

CONUNDRUM OF LEX ARBITRI: A REVIEW OF RECENT JUDICIAL TRENDS IN INDIA

Written by Dr. Liji Samuel

Assistant Professor, NUALS, Kochi

ABSTRACT

The law governing arbitration is a complex system of national and international laws where in party autonomy plays a pivotal role in determining rights of parties and the propriety of arbitration. But the broad spectrum of party autonomy is considered to be subject to the mandatory rules of the State. Thus lex arbitri or law governing arbitration agreement determines the scope and extent of party autonomy though there a trend of liberalization of arbitration and its disenfranchisement from national law. The Arbitration and Conciliation Act, 1996 was enacted in the lines of the UNCITRAL Model Law and gives due importance to party autonomy. However, the intricacies of lex arbitri in domestic disputes are not clearly dealt under any of the provisions of the Act, and the same lead to conflicting decisions.

Keywords: Party autonomy, *lex arbitri*, foreign seated arbitration.

INTRODUCTION

Arbitration is generally accepted as a process by which parties delegate, by their contract, power and capacity to settle a dispute between themselves to a neutral third party, the arbitrator¹. Thus, the arbitrator derives power to settle dispute from the arbitration clause in the contract or from the arbitration agreement. The power of parties to appoint arbitrator of their choice and entrust him with the task of dispute settlement is considered as inseparable part of arbitration law which is otherwise noted as party autonomy. The parties by mutual agreement can decide the course of proceedings in any manner as long as they adhere to basic rules of fairness. All of this is because the genesis of arbitration is a contract². The Arbitration and Conciliation Act, 1996 encapsulates this golden principle of arbitration law and it has once again affirmed by the recent amendment Act, 2015. The frame work of Arbitration Law in India gives the freedom to parties to design the arbitration process including appointment of arbitrator, course of proceedings, admissibility of evidence, application of substantive law in case of international commercial arbitration etc.,. The issues propped up recently are inextricably connected with the basic concept of party autonomy. The right of Indian parties to choose foreign seat of arbitration and their right to go for second level arbitration are two major issues discussed by the arbitration world in the recent past. Though states have accepted party autonomy as the basic feature of arbitration law, many of the time, they reserve certain rights of parties outside the umbrella of party autonomy.

CONCEPT OF PARTY AUTONOMY

Arbitration is the alternative jurisdiction to national courts which are specifically established by the State to apply and uphold the law and determine all forms of dispute. Arbitration is also the jurisdiction selected by the parties in preference to national courts³. However, the extent to which parties can refer their dispute to arbitration is inevitably a matter to be regulated by law. In recent years, this has been through both national and international law⁴. The regulatory web for

¹ Mallika Taly, Introduction to Arbitration 1 (1st ed. 2015).

² Id. at 2.

³ Julian D. M. Lew, Loukas A. Mistelis & Stefan Kroll, Comparative International Commercial Arbitration 17 (2003).

⁴ Id. at 18.

international arbitration is hierarchical involving elements of party autonomy, the chosen arbitration rules, international arbitration practices, the applicable arbitration laws as well as the relevant international arbitration conventions. Party autonomy is the primary source of arbitration and the procedure. The arbitration will be governed by what parties have agreed in the arbitration agreement, subject to the limits provided by the mandatory rules⁵. Thus, the legal regime of arbitration proceedings is complex web of rules ranging from party autonomy to international conventions.

All modern arbitration laws recognise party autonomy i.e. parties are free to determine the substantive law or rules applicable to the merits of the dispute to be resolved by arbitration. It also empowers the parties to decide up on the law applicable to arbitration agreement and procedure. Thus it provides contracting parties with a mechanism of avoiding the application of an unfavourable or inappropriate law to an international dispute⁶. Due to the universal acceptance of party autonomy in most developed legal systems and its origin in the express or determinable intention of the parties, it is now recognised that party autonomy operates as a right in itself⁷. The rule has special transnational or universal character and has binding effect because it has been agreed to and adopted by the parties. Unquestionably, party autonomy is the most prominent and widely accepted international conflict of laws rule. The national conflict of law system recognise that contracting parties do express their view as to the law to govern their contractual relations and the national laws have no reason to ignore and very limited rights to interfere with the expressed will of the parties⁸. The Arbitration and Conciliation Act, 1996 drafted in the line of UNCITRAL Model Law by Indian policy makers incorporated many provisions reflecting the basic norm of party autonomy⁹.

⁵ Id. at 28.

⁶ Id. at 412.

⁷ Id. at 413.

⁸ Id. at 414.

⁹ S. 10 of the Arbitration and Conciliation Act, 1996 reads: Number of arbitrators.—

- (1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.
- (2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

S.19 of the Arbitration and Conciliation Act, 1996 reads: Determination of rules of procedure.—

- (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

LAW APPLICABLE TO SUBSTANCE OF DISPUTE AND ARBITRATION AGREEMENT

The process of determining the applicable law to the dispute, arbitration agreement and procedure, is very intricate as there are no definite rules guiding to it either internationally or at the state level. The issue becomes more complex especially in cases of international arbitration where there is no choice has been exercised by the parties.

-
- (2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.
 - (3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.
 - (4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

S. 20 of the Arbitration and Conciliation Act reads: Place of arbitration.—

- (1) The parties are free to agree on the place of arbitration.
- (2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
- (3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

S.22 of the Arbitration and Conciliation Act, 1996 reads: Language.—

- (1) The parties are free to agree upon the language or languages to be used in the arbitral proceedings.
- (2) Failing any agreement referred to in sub-section (1), the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.
- (3) The agreement or determination, unless otherwise specified, shall apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the arbitral tribunal.
- (4) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

S.23 of the Arbitration and Conciliation Act, 1996 reads: Statement of claim and defence.—

- (1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.
- (2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.
- (3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

However, it is largely agreed that there are broadly three sets of laws which apply to an arbitration¹⁰:

- i. The proper law of the contract i.e., the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen (Substantive law).
- ii. The proper law of the arbitration agreement, i.e., the law governing the obligation of the parties to submit the disputes to arbitration, and to honour the award. (*lex arbitri* or the law governing the arbitration agreement).
- iii. The proper law of the conduct of the arbitration i.e., the law governing the conduct of the individual reference. It is usually held to be the law of the seat of the arbitration. (*lex fori/curial* law).

In addition to this, in an international agreement, there will be

- iv. Other applicable rules, non-guidelines and recommendations and
- v. The law governing recognition and enforcement of awards (which may, in practice, prove to be not one law, but two or more, if recognition and enforcement is sought in more than one country in which the losing party has, or is thought to have, assets)¹¹

The law applicable to substance of dispute and law applicable to arbitration agreement are the two separate sets of law applicable to arbitration. The law applicable to substance of dispute or substantive law governs the validity of contract and the contractual rights and obligations of parties. And parties can either expressly or impliedly apply any law of any nation of their choice¹². Whereas the proper law of arbitration agreement or *lex arbitri* determines the internal and external validity of arbitration agreement. Internal procedure includes the principles of equal opportunity of parties to present their case and external validity determines the interaction with local courts of competent jurisdiction. *Lex arbitri* determines what law governs arbitration and

¹⁰ Ejas Karia, Lla Kapoor & Ananya Aggarwal, Post Amendments: What Plagues Arbitration in India? 5 IJAL 230 , 233 (2016).

1. ¹¹ Nigel Blackaby, Constantine Partasides QC, Alan Redfern, & Martin Hunter, Redfern and Hunter on International Arbitration 157 (6th ed. 2015).

¹² Id. at 158.

which courts will exercise jurisdiction over many of the crucial matters liable to impact on the fate of the arbitration¹³. In case of selection of proper law of arbitration agreement also, parties can exercise their freedom of choice. In the absence of express provision in the contract, the courts apply different tests to determine the proper of law of agreement¹⁴.

According to the paradigm that still prevails today, the *lex arbitri*, together with the will of the parties, provides the main foundation of the arbitration and of its binding force. The *lex arbitri* also provides the framework for the arbitration. It determines the extent of the parties' right to resort to arbitration and defines the boundaries of their autonomy¹⁵. There is an undeniable trend towards the liberalization of arbitration and its disenfranchisement from national law¹⁶. Even in the context of liberalization of arbitration rules, all legal systems contain at least some rules from which the parties will, under no circumstances, be permitted to derogate¹⁷. Certain countries are unquestionably less sympathetic to arbitration than others. In particular, in certain countries that in recent years have reached a central stage in their economic relations such as China, Russia and India, the attitude towards international arbitration remains considerably less favourable than in the legal systems where the culture of arbitration first emerged such as France and Switzerland¹⁸. Arbitration is not harmonized at the international level. The international convention that constitutes the basis of the system of international arbitration, the New York Convention, governs only two, albeit crucial elements of arbitration: the enforcement of arbitration agreements and of arbitral awards. Even in relation to these two aspects, it is very far from imposing a harmonized regime. Consequently, states retain total freedom as to how to govern issues relating to arbitration. The only important legal instrument which goes some way towards bringing about some level of harmonization is the UNCITRAL Model Law on International Arbitration, which, however, is not binding and, moreover, is silent on many matters¹⁹.

¹³ International Commercial Arbitration 48 (Giuditta Cordero-Moss ed., 2013).

¹⁴ Indian courts apply the closest connection test *NTPC v. Singer* (AIR 1993 SC998), where as English courts apply three stage test (*Sulamerica v. Enesa* (2012EWCA Civ638)).

See Abhinav Bhushan and Niyati Gandhi, *The Ghost of Governing Law Returns: Lex Arbitri v. Curial Law in India*, (March 25, 2018, 3.30 PM), <http://arbitrationblog.kluwerarbitration.com/2014/02/26/the-ghost-of-the-governing-law-returns-lex-arbitri-v-curial-law-in-india/>.

¹⁵ Cordero-Moss, *Supra* n. 13 at 43.

¹⁶ *Id.* at 45.

¹⁷ For e.g., law governing the number arbitrators or some fundamental principles of procedure. *Id.*

¹⁸ *Id.* at 47.

¹⁹ *Id.* at 46.

It in this context, the issue of parties domiciled in one country to choose law of arbitration agreement of another country becomes relevant, and it is pertinent to analyse and understand whether, permitting such contracts would be contrary to the basic tenants of arbitration law. Many jurisdictions across the globe permits international arbitration even in domestic disputes. In the larger spectrum of autonomy, *lex arbitri*, determines the boundaries, that which cannot be violated by parties through agreement. As far India is concerned, there is no specific provision in the Arbitration and Conciliation Act, 1996 governing the party autonomy in choosing foreign seat of arbitration or governing law in case parties domiciled in India.

PRINCIPLE OF TERRITORIALITY AND PARTY AUTONOMY

Arbitration procedure is generally governed by the arbitration law of the place where the tribunal has its seat, is otherwise known as principle of territoriality²⁰. The territoriality principle applies only to the law governing the arbitration procedure and does not extend to cover the law governing the merits of the dispute²¹. As to the substantive law, parties are at liberty to follow any specific legal rules to decide the rights of contracting parties. Similarly, some states have opened up for the parties to choose the law governing the arbitration agreement and procedure. Therefore, in these states the parties may derogate the territoriality principles of *lex arbitri*²². Hence if parties wish the arbitral proceeding to be regulated by a law different from the law of the place where the arbitral tribunal is seated, they should make specific reference in the arbitration agreement. Thus, the autonomy of parties to choose substantive and procedural law has been an accepted standard of arbitration at least for some countries, though it is not a uniform standard. Though the UNCITRAL Model Law has provisions ensuring party autonomy, the rights of parties to choose governing law in case of domestic disputes is not clearly laid down and the Model Law generally operates on the principle of territoriality. Since India is known as Model Law country, how far parties can derogate the arbitral law of India in case of domestic disputes remains as an unresolved issue even after the decision of Supreme Court on this point.

²⁰ Territoriality principles is affirmed in Article 46 of the Swedish Arbitration Act, Article 176 of the Swiss Private International Law Act, S. 2 of the English Arbitration Act and Article 1(2) of the UNCITRAL Model Law. Cordero-Moss, *Supra* n. 13 at 14.

²¹ *Ibid.*

²² Article 182(1) of the Swiss Private International Law Act, Article 1494 of the French Civil Procedure Code. *Ibid.*

CONTOURS OF INDIAN ARBITRATION LAW

The freedom of party autonomy to exercise the choice of substantive law by express inclusion or implied exclusion may find expression in S. 28 of the Arbitration and Conciliation Act, 1996, which is recently amended in 2015. S. 28 of the Act follows the same standard as given under the UNCITRAL Model Law²³.

S.28²⁴ says that where the place of arbitration is in India and the subject matter is a domestic arbitration, the tribunal has to decide the dispute in accordance with the substantive law for the time being in force in India. In an international commercial arbitration, the tribunal has to decide the dispute according to the rules of law designated by the parties as applicable to the substance of the dispute. It is further provided that any designation by the parties of the law or legal system of a given country is to be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules. Where parties do not designate any law, the tribunal has to apply the rules of law which it may consider to be the most appropriate

²³ Article 28 of the UNCITRAL Model Law reads: Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

²⁴ S. 28 of the Arbitration and Conciliation Act reads: Rules applicable to substance of dispute.—(1) Where the place of arbitration is situate 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 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;

(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;

(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.

(2) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.

(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.

given all the circumstances surrounding the dispute²⁵. Thus, one may safely arrive at a conclusion that S.28 speaks about only the substantive law and not governing law as to arbitration agreement or procedure. In respect of the international commercial arbitrations, as agreed generally, the seat of arbitration determines the law governing arbitration and the parties can exercise their freedom of choice by incorporating the *lex arbitri* specifically in the arbitration clause or by implied exclusion of any law of the country²⁶.

However, on analysing the specific situation in India, S.28 is applicable to settle issues in connection with the determination of substantive law. The issue becomes more complex on interpreting S.2 (f) of Act where it is specifically given that an arbitration held outside India cannot be considered as international arbitration²⁷. Thus to apply S.28 either of the parties should have connection with a jurisdiction outside India. Thus if parties in India agree to settle the dispute outside India, the validity of such agreement may be analysed on the basis of accepted norms of international arbitration law rather than under the provisions of the Arbitration and Conciliation Act, 1996, due to the reason that there is no specific indication given in the Act.

SEAT OF ARBITRATION AND THE LEX ARBITRI: THE INDIAN CONTEXT

The Arbitration and Conciliation Act, 1996 or even the Amendment Act, 2015 are not providing any specific provision for deciding the questions as to the law governing arbitration agreement. Since India adopted the UNCITRAL Model Law, the party autonomy plays pivotal role in deciding the issues relating to substantive law and law governing arbitration agreement along with the territoriality principle.

²⁵ Justice R.S. Bachawts, Law of Arbitration and Conciliation, 1260 (4th ed. 2015).

²⁶ Redfern & Hunter, Supra n. 11 at 157.

²⁷ S. 2(f) of the Arbitration and Conciliation Act, 1996 reads: “international commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

- (i) an individual who is a national of, or habitually resident in, any country other than India; or
- (ii) a body corporate which is incorporated in any country other than India; or
- (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or
- (iv) the Government of a foreign country;

DECIDING THE QUESTION OF RIGHT OF INDIAN PARTIES TO CHOOSE FOREIGN SEATED ARBITRATION: CONTRADICTIONARY VIEWS

Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Private Limited²⁸

In the instant case the two Indian Companies entered into an arbitration agreement, wherein Clause 23 of the agreement stated that: *Arbitration in India or Singapore and English Law to be applied.* The petitioner filed the application under Section 11(6) of the Act 1996 for the appointment of arbitrator. The petitioner stated that since both the parties are incorporated in India and are situated in Mumbai and since the said clause 23 provides that the arbitration shall be in India or Singapore and English law to apply, intention of the parties is clear that the parties can have arbitration in India. It was argued that since both the parties are from India, the parties cannot be allowed to derogate from Indian law. The learned counsel for the respondent submitted that though both the parties are Indian, parties by agreement can agree to the seat of the arbitration at Singapore and to apply English law.

The Bombay High Court admitted the application of the petitioner for the appointment of arbitrator by relying on the TDM case by stating that:

A perusal of clause 23 clearly indicates that intention of both parties is clear that the arbitration shall be either in India or in Singapore. If the seat of the arbitration would have been at Singapore, certainly English law will have to be applied. Supreme Court in case of *TDM Infrastructure Private Limited* has held that the intention of the legislature would be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country.

Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Private Limited

2015 SCC Online Bom 7752

²⁸ 2015 SCC OnLine Bom 7752

Thus, the Bombay High Court without differentiating the laws to be applied in respect of the substance of dispute and procedure, and relying wrongly on TDM Infrastructure Pvt. Ltd. case²⁹, where the right of Indian parties to choose foreign seat of arbitration was not at all a ratio of the decision, came to the conclusion that two Indian parties cannot derogate Indian law.

Sasan Power Limited v. North American Coal Corporation India Private Limited³⁰

The appellant was a company registered under the Indian Companies Act, and was a subsidiary of the Reliance Power Ltd. The respondent was also a company registered in India and was subsidiary of the North America Coal Corporation (NACC-USA). Sasan Powers entered into an association agreement with NACC-USA based on the agreement between the Reliance and the NACC-USA. Consequently, NACC-USA vide an agreement assigned all its rights and responsibilities to its Indian Company, NACC-India. Disputes started arising between the parties and on 23.7.2014, the respondent Indian Company issued a letter of termination in respect of the associate agreement and also filed a request for arbitration with the International Council for Arbitration (ICC) and

²⁹ TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt.Ltd (2008) 14 SCC 271

In this case the case both parties, TDM Infrastructure and UE Development India, were Indian companies registered and incorporated under the Indian Companies Act, 1956. However Board of directors and shareholders of the petitioner company were in Malaysia. The petitioner approached the Supreme Court for appointing a sole arbitrator as per S.11(5) and S.11(6) of the Arbitration and Conciliation Act, 1996. On that point, the Court considered the main issue of the nationality of the companies and dismissed that petition stating the reason that the centre of control situates outside India, and rightly noted that:

In respect of 'international commercial arbitration', clause (b) of Sub-section (1) of Section 28 of the 1996 Act would apply, whereas in respect of any other dispute where the place of arbitration is situated in India, clause (a) of Sub-section (1) thereof shall apply.....Section 28 of the 1996 Act is imperative in character in view of Section 2(6) thereof, which excludes the same from those provisions which parties derogate from (if so provided by the Act). The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country.

³⁰ 2015 SCCOnline M.P. 7417

claimed compensation along with compound interest. Matter came before the MP High Court by way of a miscellaneous appeal filed by the respondent against the injunction granted by the District Court against arbitration under ICC in favour of the petitioner inter alia with other petitions.

One main issue discussed by court was the intricacies of the choice of substantive and procedural law in an arbitration. In this case, the court appreciated the difference between substantive and procedural law by analysing S.28 of the Arbitration and Conciliation Act, and opined that:

As the heading of Section 28 indicates, its only purpose is to identify the rules that would be applicable to a substance of dispute. In other words, it deals with the applicable conflict of law rules. This section makes a distinction between purely domestic arbitrations and international commercial arbitrations, with a seat in India. Section 28(1)(a) makes it clear that in an arbitration under Part I to which section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide the dispute by applying the Indian substantive law applicable to the contract. This is clearly to ensure that two or more Indian parties do not circumvent the substantive Indian law, by resorting to arbitrations. The provision would have an overriding effect over any other contrary provision in such contract. On the other hand, where an arbitration under Part I is an international commercial arbitration within Section 2(1)(f), the parties would be free to agree to any other substantive law and if not so agreed, the substantive law applicable would be as determined by the Tribunal. The section merely shows that the legislature has segregated the domestic and international arbitration. Therefore, to suit India, conflict of law rules have been suitably modified, where the arbitration is in India.

Sasan Power Limited v. North American Coal Corporation India Private Limited 2015
SCC Online M.P. 7417

In the instant case, the Madhya Pradesh High Court relied on *M/S Atlas Export Industries v. M/S Kotak & Company* on the ground that the issue was decided by a larger bench³¹. The Court

³¹ *M/S Atlas Export Industries vs M/S Kotak & Company* (1999) 7 SCC 61.

reiterated the position taken by the Supreme Court in the Atlas case and observed that such arbitration agreements are valid and the award will be governed under Part II of the Arbitration and Conciliation Act, 1996.

LEAVING THE ISSUE UNSETTELED: THE VIEW OF SUPREME COURT

*Sasan Power Ltd v. North American Coal Corporation India Pvt. Ltd.*³², was an appeal case filed before the Supreme Court against the decision of the Madhya Pradesh High Court, and the main issue was whether it is permissible under the consolidated Indian law of arbitration for two Indian Companies (each incorporated and registered in India) to agree to refer their commercial disputes to an arbitration, with place of arbitration outside India, and with a different governing law.

The entire case of the appellant was built up on the assumption that the parties to the arbitration agreement were only two Indian companies. However, Court on perusing the agreements entered into between two parties and the assignment agreements concluded that it was dispute among three parties, of which one is an Indian Company, with a foreign element, i.e, rights and obligations of the American Company. Hence the stipulation regarding the governing law cannot said to be an agreement between only two Indian Companies. Deciding the involvement of foreign element, court by oversight gave up the question of law of right of Indian parties to agree up on foreign seat of arbitration or foreign law of arbitration.

In this case two Indian parties, based on the prior arbitration agreement they entered for settlement of disputes, arbitrated the dispute where the seat of arbitration was London. Atlas filed application in India for enforcement of award and it was challenged by Kotak alleging the validity of arbitration agreement and it was dismissed by the High Court. The case came before the Supreme Court and the Supreme Court considered two issues such as the validity of arbitration agreement and whether the enforcement of the award would violate sections 23 and 28 of the Indian Contract Act. Division bench decided both the issues, and the Court dismissed the petition stating that the agreement between Atlas and Kotak was valid and the award will not be against public policy or against S.23 and 28 of the Indian Contract Act.

³² (2016) SCC 10 813.

Though the question of *lex arbitri* was a major issue in this case, court took much time to discuss the foreign element involved in the case, and left the issue unsettled. Thus it requires further clarification either from the court or an amendment to determine the extent to which Indian parties may agree on foreign seated arbitration and governing law. As long as it is not clearly prohibited under the Act, and party autonomy being the basic feature of arbitration law across the world, it may be assumed that, such agreements are valid. A conflicting view may also be taken that S.28 clearly speaks about the substantive law. Since there is no clear indication as to the right of the parties to choose a different law, it may also presume that, such agreements are invalid, because the law makers had not intended so.

EMERGING JUDICIAL TRENDS: THE UNENDING BATTLE

Very recently, the arbitration world and legal fraternity once again discussed upon the rights of Indian parties to choose foreign seat for arbitration after proclaiming the validity of such agreements by the Delhi High Court in 2017. In *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors*³³, the Delhi High Court considered the issue of choosing *lex arbitri* where two parties are Indian and it has been well accepted by the arbitration world as a pro-arbitration judgement.

In the instant case³⁴ GMR Energy Ltd filed the suit for a decree of injunction to restrain Doosan Power Systems India Pvt. Ltd from instituting or proceeding with arbitration proceedings against GMR Energy Pvt. Ltd before the Singapore International Arbitration Centre (SIAC). The Delhi High Court extensively considered *inter alia* the issue of two Indian parties to enter into a contract to undergo arbitration in foreign jurisdiction. The Court by relying on *Sasan Power Limited v. North American Coal Corporation India Private Limited (MP)* concluded **that** arbitration agreement is an independent self- contained agreement not dependant on the

³³ 2017 SCC OnLine Del 11625

³⁴ GMR Chattisgarh Energy Limited (GCEL) entered into three EPC agreements with Doosan Power Systems India Private Limited (Doosan India), on 22 January 2010. A separate corporate guarantee was also executed between GCEL, GMR Infrastructure Ltd (GIL), and Doosan India on 17 December 2013. Thereafter, two Memoranda of Understanding were executed between Doosan India and GMR Energy Limited (GMR Energy) dated 1 July 2015 and 30 October 2015. The EPC Agreements, Corporate Guarantee, and the MOUs became the subject matter of a dispute and Doosan India invoked Arbitration Proceedings against GIL, GMR Energy and GCEL seeking enforcement of certain liabilities before the Singapore International Arbitration Centre (SIAC). GMR was included in the arbitration proceedings even if they were not party to EPC Agreements.

substantive agreement, therefore irrespective of the contractual rights and obligations parties can opt for an international arbitration.

However in the year 2017, yet another conflicting decision came from Uttarakhand High Court. *KLA Construction Pvt. Ltd. v. Kajima India Pvt. Ltd.*³⁵, the Court opined that in case where there the foreign element as given S. 2(1)(f) is absent, the case cannot be referred to international arbitration and it will be treated as domestic arbitration under the Arbitration and Conciliation Act, 1996. The court relied upon *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd.* and observed that a company incorporated in India can only have Indian nationality for the purpose of the Act. It cannot be said that a company incorporated in India does not have an Indian nationality. Hence, where both the parties have Indian nationalities, then the arbitration between such parties cannot be said to be an international commercial arbitration.

CONCLUSION

The emerging judicial trends in connection with *lex arbitri* in India is intricate and add on the complexity, though there are many decisions, which are welcomed by the arbitration world across the globe in the recent past. Though the judiciary is taking a pro-arbitration approach it is quintessential to bring clarity in respect of law governing arbitration agreements, especially in the context of conflicting High Court decisions. Since S.28 gives the freedom to choose substantive law to the parties to international arbitrations, there is no specific provision dealing with the right of Indian parties to exercise such options in respect of *lex arbitri*. Though the Delhi High Court has recently confirmed the possibility of choosing foreign seat of arbitration by Indian parties, it subject to rectification. As mentioned earlier, S.28 opens the possibility of two conflicting interpretations, where the final decision has not yet come from the Supreme

³⁵ Arbitration Petition No. 21 of 2017 .In this case, a contract was executed between the Petitioner and the Respondent on September 09, 2015 at Delhi. The contract between the parties was for the construction of a factory at SIDCUL in Haridwar . The Arbitration Clause 20.6 of the agreement read as:

"...**20.6. Arbitration.** Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both the parties:

(a) The dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce..."

Court. Though the Delhi High Court relied on the precedents and came to conclusion that the Arbitration and Conciliation Act, 1996 does not prohibit foreign seated arbitration for domestic dispute, it is necessary to eliminate the ambiguity in the decisions. It is also pertinent to note that S.28 authorises the parties to international arbitrations to exercise their autonomy and at the same time the provision is silent about the rights of parties of domestic disputes. Thus to ensure safe arbitral climate in India, it is better to reform the law governing *lex arbitri*.

