Foreign Awards (Recognition and Enforcement) Act, No. 45 of 1961, §§ 5, 6 (India).

Sections 23 and 28 of the Indian Contract Act ["**ICA**"][29]. However, the Court rejected this argument by holding that:[30]

> "*10. […] It was submitted that Atlas and Kotak, the parties between whom the dispute arose, are both Indian parties and the contract which had the effect of compelling them to resort to arbitration by foreign arbitrators and thereby impliedly excluding the remedy available to them under the ordinary law of India should be held to be opposed to public policy….*
>
> *11. The case at hand is clearly covered by Exception 1 to Section 28. Right of the parties to have recourse to legal action is not excluded by the agreement. The parties are only required to have their dispute/s adjudicated by having the same referred to arbitration. 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*…."
>
> (emphasis supplied)

It was categorically held that a foreign award could not be refused enforcement merely because two Indian parties were involved, and the arbitration was extra-territorial. Although, the analysis by the Atlas Court was in the context of Sections 23 and 28 of the ICA and the existence of remedies. In this regard, the Court simply pointed to the mutuality of the agreement to arbitrate extraterritorially. Besides, the Court also observed that the award debtor never took this plea before and could not be allowed to wipe the board clean in hindsight.[31]

iv. Reliance on the 'Sasan (I)' case

To further its conclusions above,[32] the Pasl Court also referred to *Sasan Power Ltd.* v. *North American Coal Corp. Ltd.*, ["**Sasan (I)**"][33] which had considered the following arbitration clause:

> "*Section 12.2 - Dispute Resolution*
>
> *Arbitration*
>
> *(a) Any and all claims, disputes, questions or controversies involving Reliance on the one hand and NAC on the other hand arising out of or in connection with this Agreement (collectively, 'Disputes') which cannot be finally resolved by such parties within 60(sixty) days of arising by amicable negotiation shall be resolved by final and binding arbitration to be administered by the International Chamber of Commerce (the 'ICC') in accordance*

29 Indian Contract Act, No. 9 of 1872, §§ 23, 28 (India).

30 *Ibid. See also*, PASL, (2021) SCC OnLine SC 331, ¶ 50 (It can be seen that exception 1 to Section 28 of the Contract Act specifically saves the arbitration of disputes between two persons without reference to the nationality of persons who may resort to arbitration. It is for this reason that this Court in Atlas (supra) referred to the said exception to Section 28 and found that there is nothing in either Section 23 or Section 28 which interdicts two Indian parties from getting their disputes arbitrated at a neutral forum outside India).

31 PASL, (2021) SCC OnLine SC 331, ¶ 30 ("We are, therefore, unable to accede to the contention of Mr. Himani that this case cannot be regarded as an authority for the proposition that Sections 23 and 28 of the Contract Act are out of harm's way when it comes to enforcing a foreign award under the Foreign Awards Act, 1961, where both parties are Indian companies.").

32 *Id.* ¶ 33.

33 Sasan Power Ltd. v. North American Coal Corp. Ltd., (2015) SCC Online MP 7417 [*hereinafter* "Sasan (I)"].

with its commercial arbitration Rules then in effect (the 'Rules'). The place of arbitration shall be London, England."

(emphasis supplied)

The Sasan (I) Court held that it was permissible for two Indian parties to arbitrate extraterritorially.[34] Sasan (I) in turn also relied on Atlas and rightly appreciated the core issue: which among the two Parts (I or II) would apply to an extra-territorial arbitration. Like the PASL Court, it too considered that Section 44 of the Arbitration Act concerned an award to which the New York Convention applied.[35] And, like the Atlas Court, it also observed the mutuality of the agreement to arbitrate extraterritorially.[36] After all, the choice was made at their own risk, and they could not be allowed to later complain about it. Part I would simply not apply if their agreement to arbitrate conformed with the ingredients under Section 44 of the Arbitration Act.

D. Deconstructing the *TDM* Case

The decision of the Supreme Court in *TDM Infrastructure Pvt. Ltd.* v. *UE Development India Pvt. Ltd.* ["**TDM**"][37] was disregarded as a binding precedent, having been rendered by a single judge under Section 11 of the Arbitration Act. For the longest time, the ratio of the TDM case had a contagious impact on the decisions of various High Courts. TDM made far-reaching conclusions. It interpreted Section 2(6) of the Arbitration Act to mean that Section 28 was imperative/mandatory and that Indian parties, therefore, could not be allowed to derogate from Indian law.[38] The TDM court committed the error of blurring the fine line between the substantive law (dealt under Section 28) and the law of the juridical seat and wrongly held that Indian parties could not choose a foreign juridical seat.

Section 28 (Sub Provisions, Clauses)	**Remarks on the Implications**
Rules applicable to the substance of the dispute. — **(1) Where the place of arbitration is situated in India, —** **(*a*) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with**	– Where the 'place of arbitration' is in India – Concerns domestic arbitrations only – Indian law will mandatorily apply to the substance of the dispute (substantive law) – No choice of law available in case of substantive law

[34] Sasan I, (2015) SCC Online MP 7417, ¶ 57.
[35] *Ibid.*
[36] *Id.*, ¶ 72.
[37] TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd., (2008) 14 SCC 271.
[38] Arbitration Act, No. 26 of 1996, § 2(6) (India) ("(6) Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.").

the substantive law for the time being in force in India;	
(*b*) in international commercial arbitration,— **(*i*) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;**	– Where the 'place of arbitration' is in India – Concerns 'international commercial arbitration' as per Section 2(1)(f) – Choice of law (for substantive law) available to the parties
(*b*) in international commercial arbitration,— **(*ii*) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;**	– Where the 'place of arbitration' is in India – Concerns 'international commercial arbitration' as per Section 2(1)(f) – Any designation of choice of law (for substantive law) would exclude the conflict of law rules
(*b*) in international commercial arbitration,— **(*iii*) 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.**	– Where the 'place of arbitration' is in India – Concerns 'international commercial arbitration' as per Section 2(1)(f) – If parties have not made a choice of law (for substantive law), the tribunal will determine the applicable substantive law

For the sake of clarity about Section 28 of the Arbitration Act, it provides and means the following:

Unfortunately, the Court in TDM sent the wrong signal, picked up by the High Courts, for instance, in *Seven Islands Shipping Ltd.* v. *Sah Petroleums Ltd.* ["**Seven Islands**"].[39] There, the Bombay High Court relied on TDM to hold that there could not be an 'international arbitration agreement' between two Indian parties.[40] Another Single Judge of the Bombay High Court, in *M/s Addhar Mercantile Pvt. Ltd.* v. *Shree Jagadamba Agrico Exports Pvt. Ltd.* ["**Addhar**"],[41] referred to TDM and held that Indian nationals

39 Seven Islands Shipping Ltd. v. Sah Petroleums Ltd., (2012) 5 Mah LJ 822.

40 *Id.* ¶ 13.

41 M/s Addhar Mercantile Pvt. Ltd. v. Shree Jagadamba Agrico Exports Pvt. Ltd., Arbitration Application No. 197 of 2014 along with Arbitration Petition No. 910 of 2013.

could not be permitted to derogate from Indian law and that this was part of the public policy.[42] TDM and the decisions that followed it did not appreciate the law in the correct perspective and, therefore, stood overruled in PASL.

In contrast, a decision of the Delhi High Court, in *GMR Energy Limited* v. *Doosan Power Systems India* ["**GMR**"],[43] also considered the same question and instead followed Sasan (I) and Atlas.[44] It correctly distinguished TDM stating that the TDM Court had clarified that any findings/observations made were only to determine the Court's jurisdiction under Section 11 of the Arbitration Act and not for any other purpose. Hence, the Court in GMR did not rely on TDM or have the need to follow it. Likewise, the Delhi High Court followed the trend in *Dholi Spintex* v. *Louis Dreyfus*, ["**Dholi**"][45] which also relied on Sasan (I) to consider the same point of law and held that an arbitration agreement between the parties is independent of the substantive contract and parties can choose a different law governing the arbitration (i.e., juridical seat). Though the validity of the arbitration agreement would not turn on it, Dholi also justified the parties' choice of a foreign seat by noting the existence of some foreign element to the agreement between the parties.[46]

E. A Recapitulation

Indeed, legislatures and courts have the authority to create reasonable exceptions to restrict the exercise of freedom of contract where it is conceived that public policy requires it.[47] Besides the statutory leeway confirmed by the Court in Pasl, it was hard to see why there should be a need to limit the freedom to contract a seat of arbitration outside domestic borders; or why it is difficult to perceive the ramifications of substituting a local seat with a foreign seat.

Minimal State intervention is better suited in respect of contracts between parties on how to resolve their disputes. Indeed, any pro-arbitration jurisdiction fixates some limit to party autonomy,[48] but these limits are generally prescribed when procedural autonomy results in the abridgment of substantive rights. In the tug-of-war between procedural and substantive rights, substantive rights often prevail. And the selection of a foreign seat of arbitration—which is predominantly procedural[49]— does not

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42 *Id.* ¶ 8.

43 GMR Energy Ltd. v. Doosan Power Systems India, CS (Comm) 447/2017.

44 *Id.* ¶¶ 29-31, 41. *See also*, ¶ 43 (where the court relied on Fuerst Day Lawson v. Jindal Exports Ltd., (2001) 6 SCC 356, wherein comparing the pre amendment and post amendment Arbitration Act it was observed that the new Act is more favourable to international arbitration than its previous incarnation.).

45 Dholi Spintex v. Louis Dreyfus, CS (Comm) 286/2020.

46 *Id.* ¶ 47. See also, PASL, (2015) SCC Online MP 7417, ¶¶ 31-32 ("It is important to note that no such caveat is entered when India acceded to the New York Convention and enacted the Foreign Awards Act and the Arbitration Act, 1996. On the contrary, we have seen as to how "persons" mentioned in Section 44 has no reference to nationality, residence or domicile. This is another important pointer to the fact that, unlike the U.S. Code, Section 44 of the Arbitration Act does not enter any such caveat.").

47 *See* Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647, 657 (prohibitions against lotteries, Sunday laws, and usury statutes, or other regulations that are intended to protect the health, safety, and economic welfare of citizens).

48 *See* In re Wal-Mart Waze & Hours Emp't Practices Litig., 737 F.3d 1262, 1267-68 (9th Cir. 2013) (parties cannot waive their right to judicial review).

49 REDFERN & HUNTER, *supra* note 3, at 175.

conflict with public policy.[50] Notably, under the Arbitration Act, an award is not subject to annulment for violating 'Indian law' applicable to the substance of the dispute; instead, the ground is narrower —'public policy.'

Hence, an award contrary to the public policy, or the mandatory rules, would be unenforceable (to the extent it offends it).[51] And these 'mandatory rules' may be defined as rules that cannot be derogated;[52] thus, providing the necessary safety net. This safety net, as it were, performs the function of not allowing domestic parties to derogate mandatory rules (that they are subject to) by arbitrating extraterritorially.[53] Another effect of choosing a particular place of arbitration abroad is that it also brings its own mandatory rules and public policy, the entire package, and those must be obeyed as well.[54]

In the end, an extra-territorial award's recognition or enforcement will depend on the law and the will of the enforcing State. And when enforcing, which would be under the New York Convention, the enforcement would depend on where the award was made — at the seat.

III. Legal effects in arbitration governance

The selection of a juridical seat is like ordering the whole enchilada — it is the whole package. Meaning that the choice includes the corresponding *lex loci arbitri* or *lex arbitri*. Inversely, therefore an express choice of *lex arbitri* may be regarded as an implied choice of the corresponding seat.[55] And because there are important procedural consequences (sometimes substantive), the choice of seat is critical because the arbitrator (and the parties) must bow down to the mandatory norms of the country in which he sits. For example, many legal systems prohibit the arbitration of disputes involving sensitive public interests, such as the protection of investors in corporate securities or contracts with state agencies. Furthermore, some legal systems require arbitrators to state the reasons for their awards; some provide for the removal of inept or unfair arbitrators. A few legal systems provide for an appeal from errors in matters of law.

In this regard, Gary Born ["**Born"**] tenders a succinct understanding:[56]

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50 PASL, (2015) SCC Online MP 7417, ¶ 55-58 (discussing the example of the Benami Transaction Act and its potential violation).

51 REDFERN & HUNTER, *supra* note 3, at 357.

52 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, Article 3(3).

53 Under Article 17(1) of the UNCITRAL Model Law, for instance, parties must be treated with equality and each party must be given a reasonable opportunity of presenting a case; Article 17(3) states that the tribunal must hold a hearing if either party requests; under Articles 20 and 21, there must be a consecutive exchange of written submissions; under Article 29(5), if the tribunal appoints an expert, parties must be given an opportunity to present their own expert witnesses on the points at issue.

54 REDFERN & HUNTER, *supra* note 3, at 176.

55 *See, e.g.,* Braes of Doune Wind Farm (Scotland) Ltd v. Alfred McAlpine Business Services Ltd, [2008] EWHC 426 (TCC) (That while the choice of seat will usually dictate the corresponding procedural law, the converse can also be true. The parties' choice of procedural law of a country (England) was held to indicate that England was also the chosen country as the seat of the arbitration.).

56 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2214 (3d ed., 2021) [*hereinafter* "GARY B. BORN"].

"*The local law of the arbitral seat may have a material influence on the law applicable to the substantive or procedural issues that arise during the course of the arbitration. Again, that is true both because some national arbitration laws directly impose both mandatory procedural requirements and substantive rules in locally-seated arbitrations, and because, in practice, a variety of considerations give the arbitral seat an indirect influence on the procedures and substantive rules applicable in the arbitration.*

… [N]ational arbitration legislation in the arbitral seat often imposes rules regarding choice of law, 'internal' procedural issues, statutes of limitations, confidentiality, disclosure, provisional relief and consolidation or joinder in locally-seated arbitrations."

But what does *lex arbitri* mean? It is, of course, not the law governing the dispute. Rather *lex arbitri* is also the *lex loci arbitri*, as in the law of the place of the proceedings; thus, an arbitrator must bend to the mandatory norms of the state in which he legally sits. Its components have unique coverage, but ultimately *lex arbitri* essentially governs the validity of the arbitral process itself.[57] Though the context of *lex arbitri* varies from jurisdiction to jurisdiction,[58] the package would most likely comprise the following segments — the broad contents of *lex arbitri*. But before we consider these segments, it is worthwhile to read what the English case law[59] rhetorically questioned and answered:

"*What then is the law governing the arbitration? It is, as the present authors trenchantly explain, a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures (e.g. Court orders for the preservation or storage of goods), the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties (e.g. filling a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations (e.g. removing an arbitrator for misconduct*."

A. Rules governing court assistance

An important consideration about the choice of seat is the auxiliary support from the courts, such as interim measures, the appointment of arbitrators, the taking of evidence, and so on. These are rules entitling the local courts to intervene to support the arbitration.

Particularly about interim measures, *lex arbitri* is generally also considered to supply the standards applicable to a request for interim measures (which is distinguishable from the tribunal's power or authority to grant measures).[60] This standard is often based on three elements: (i) whether the claimant

57 William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, INT'L COMP. L. Q. 32 (1983), 21, 23.

58 REDFERN & HUNTER, *supra* note 3. (Each state will decide for itself what laws it wishes to lay down to govern the conduct of arbitrations within its own territory.).

59 REDFERN & HUNTER, *supra* note 3, at 79; Smith v. H International, [1991] 2 Lloyd's Rep 127, ¶ 130.

60 For awards adopting this approach, *see* Procedural Order of July 2008 in ICC Case No. 15218, in ICC, PROCEDURAL DECISIONS IN ICC ARBITRATION 79 (2015) (tribunal applied Swiss lex arbitri); Procedural Order of December 2007 in ICC Case No. 14993, in REDFERN & HUNTER, *supra* note 3 at 77 (tribunal seated in Vienna referred to Austrian procedural rules when granting security for costs); Procedural Order of June 2007 in ICC Case No. 14581, in *id.* at 86 (tribunal seated in Geneva applied Swiss law in denying anti-suit order); Procedural Order of December 2006 in ICC Case No. 14020, in *id.* at 67 (tribunal seated in London relied on 1996 English Arbitration Act); Procedural Order of May 2006 in ICC Case No. 13620, in REDFERN & HUNTER, *supra* note 3 at 65 (tribunal seated in London relied on 1996 English Arbitration Act); Interim Award in ICC Case No. 8879, 11(1) ICC CT. BULL. 84 (2000) (relying on lex contractus and lex fori); Interim

has a prima facie case on the merits; (ii) whether there is an urgent need for interim relief; and (iii) whether the claimant will suffer serious or irreparable harm if the emergency relief is not granted. While there is an alternative view that *lex arbitri* has no business in providing such standards (which have led some tribunals to apply "international standards"),[61] the author(s) find(s) that following the standards under the law of the seat is more objectively available to a tribunal to apply.

As with standards, local nuances may also arise in matters like the maintainability or admissibility of an application before a court for urgent provisional relief. E.g., in *Gerald Metals SA* v. *Timis*,[62] an English Court considered urgent provisional relief under Section 44(3) of the English Arbitration Act 1996 [63]["**EAA**"] in circumstances where timely and effective relief could have instead been granted by an expedited tribunal or emergency arbitrator under the institutional rules. It held:

> "*[The] test of exceptional urgency must be whether effective relief could not otherwise be granted within the relevant timescale – the relevant timescale for this purpose being the time which it would otherwise take to form an arbitral tribunal. Likewise, under Article 9B [of the LCIA Rules] the test of what counts as an emergency must be whether the relief is needed more urgently than the time that it would take for the expedited formation of an arbitral tribunal. That, in my view, is the rational interpretation of these rules. Accordingly, it is only in cases where those powers, as well as the powers of a tribunal constituted in the ordinary way, are inadequate, or where the practical ability is lacking to exercise those powers, that the Court may act under section 44*."[64]

This is a significant aspect highlighting the distinctiveness of English *lex arbitri*. And in contrast, no such standard exists under Indian *lex arbitri,* which considers the maintainability of an application for interim relief (prior to the tribunal's constitution) vis-à-vis any emergency remedies available under the agreed arbitration rules. Hence, the decision of a seat can be significant, as in the case of the English *lex arbitri*, which suggests that the availability of timely and effective relief under institutional rules (such as emergency arbitrators) may, in certain circumstances, erode the Court's power to grant urgent interim relief in support of the arbitral proceedings.

Where parties disagree on the appointment of a sole arbitrator or where there is a breakdown of the appointment procedure, Indian parties will not have access to Indian courts for assistance. This is simply because Section 11 of the Arbitration Act[65] is only available to arbitrations seated in India (in other words, governed by Part I of the Arbitration Act). Hence, Indian parties are likely to confront

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Award in ICC Case No. 8786, 11(1) ICC CT. BULL. 81, 82 (2000) (referring to Article 183 of Swiss Law on Private International Law as basis for provisional and protective measures); Interim Award in ICC Case No. 7544, 11(1) ICC CT. BULL. 56 (2000) (considering French domestic standards as "helpful as a pointer"); Award in Summary Arbitral Proceedings in NAI Case No. 2212 of 28 July 1999, XXVI Y.B. COMM. ARB. 198 (2001) (considering Dutch domestic standards); Interim Award in NAI Case No. 1694 of 12 December 1996, XXIII Y.B. COMM. ARB. 97 (1998) (considering Dutch domestic standards). *See also* R. SCHÜTZE, SCHIEDSGERICHT UND SCHIEDSVERFAHREN ¶ 257 (4TH ED. 2007) (under German version of UNCITRAL Model Law, domestic standards for provisional measures applicable to tribunal's consideration of such measures). *See also*, GARY B. BORN, *supra* note 56, at 4034.

61 GARY B. BORN, *supra* note 56, at 2645-47.

62 Gerald Metals SA v. Timis, [2016] EWHC 2327 (Ch), ¶ 7.

63 Arbitration Act 1996, ch. 23, § 44(3) (Eng.) [*hereinafter* "EAA"].

64 GARY B. BORN, *supra* note 56, at 2645-47.

65 Arbitration Act, No. 26 of 1996, § 11 (India).

some unfamiliar laws around the appointment of arbitrators. For example, English *lex arbitri* features odd and even numbers of arbitrators in the tribunal. Further, unequal appointment rights are permitted in certain circumstances; e.g., by operation of Section 17 of the EAA[66], one party may appoint his arbitrator as sole arbitrator in circumstances where the arbitration agreement provides that each party is to appoint an arbitrator and one party fails to do so. Moreover, where the agreement is commercial and provides that a tribunal is to be constituted from a panel wholly appointed by one side, the other party cannot seek to attack the award on the basis that the procedure would result in an impartial tribunal.[67]

This is a potential concern if an enforcing jurisdiction, like India, treats unequal and unilateral appointments with scrutiny under its public policy.[68] It is, therefore, reasonable to consider that an award resulting from extra-territorial arbitrations (i.e., a foreign award under Part II of the Arbitration Act) may be vulnerable based on local jurisprudence/public policy,[69] which could potentially give rise to a lack of substantive jurisdiction of the tribunal leading to the annulment of the arbitral award under Section 34 of the Arbitration Act.

B. Rules governing court supervision

A juridical seat comes with strings attached, and particularly important are the rules governing court supervision, i.e., rules entitling the local courts to intervene to, *e.g.*, set-aside/annul an arbitral award, or terminate the mandate of an arbitrator and substitute him, or determine jurisdictional claims (if possible, under the *lex arbitri*).

Thus, when challenging an award, the *lex arbitri* will provide the grounds on which an award may be set aside (the permissible challenges to an award[70]) and, notably, the standard of review applicable in such proceedings.[71] The New York Convention also echoes this in that a party may seek to vacate or set aside an award in the State in which, or under the law of which, the award is rendered.[72]

This is a serious matter when considering the practicality of arbitrating extraterritorially. Unlike the Indian setting under the Arbitration Act, which only has the one infamous provision (Section 34) for setting aside arbitral awards, the EAA has a sort of platter of possibilities. Concerning an arbitration seated in England, a party may challenge the award on the grounds of serious irregularity affecting the

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66 EAA, § 17 (Eng.).

67 RUSSEL ON ARBITRATION 4-036 (David St. John Sutton et al. eds. 2015).

68 *See* Perkins Eastman Architects DPC & Anr. v. HSCC India Ltd., 2019 SCC Online SC 1517, ¶¶ 20-21; Proddatur Cable TV Digi Services v. SITI Cable Network Ltd., 2020 SCC Online Del 350, ¶¶ 11, 22-23, 27-28. *See also*, Ellora Paper Mills Ltd. v. State of MP, 2022 SCC Online SC 8 (mandate of the arbitrator terminated concerning a contract and arbitration that was pre-2015 amendment).

69 *See, e.g.*, Societe Siemens & BKMI v. Societe Dutco (1992) 119 JDI 707 (on the principle of equality of parties, where one claimant appoints an arbitrator and multiple defendants with potentially separate interest are only able to appoint one arbitrator jointly).

70 *See, e.g.*, C v. D, [2007] EWCA Civ 1282 (English court held that the law of the seat governed the scope of permissible challenges to an arbitration award, and the attempted challenge to the award in the courts of New York was restrained by injunction.).

71 *See generally*, Gracious Timothy Dunna, *Standard of Review in Set-Aside and Enforcement Proceedings Relating to Arbitral Awards in India*, 14 NATIONAL L. SCHOOL J. 252 (2019).

72 *See* Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997).

tribunal, the proceedings, or the award,[73] or that the tribunal had no substantive jurisdiction.[74] Further, it is also possible to appeal against the award on a question of law, but unlike the previous two grounds of challenge, this requires the Court's leeway (unless the parties have agreed to it).[75]

Thus, Indian parties are cautioned that because the effect of the choice of seat is to treat the courts of the seat as having exclusive supervisory jurisdiction, when the seat is, *e.g.*, London, it will be inappropriate to commence proceedings in India with the object to set aside the award (which is christened English by virtue of the seat).

Likewise, challenges to the appointment may also work differently in a foreign jurisdiction. For example, Section 24 of the EAA[76] provides that parties will need to seek the Court's intervention through an application where arbitration rules do not apply. While this remedy before a court is not available at the first instance, it is placed differently in comparison to Sections 12 and 13 of the Arbitration Act[77], wherein the tribunal itself determines the challenge, and the machinery does not allow a court's intervention in this issue except in an application for setting aside such an arbitral award (that comes post-arbitration proceedings). Under Section 24(1)(d)(ii) of the EAA, an applicant must meet the threshold and establish that he has suffered or will be caused substantial injustice if the arbitrator is not removed.[78]

The point is that these differences matter, and Indian parties must not find it surprising when confronted by such legal standards in seeking the Court's intervention.

C. Rules governing procedure and due process

Any *lex arbitri* generally sets out the principle that party autonomy prevails concerning the procedure of the arbitration.[79] This often exists in the arbitration agreement itself or under the institutional rules selected by the parties. But when that is not the case, *the arbitrator is the master of his own procedure*.[80]

Bequeathed with the power to regulate the procedure as it deems fit, the tribunal, for instance, must consider the application of the rules of evidence. The Arbitration Act makes it abundantly clear that arbitrations are free from the proverbial chains of CPC and the Indian Evidence Act 1872.[81] Though, where the parties have not expressly agreed, the tribunal bears the mantle in deciding whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance, or weight of any material (oral, written, or other) sought to be relied upon on matters of fact or opinion.

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73 EAA, § 68 (Eng.).
74 EAA, § 67 (Eng.).
75 EAA, § 69 (Eng.).
76 EAA, § 24 (Eng.).
77 Arbitration Act, No. 26 of 1996, §§ 12, 13 (India).
78 The expression "substantial injustice" is not defined in the English Arbitration Act 1996.
79 This principle is enshrined in the UNCITRAL Model Law, Article 19(1) ("Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the tribunal in conducting the proceedings.") *See also*, EAA, §§ 34(1), 38(1).
80 Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp, [1981] AC 909, 972 & 985. *See also*, Arbitration Act, No. 26 of 1996, § 19 (India).
81 Arbitration Act, No. 26 of 1996, § 19 (India).

The only rider is the overriding mandatory rules. Meaning, that where the law governing the procedure is, for example, English law, the parties' freedom will be restricted by the EAA[82] and the public interest[83] (including, of course, principles of natural justice and fairness[84]). A departure from this has the potential to constitute a serious irregularity and result in the award being set aside or unenforceable.

IV. Potential legal concerns

When two Indian parties are arbitrating extraterritorially, they do not escape the shadow of various legal hurdles and impediments, both at home and abroad. Those that are particularly foreseeable are commented upon in the following segments. However, it is necessary to keep in mind that we are still in the nascent stages of such extra-territorial adoption among parties and that it is still an evolving front in law and practice.

A. Arbitrability issues

Extra-territorial arbitrations raise questions about India's reservations in enforcing foreign awards. Arbitrability of issues is one such hurdle under Section 48(2)(a) of the Arbitration Act[85].

Take, for instance, the dichotomy that can arise in the arbitrability of issues under competition/anti-trust law. The United States of America"["U.S."] allows for arbitration of such issues where it is of an international character: in *Mitsubishi Motor Corporation* v. *Soler Chrysler-Plymouth* ["**Mitsubishi**"],[86] anti-trust issues arising out of international contracts were held to be arbitrable under the Federal Arbitration Act 1925, despite the public importance of anti-trust laws in the domestic realm. On the contrary, India's policy on arbitrability of issues under competition/anti-trust law is practically non-existent, so it is fair to suggest that the subject matter is likely not capable of settlement by arbitration under Indian laws[87]. Hence, while a foreign award resulting from an extra-territorial arbitration in the U.S. may be valid under its *lex arbitri*, a potential challenge brews in India if that award is sought to be enforced in the Indian courts.

That apart, there is, of course, the issue of public policy of the state—a theme that will remain evergreen in India. And to that, the New York Convention reserves to each signatory country the right to refuse enforcement of an award[88] where the recognition or enforcement of the award would be contrary to a public policy of that country.

B. Reception by Foreign Courts

That parties from a State may contract to arbitrate extraterritorially is one thing, but whether foreign courts will be ready to receive alien parties to take their assistance and intervention is another. In one sense, it should make no difference to a foreign court whether the parties are from different States or

82 EAA, § 4(1), sched. 1 (Eng.).
83 EAA, § 1(b) (Eng.).
84 EAA, § 33(1) (Eng.).
85 Arbitration Act, No. 26 of 1996, § 48(2)(a) (India).
86 Mitsubishi Motor Corporation v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).
87 *See* Abhisar Vidyarthi, *Applying Vidya Drolia's "Four-Fold Arbitrability Test" to Antitrust Disputes in India*, KLUWER ARB. BLOG (Feb. 10, 2021).
88 Article V(2)(b), New York Convention, 1959.

the same (the former situation being more familiar to us). Parties are, therefore, cautioned not to be too excited to go 'seat shopping' abroad, lest the local courts find no regard for it and the parties lose all court assistance and supervision.

Candidly, instances of this nature are a rare breed. But England, for instance, for many years, has been a premier location for international disputes, with foreign parties often trying to litigate in London. And generally, there are many ways in which the English courts assume jurisdiction over international disputes between foreign parties. In particular, to claim jurisdiction, an English Court will rely on the parties' contract (besides the Court's expectation to be satisfied with the reasonable prospects of success and if England would be an appropriate forum).[89] Albeit, the foregoing is in the context of litigation, it is safe to say that English courts may well be open to welcoming two Indian parties, selecting London as the seat of arbitration. And so, if Indian parties prefer a foreign seat of arbitration, the jurisdiction of that forum would go to bind the parties.

C. Lex Arbitri Issues

Lex arbitri, as discussed above, provides the default rules, which (in most cases) can be modified by the parties' agreement. But often, there will be matters of mandatory law that apply and cannot be derogated. Either way, the *lex arbitri* will significantly influence the law applicable to several issues (particularly procedural) that arise pre, during, and post-arbitration proceedings. Thus, Indian parties are cautioned that, as a practical matter, things may be the *same, but different,* like one of those occasions when you get exactly what you are not looking for.

i. Conflict of laws

The *lex arbitri* (depending on the foreign seat selected) may mandatorily require the arbitral tribunal to apply the local conflict law rules (as applied by national courts) whenever there is a need to find/ identify the applicable law in the absence of the parties' agreement. E.g., where parties have not agreed to the substantive law that would govern the dispute. The idea is that every system of conflict of laws rules is a subset of the national law of the arbitral seat, and every arbitration is anchored and subject to some national law. Accordingly, the national law also ends up governing the rules of conflict of laws to be followed by the arbitral tribunal seated there.[90]

Although, the more contemporary legislations like those following the UNCITRAL Model Law on International Commercial Arbitration ["**Model Law**"] may take a different approach by giving substantial discretion/freedom to the arbitral tribunal, like Section 28(1)(b)(iii)[91] of the Arbitration Act, which states:

> "*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*."

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89 *See, e.g.,* Cherney v. Deripaska, [2008] EWHC 1530 (Comm)(Cherney relied upon a contract which he claimed had been entered into in London in 2001). *See also*, OJSC Oil Co. Yugraneft (in liquidation) v. Abramovich & Ors., [2008] EWHC 2613 (Comm).

90 *See* F.A. Mann, *Lex Facit Arbitrum*, 2 ARB. INT'L (1986), 241, 244-45, 248.

91 Arbitration Act, No. 26 of 1996, § 28(1)(b)(iii) (India).

The EAA is similar, stating in Section 46(3)[92] that: "*If or to the extent that there is no … choice or agreement [on the substantive law applicable to the dispute,] the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable*."

However, it is unlikely that there is absolute discretion and, hence, the arbitrator would feel more comfortable or convinced to simply apply the local rules of conflict of laws.

There are also more unfamiliar national arbitration laws where arbitrators are bestowed with the power to directly apply whatever substantive law they consider appropriate, without the medium of conflict of laws. *E.g.*, Article 1511 of the French Code of Civil Procedure[93] provides that the arbitrator may resolve the dispute "*in accordance with the rules of law [he] considers appropriate*." Some other civil law countries in Europe and elsewhere take a similar approach, which apparently requires no conflict of laws analysis and permits the direct application of substantive law. This parallels with some leading arbitration rules, like Article 21 of the ICC Rules of Arbitration (2012)[94], Article 35 of the UNCITRAL Arbitration Rules (2010)[95], Article 59 of the WIPO Arbitration Rules (2002)[96], Article 22.3 of the London Court of International Arbitration Rules ["**LCIA**"] (1998)[97] amongst others. In essence, all these rules suggest that if the parties fail to designate rules of law, "*the arbitral tribunal shall apply the rules of law which it determines to be appropriate*."[98]

ii. *Burden of proof and evidence*

The burden of proof (the burden of proving a particular issue) may also give rise to a conflict of laws questions: whether it assimilates with the substantive law governing the dispute or with the *lex arbitri*. On one side, it concerts with the substantive law dealing with parties' rights and liabilities, but on the other side, certain procedural matters (such as disclosures) can also directly or indirectly concern the burden of proof.

Where neither of these options is suitable, arbitrators may end up developing their own rules in light of the substantive law and *lex arbitri* relevant to the particular issue before them. The same thought process can apply to evidentiary matters (such as admissibility, the weight of evidence, and the like).

iii. *Limitation/ prescription periods*

A limitation or prescription period will virtually always apply to extra-territorial arbitrations, as normally applicable in the case of national court proceedings. But there are significant choice of law questions here for such extra-territorial arbitrations — it is the age-old debate of whether statutes of limitation are to be regarded as "procedural" or "substantive."

92 English Arbitration Act, 1996, § 46(3) (Eng.).
93 Civ. Pro. C. art. 1511 (Fr.).
94 International Chamber of Commerce (ICC) Rules of Arbitration, 2012, art. 21 [*hereinafter* "ICC Rules"].
95 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, 2010, art. 35.
96 World Intellectual Property Organisation (WIPO) Arbitration Rules, 2002, art. 59.
97 London Court of International Arbitration (LCIA) Arbitration Rules, 1998, art. 22.3.
98 ICC Rules, art. 17.

In the US, for instance, statutes of limitations have been regarded as procedural in nature and, therefore, governed by the law of the forum. In contrast, some civil law jurisdictions generally regard them to be substantive in nature, thus, holding these to be issues governed by the substantive law applicable to the merits. Thus, as a practical matter, there is a lot of potential for confusion in extra-territorial arbitrations. The Canadian Supreme Court aptly describes it:

> "*[N]ot all legal systems treat limitation periods – or extinctive prescription, as it is known in civil law jurisdictions – alike. Those built on the common law tradition have tended to conceive of them as a procedural matter, while those following the civil law tradition generally consider them to be a question of substantive law*."[99]

In this regard, Born notes a trend in common law jurisdictions to assimilate limitation issues with substantive law governing the dispute. In part, it is because the jurisdiction whose substantive law applies is generally more likely to have been within the parties' expectations.[100] Hence, as a practical matter, it would be safer for Indian parties to consider the shortest potentially-applicable limitation/prescription period when in dispute.

iv. Joinder of parties

Arbitration laws generally do not deal with consolidation, joinder, or intervention of parties. Hence, there is potential for variations from jurisdiction to jurisdiction and surprises for Indian parties, though there is not much authority (or clarity) on what law governs these issues in international arbitration.

There are at least three legal systems that can plausibly apply to issues of consolidation, joinder, and intervention, and each of these alternatives can be quite compelling: (a) the law governing the arbitration agreement; (b) the law of the arbitral seat; and (c) the national law of the party concerned. The applicability of any of these alternatives will obviously depend on the jurisdiction where extraterritorial arbitration is taking place and the rules of conflict of laws of that place. Hence, Indian parties are advised to make an express choice of the law governing these issues or the criteria applicable when at the crossroads of conflict of laws.

III. Practicality of Arbitrating Extra-Territorially

There may be a number of reasons why going extra-territorial may seem lucrative to Indian parties. Much like the quirks among Indians to go and settle abroad, the choice of a foreign seat has its fancies. These may include the court systems, pool of qualified lawyers, specialists/experts, and so on. And in a way, much of it is *per se* unrelated to the law of that place but equally important in many ways.

In the context of London, for instance, Justice Carr has said that the "*coexistence of London's reputation as an international business with its reputation as a global legal centre is no coincidence. Business requires expert legal advice and a predictable and stable legal system in which to operate. The English Courts are a safe and neutral forum*

99 Tolofson v. Jensen, [1994] 3 S.C.R. 1022, at 1068-70.
100 GARY B. BORN, *supra* note 56, at 2874.

for the resolution of disputes, overseen by a strong and famously independent judiciary."[101] With that, it is quite understandable why extra-territorial arbitration can be appealing (and validly so) to Indian parties.

A. Access to Specialist Courts or Advanced Court Systems

Court systems are usually the markers of high-quality jurisprudence and legal environments. And so, a good reason for Indian parties to choose a seat beyond home-state territory may actually be within the home-state territory itself, like the incongruities in domestic courts, which can be pretty demotivating, notably in set aside proceedings. Hence, all the positives of going extra-territorial that one can consider hereinbelow have an equal and opposite negative in the home-state jurisdiction.

A foreign seat mainly opens access to specialist commercial courts staffed by highly competent and experienced judges in dealing with the most complex commercial cases. In addition, there may be an array of powerful interim remedies available to Indian parties. All this comes with a wealth of reported case law, supplying certainty to the greatest extent and ensuring that procedural law and arbitration-related litigation are principled and predictable. The list does not stop there. Other beneficial/ attractive features include the recoverability of legal costs if the arbitration (and the related litigation) is successful. This provides good value when assessed against the comparable costs parties incur in India, which often do not result in any recovery of costs.

B. Taking Advantage of International Public Policy

It is well acknowledged that there is always a firm public policy behind the judicial enforcement of arbitration agreements and arbitral awards, and the New York Convention is the foundation of this idea.

India is one such jurisdiction that uses a different standard of public policy (call it "international public policy") when considering the enforcement of a foreign arbitral award. It arises out of the clear statutory difference between the definitions of public policy in Part I of the Arbitration Act for arbitrations seated in India (under Section 34(2)(b)(ii)) and Part II of the Arbitration Act for arbitration seated outside India (under section 48(2)(b)).

Accordingly, in the case of extra-territorial arbitrations, which yield a foreign award governed by Part II of the Arbitration Act, Indian parties can potentially take advantage of the difference in public policy standards (Section 48 being narrow; hence, referrable as "international public policy"). In other words, since an arbitral award may only be set aside by Indian courts if the arbitral seat is in India, public policy standards (under Section 34) normally applicable between two Indian parties would not apply to an incoming foreign award for enforcement proceedings, which applies the international public policy.[102] As unusual as it may seem, it is hard to think this disturbs the delicate balance between the tenet of party autonomy and the public policy of India.

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[101] Justice Carr, Closing Address for British Turkish Lawyers Association Seminar, *available at* https://www.judiciary.uk/announcements/speech-carr-j-btla-190913/.

[102] Arbitration Act, No. 26 of 1996, §§ 46 (When foreign award binding), 48 (Conditions for enforcement of foreign awards).

C. Other Practical Considerations

Not everything in the garden is rosy. Much like the anxieties Indians face when traveling abroad (with food, culture, cost, etc.), the choice of a foreign seat has a few snags. Cost is an important factor, and representation in arbitrations in pre- and post-arbitral stages will not be cheap (especially if local lawyers from foreign jurisdictions are involved). Cost may be coupled with the addition of burdens like the location of evidence and witnesses, which are likely to be based in India itself.

The huge differences in legal culture can emerge (and sometimes even ambush), revealing their significant (or nuanced) impact on legal issues. Practically speaking, local procedural laws and customs may have an impact on the procedural decisions made by an arbitral tribunal, especially if one or more of the arbitrators is a local practitioner.[103] Thus, where Indian parties were to arbitrate in London or New York, with English/ American arbitrators, it should not be a surprise if the procedures entail relatively fulsome common law document disclosures and cross-examinations (than an arbitration seated in a civil law country like Switzerland with domestically-oriented Swiss arbitrators). Similarly, local arbitrators may instinctively incline to apply the local conflict of laws rules of the arbitral seat (or sometimes with some hybrid combination of other choice-of-law rules to relate with the extra-territorial nature of the arbitration at hand). Likewise, local standards of provisional reliefs are likely to be relied upon when considering an application for provisional measures of protection.

IV. Concluding Remarks

This landscape shift in arbitration has many faces — some positive, others not so much. And while it may seem pessimistic, it is worth pondering whether extra-territorial arbitration indicates the condition of domestic arbitration in India and the need felt by users to go abroad in search of a better seat to arbitrate. With this new dimension, India might come under pressure to further its pro-arbitration policy, especially domestic arbitration. Else why would Indian parties feel the need to arbitrate extraterritorially? There is clearly a drastic need to pace up with the more advanced jurisdictions or, at least meet the users' expectations.

[103] GARY B. BORN, *supra* note 56, at 3213.