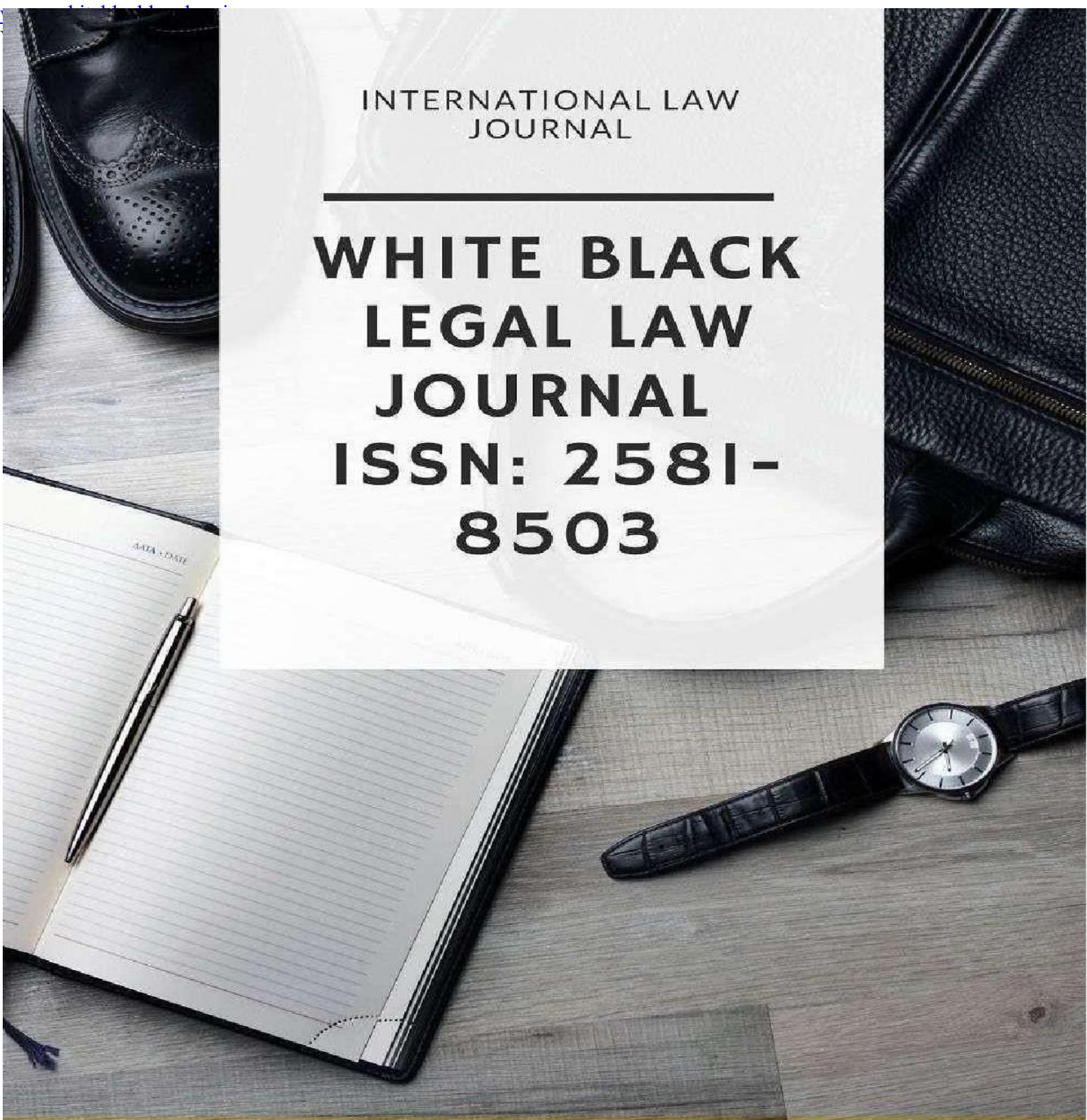




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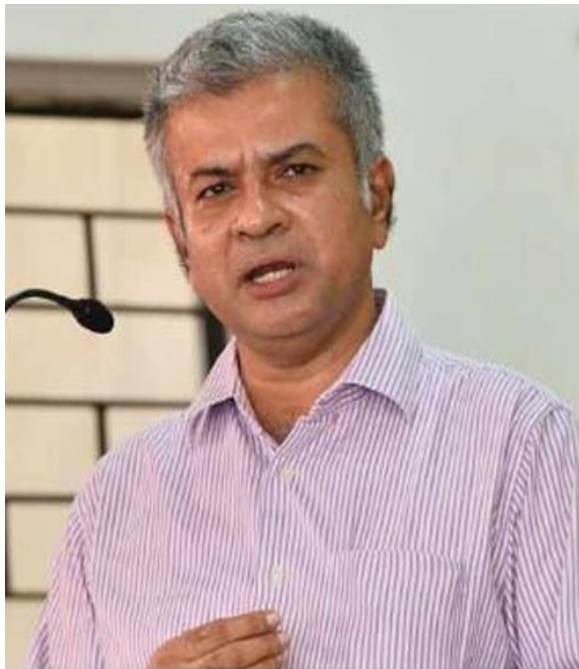
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With this thought, we hereby present to you

CAN TWO INDIAN PARTIES CHOOSE A FOREIGN SEAT OF ARBITRATION: ANALYSING THE CURRENT SCENARIO

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Abstract

Party autonomy is one of the cardinal principles of arbitration in an international commercial arbitration, where the parties have the freedom to choose a seat of arbitration and the laws governing their dispute. This article seeks to establish that such autonomy is in fact extended to two Indian parties as well, and that the Arbitration and Conciliation Act does not prohibit Indian parties from choosing a foreign seat of arbitration. The author will analyse the decisions of the Madhya Pradesh High Court and the Delhi High Court in support of this proposition, and then distinguish the case from other judgements such as TDM Infrastructure Pvt. Ltd. v. U.E. development India and Addhar Mercantile (P) Ltd. v. Shree Jagdama Agrico Exports, to show that neither the act nor the courts have put a bar on two Indian parties choosing a foreign seat of arbitration.

Keywords:

Party Autonomy

Indian Parties

Foreign Seat of Arbitration

1. Introduction

The increased preference for arbitration in commercial disputes has reduced the growing burden on the courts. The foundation of every arbitration proceeding is the arbitration agreement. In arbitration, the parties contractually agree to resolve their disputes by way of reference to an arbitral tribunal. The freedom of parties to consensually execute an arbitration agreement and to choose the manner of conducting the arbitration is known as the principle of party autonomy.

The Arbitration and Conciliation Act of 1996 (“1996 Act”) makes a distinction between domestic arbitration and international commercial arbitration. In an International Commercial Arbitration, parties have the option of choosing the three laws which would govern their arbitration, namely, the procedural law, the curial law and the substantive law.¹

The 1996 Act gives complete autonomy to the parties to an International Commercial Arbitration to decide which countries laws would apply to their dispute. For e.g., in an arbitration, wherein one of the parties is an Indian and the other is an American National, the same would qualify as an international commercial arbitration as per the definition provided under Section 2(1)(f) of the 1996 Act. In this case even if the parties decide that the place of arbitration is to be India, they can choose the law of any country to govern their dispute.² However, while the position on party autonomy in international commercial arbitration is clear, ambiguity arises about whether this autonomy extends to two domestic Indian nationals.

The Madhya Pradesh High Court³ has conclusively answered the question in the affirmative and the same has been reaffirmed by the Delhi High Court in a very recent judgement.⁴ In this essay, I will analyse the decision of the Madhya Pradesh High Court, the decision of the Supreme Court⁵ passed in appeal of this judgement and the Delhi High Court’s judgement. I will further distinguish this judgment from the ratio and the finding of the Supreme Court in the *TDM Infrastructure* case⁶ as well as the finding of the Bombay High Court in the *Addhar Mercantile* case⁷ and seek to establish that the finding of the Madhya Pradesh High Court and the Delhi High Court are the

¹ Sumitomo Heavy Industries Ltd vs Onge Ltd. & Ors, AIR 1998 SC 825.

² Arbitration and Conciliation Act, 1996, § 28(1)(b).

³ Sasan Power Limited v. North American Coal Corporation, 2016 (2) Arb LR 179 (MP) (*hereinafter* Sasan).

⁴ GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors, 2017 SCC OnLine Del 11625 (*hereinafter* GMR).

⁵ Sasan Power Limited v. North American Coal Corporation, 2017 (2) Arb LR 86 (SC) (*hereinafter* North American Coal).

⁶ TDM Infrastructure pvt. Ltd. v. U.E. Development India Pvt.Ltd., 2008 (2) Arb LR 439 (SC) (*hereinafter* TDM).

⁷ Addhar Mercantile (P) Ltd. v. Shree Jagdama Agrico Exports (P) Ltd., 2015 SCC Bom 7752 (*hereinafter* Addhar).

correct position of law.

2. Party autonomy and choosing the 'place' of arbitration

Before commencing any international commercial arbitration, the parties need to agree on the form of arbitration, the procedure to be followed by the arbitral tribunal, place of arbitration and the governing law. The parties are also free to choose the arbitrators, the venue of arbitration, the language to be used during arbitration proceeding etc.⁸ one major benefit of choosing arbitration is that everything is decided by the parties themselves and this provides a convenient approach when compared to traditional litigation.

Where the place of arbitration is in India and the two parties to the dispute are Indian, it is understood that the substantive law which would be applicable would also be Indian law.⁹ However the hypothesis presented now is whether two Indian parties can select the place of arbitration to be outside India?

Section 28 of the 1996 Act provides that where the place of arbitration is in India and the arbitration does not qualify as an international commercial arbitration under Section 2(1) (f)¹⁰ of the Act, then the dispute would need to be decided by the law in force in India. The provision does not impose a bar on two Indians to choose the place of arbitration to be in another country. Theoretically, if two Indians chose to resolve their dispute by way of arbitration in another country, then they should be allowed to choose a law of their preference to resolve their dispute.

Since arbitration is a completely voluntary alternative to litigation in order to expedite the dispute resolution process, and as only private commercial disputes can be resolved by way of arbitration, the choice of two individuals to resolve their dispute as per the law of another country cannot derogate any Indian law. If two parties willingly agree on resolving their private dispute through arbitration in a foreign country, there exists no need to stop them.

There are certain matters which cannot be resolved through arbitration such as,

⁸ Raghav Sharma, *Party Autonomy versus Public Policy: The Case of Appellate Arbitration in India*, October 27, 2008, available at SSRN: <https://ssrn.com/abstract=1290551/> (Last visited on April 17, 2018).

⁹ Arbitration and Conciliation Act, 1996, § 28 (*hereinafter* S. 28).

¹⁰ Arbitration and Conciliation Act, 1996, § 2(1) (f) (*hereinafter* S. 2(1)(f)).

- (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
- (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
- (iii) guardianship matters;
- (iv) insolvency and winding up matters;
- (v) testamentary matters (grant of probate, letters of administration and succession certificate); and
- (vi) Eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

Any matter which affects public interest is not arbitral and so if two parties are willing to resolve a private dispute on their own costs as per their own convenience in any other country, the same should be permitted.¹¹

2.1 Whether the autonomy extends to two Indians being permitted to choose the place of arbitration to be in a country other than India?

As pointed out earlier, Section 28 does not put an explicit bar on two Indian parties choosing a foreign place of arbitration. However because this area is murky, there exists a need for the courts to clarify this question once and for all.

They have indeed tried to do so, and this question was first answered by the Supreme Court in *Atlas Exports Industries v. Kotak & Company*.¹² In this case, the Supreme Court had held that, even in arbitrations between two Indian parties, merely because the arbitrators were situated in a foreign country cannot be enough in itself to nullify the arbitration agreement especially when the parties have willingly initiated the arbitration proceedings to resolve the dispute between them. In this case, the Arbitration Act of 1940 ("1940 Act") was in force and the Supreme Court came to the aforementioned conclusion after dismissing arguments that the agreement violated Sections 23¹³ and 28¹⁴ of the Indian Contract Act. It brought into effect the rule that two Indian companies could enter into an agreement wherein the place of arbitration could be in a country outside of India. Thus if this is permissible, then the bar imposed by Section 28 of the 1996 Act ceases to operate and as a result, two Indian parties can very well choose a foreign law to resolve the

¹¹ *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. & Ors.*, 2011 (5) SCC 532.

¹² *Atlas Exports Industries v. Kotak & Company*, AIR 1999 SC 3286 (*hereinafter* Atlas).

¹³ The Indian Contract Act, 1872, § 23 (*hereinafter* S.23).

¹⁴ The Indian Contract Act, 1872, § 28.

substance of their dispute. Since the Supreme Court has held that the 1940 Act is very similar to the 1996 Act¹⁵, it would indicate that the Supreme Court's interpretation of this principle based on the 1940 Act should extend to the 1996 Act as well.

This judgement of the Supreme Court was relied upon by the Madhya Pradesh High Court in *Sasan Power Limited v. North American Coal Corporation*.¹⁶ In this case, the parties (understood to be Indian parties by the High Court) had an arbitration clause in the agreement which stated that the arbitration proceedings would be conducted in the United Kingdom and the law governing the substance of the dispute would be the law of the United Kingdom. The High Court looked at the question as to whether two Indian parties could choose a foreign seat of arbitration. The High Court relied on the Supreme Court's judgement in the *Atlas* case to come to the conclusion that two Indian parties can be permitted to choose a foreign seat of arbitration. The Appellant's (Sasan Power) had placed reliance on the *TDM Infrastructure* case and contended that it is not permissible for two Indian parties to choose a foreign seat of arbitration.

The High Court rightly refused to apply the decision of TDM case to the dispute at hand and held that two Indian parties can be permitted to choose a foreign seat of arbitration. The Court also held that Section 28 of the 1996 Act is divided into two parts, and only when the condition of sub section 1 is met, i.e., only where the place of arbitration In the *TDM Infrastructure* case, the Supreme Court had held that two Indian parties cannot be allowed to derogate from Indian law and the same was part of the public policy in India. In this case, the Court was dealing with an application for appointment of an arbitrator under Section 11 of the 1996 Act and the issue before them was completely different from the question raised in *Sasan Power* is situated in India would the following sub sections apply. Only in cases where the place of arbitration is in India and the arbitration is not falling within the definition of Section 2(1) (f)¹⁷, will the arbitral tribunal be bound to decide the dispute as per the law in force in India.

This judgement was relied upon by the Delhi High Court in *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors*¹⁸ and the court came to the similar conclusion that there is no prohibition on two Indian parties from choosing a foreign seat of arbitration and such an award would be enforceable under part II of the 1996 Act. The Delhi High Court relied extensively on the judgement of the Supreme Court in the *Atlas* case and the Madhya Pradesh High Court's judgement in the *Sasan* case and came to a similar conclusion as the two courts. The Delhi High Court also similarly distinguished the facts before it from that of the *TDM*

¹⁵ Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2011) 8 SCC 333.

¹⁶ *Sasan*, *supra* note 3.

¹⁷ S. 2(1)(f), *supra* note 10.

¹⁸ *GMR*, *supra* note 4.

Infrastructure case and said that the same was an interpretation of Section 11 of the Act and thus it would not be applicable to the issue at hand.

This ruling reaffirms the position of law on this issue, and as was pointed out earlier, matters *in rem* cannot be resolved by way of arbitration as the Supreme Court's ruling in the *Booze Hamilton* case makes certain matters not arbitral. Thus, if two parties voluntarily chose a foreign seat of arbitration and in turn a foreign law to resolve the substance of the dispute, then there is no reason to prohibit the same. Parties should be permitted to resolve their personal disputes by whatever law they deem acceptable, subject to the condition that they choose a foreign place of arbitration as they are doing the same at their own cost and will.

3. Enforcement of an award passed in such a case

3.1 Which part of the Arbitration Act would govern such an award?

Next question which arises in cases like these is that, under which part of the 1996 Act would such an award be enforced. Generally in cases where the arbitration is between two Indian nationals, the place of arbitration is in India and then the award needs to be enforced under Section 36 of Part I of the 1996 Act.¹⁹ However if two domestic parties have chosen the place of arbitration to be a foreign country, and in turn they chose a foreign law to resolve their dispute, the award would need to be enforced under Section 48²⁰ of the Act and this conclusion was also done by the High Courts in the *Sasan* and *GMR* cases. The two High Courts held that Part II of the 1996 Act would govern the dispute between the parties even though the parties to the contract were Indian.

In the *Sasan* case it was argued that classification of arbitration under the 1996 Act having an element of international arbitration is based on two factors, one is the nationality of the parties; and, second is the seat of arbitration. If an arbitration, international in nature, is based on nationality of the parties, then it falls under the provisions of Section 2(1)(f) of the 1996 Act.²¹ Here again the arbitration i.e. international commercial arbitration can be classified into two distinct categories : one where at least one of the parties is a foreign party and second where all the parties are Indian but still based on certain factors like seat of arbitration, the arbitration may fall in the category of an international commercial arbitration. The Court accepted these submissions in part, but they went on to differentiate between a foreign award and an international commercial arbitration. They held that there is a difference between an International Commercial Arbitration and an Arbitration which is not an International Commercial Arbitration. This

¹⁹ Arbitration and Conciliation Act, 1996, § 36.

²⁰ Arbitration and Conciliation Act, 1996, § 48 (*hereinafter* S. 48).

²¹ S. 2(1)(f), *supra* note 10.

distinction is based on the nationality of the parties, but this distinction is not relevant for determining the applicability of Part II, of the 1996 Act. It was held that the applicability of Part II would be based solely on the seat of the arbitration and whether or not such country was a signatory to the New York Convention or not. If the seat of arbitration was in a country which was a signatory to the New York Convention, then Part II of the Act would apply and the award would be enforceable under Section 48 of the Act.

In the *Sasan* case, the Madhya Pradesh High Court rightly held the agreement between the two parties was valid and the same would be governed by Part II of the Act even though both the parties were Indian and this point was reiterated by the Delhi High Court²² in the later judgement. Another important point that the Court raised was that the two parties had willingly entered into the agreement and only after the interim order was passed against one of them, did the affected party raise an objection to the validity of the agreement. This was enough to show malafide interest on the part of the party who had willingly entered into the agreement in the first place. This was an important point raised and it was reiterated that arbitration is a completely voluntary approach and no harm was being caused by allowing two Indian parties to choose a foreign seat of arbitration.

An appeal was filed against this judgement before the Supreme Court which gave the apex court the opportunity to answer the question and remove the ambiguity once and for all, but the apex court held that the agreement was a tri-party agreement as NACC (America) had transferred its rights to its Indian subsidiary, and for that reason the dispute fell under Part II of the Act. The Court refused to answer the question as to whether two Indian parties could choose a seat for arbitration outside India.²³

3.2 Surviving the 'public policy' test

1. Merely choosing a foreign place of arbitration and in turn a foreign law to govern the dispute does not violate any of the three conditions.

There are safeguards in place in Part II of the 1996 Act by which the Indian Courts can refuse the enforcement of foreign awards under Section 48 of the aforementioned Act.

Section 48(2)²⁴ gives the courts in India the power to refuse the enforcement of a foreign award if the subject matter of the dispute is not capable of settlement by way of arbitration in India, or if the award goes against the public policy of India.

²² GMR, *supra* note 4.

²³ North American Coal, *supra* note 5.

²⁴ S. 48, *supra* note 20.

Even though courts in India do not have the power to set aside a foreign arbitration award, they can refuse the enforcement of the same in case it goes against the provisions of Section 48 of the Act.

The Supreme Court's judgement in the *Lal Mahal* case²⁵ has limited the scope of public policy under Section 48 to awards which go against the-

1. Fundamental policy of India;
2. Interests of India;
3. Justice and morality.

In *Associate Builders v. Delhi Development Authority*,²⁶ it was held by the Supreme Court that an award can be set aside if it is:

1. Contrary to the fundamental policy of Indian law, i.e. it is "arbitrary" or "whimsical", as opposed to being fair, reasonable and objective, or it contains a decision so irrational that no that no reasonable person would have arrived at it;
2. Contrary to the interest of India, i.e. it affects India's relations with other countries;

Contrary to justice and/or morality, i.e. it "shocks the conscience of the court", or it relates to an immoral contract. Scope of the public policy test under Section 34 of the Act is wider than that under Section 48. Under Section 34 an award can be set aside for being 'patently illegal' and there the question can arise as to whether the award falls afoul of any law in force in India.²⁷

One consistent argument rose against allowing Indian parties to choose a foreign place of arbitration and a foreign law governing their dispute is that the same would be in violation of Section 23²⁸ of the Indian Contract Act. Section 23 lays down what considerations and objects are lawful, but since the test of 'patent illegality' cannot be applied for refusing enforcement of the award under Section 48²⁹, the question of the award falling afoul of this Section of the Indian Contract Act would never arise. In any case, in *Atlas Exports* it has categorically held that merely choosing a foreign seat of arbitration does not fall afoul of Section 23 of the Indian Contract Act. The Madhya Pradesh High Court was the first court to answer the question pertaining to enforcement of an award passed in such exceptional circumstances under the 1996 Act. The distinction made by it between a 'foreign award' and an award passed in cases of international commercial arbitration is a step forward in expanding the jurisprudence of arbitration in India and

²⁵ Shri Lal Mahal Ltd. vs. Progetto Grano Spa, 2013 (3) Arb LR 1 (SC).

²⁶ Associate Builders v. Delhi Development Authority, 2014 (4) Arb LR 307 (SC).

²⁷ ONGC v. Saw Pipes, (2003) 5 SCC 705.

²⁸ S. 23, *supra* note 13.

²⁹ S. 48, *supra* note 20.

this is reaffirmed by the decision of the Delhi High Court.

The Supreme Court had also allowed an enforcement of an award in such circumstances under the Foreign Awards (Recognition and Enforcement) Act, 1961.³⁰

4. TDM infrastructure and Addhar Mercantile do not prohibit two Indian parties from choosing a foreign seat of arbitration

In the *TDM case*³¹ the Supreme Court had considered the question at the stage of appointment of the arbitrator, which is before a reference was made by the parties to a Tribunal and thus the decision taken by them was in a separate scenario and was not binding on the Madhya Pradesh High Court.

In *Addhar Mercantile Pvt. Ltd. v. Shree Jagdamba Agrico Exports Pvt. Ltd.*,³² the Applicant and the Respondent had entered into an agreement whereby all disputes were to be referred to arbitration and the arbitration clause stated that the arbitration could take place either in India or Singapore and English law is to be applied, though in very ambiguous words.

Eventually a dispute ensued and the Applicant filed an application under Section 11 for appointment of arbitrator and under Section 9 for certain interim relief. The Respondent opposed the application under Section 11(6) of the 1996 Act on the ground that the parties are governed by English Law and the venue of arbitration should be Singapore.

Here the question was whether the arbitration has to be conducted in India or in Singapore, the learned judge held that the arbitration clause has to be construed to hold that the venue of the proceedings has to be in India and thus the bar of 28(1)(a) would apply and the tribunal would have to decide the issue as per Indian law.

In *TDM Infrastructure*, the Supreme Court has read Section 2(6) and Section 28 together and held that two Indians cannot be allowed to derogate from Indian law and the same is contrary to 'public policy.'

In the author's opinion, this finding is applicable only in cases where the place of arbitration is

³⁰ Atlas, *supra* note 12.

³¹ TDM, *supra* note 6.

³² Addhar, *supra* note 7.

India. One important doctrine for statutory interpretation is, ‘*expressio unius est exclusio alterius*’, which means ‘express inclusion of one thing means the implied exclusion of all others’³³. The doctrine is applicable for interpreting Section 28 of the Act, because Section 28(1)³⁴ expressly states ‘where the place of arbitration is situated in India.’ Thus this section would not apply where the place of arbitration is situated outside India, and the bar under Section 28(1) (a) would also not apply in cases where the place of arbitration is situated outside India.

If two Indian parties choose the place of arbitration to be in India and then want their dispute to be adjudicated as per a foreign law, then the bar of Section 28 would come into play and in such a situation the parties would not be allowed to derogate from Indian law.

Secondly, the parties in the *TDM Infrastructure* case had agreed that the venue of the arbitration agreement should be New Delhi. The issue in the case was whether the dispute qualified as an international commercial arbitration or not, and after holding that both the parties were Indian (because TDM infrastructure was a company registered and incorporated under the Companies Act, 1956 of India), the Supreme Court had held that they don’t have jurisdiction to appoint an arbitrator. This is because Section 11³⁵ provides that the CJI or his designate has power to appoint an arbitrator only in cases of international commercial arbitration but in arbitrations between two Indian parties, the power is vested with the Chief Justice of a High Court or his designate. Since both the parties in the *TDM Infrastructure* case were Indian, the Supreme Court could not exercise jurisdiction.

Thus the *lis* of the *TDM Infrastructure* case was completely different from the proposition sought to be established by the author in this essay.

After analysing the relevant case laws on this issue, we can see that only three of them have dealt with the question of whether two Indian parties can choose a foreign seat of arbitration or not. The decisions of *TDM infrastructure* and *Addhar Mercentile* are on completely different facts and they do not contradict the argument being raised in this essay in any respect.

An arbitration agreement is entered into voluntarily by the parties and is an alternate approach to

³³ GVK Inds. Ltd. and Anr. v. The Income Tax Officer and Anr., (2011) 4 SCC 36.

³⁴ S. 28, *supra* note 9.

³⁵ Arbitration and Conciliation Act, 1996, § 11.

litigation where the parties decide the place of arbitration and the laws governing the same. As has been argued above, Section 28 of the Act only puts a restriction on cases where the place of arbitration is in India.

Conclusion

The whole purpose of enacting legislation for arbitration was to provide an alternative to the court system in India. Furthermore, arbitration is a completely voluntary alternative approach to resolve personal commercial disputes in a manner which is convenient to the parties themselves.

The decisions in *TDM Infrastructure* and *Addhar Mercentile* have been interpreted wrongly to mean that two Indian parties cannot choose a foreign place of arbitration and in turn a foreign law to govern their dispute.

The Madhya Pradesh High Court and the Delhi High Court have answered the question conclusively to hold that two Indian parties are free to choose a foreign seat of arbitration. Keeping in mind the arguments presented pertaining to the applicability of Section 28 of the Act, it is submitted that the view of these courts is in fact good law and that there is no bar put on two Indian parties from choosing a foreign seat for arbitration.

The two courts have also answered the question pertaining to enforcement of such an award and it has, in my opinion, rightly held that such an award would be enforceable under Part II of the Act.

Under Part II of the Act, a foreign award is no longer subject to the 'patent illegality' test after the Supreme Court's decision in the *Lal Mahal* case, and as has been pointed out above, the other three tests of public policy are not violated simply because two Indian parties choose a foreign seat of arbitration.

In recent years, the Supreme Court has largely taken a pro arbitration stance and has tried to reduce judicial intervention in arbitration, after two parties voluntarily enter into an arbitration agreement and then spend a fortune in arbitration fees, there is no reason for the courts in India to refuse enforcement of such an award and reopen the entire dispute between the parties simply because two Indian parties have chosen a foreign seat of arbitration.

The judgments delivered by the High Courts of Madhya Pradesh and Delhi are the two cases in which the issue of two Indian parties being allowed to choose a foreign place of arbitration and in turn a foreign law to govern their arbitration has been answered. In appeal to the *Sasan* case, the Supreme Court has distinguished the case on facts and has held that the arbitration agreement in question in the case was a tri-party agreement involving a foreign party and thus the dispute fell under the definition of 'international commercial arbitration' under Section 2(1)(f). Thus the findings on law of the Madhya Pradesh High Court have not been overruled by the Supreme Court.

For the numerous reasons stated in this paper it is submitted that Section 28 does not bar two Indian parties from choosing a foreign seat of arbitration.

