INTERNATIONAL COMMERCIAL ARBITRATIONS BETWEEN CHINA AND INDIA

(This article is co-authored by International Commercial Arbitration lawyers of Singhania & Partners LLP, India and Zhong Lun Law Firm, China)

The present article focuses on International Commercial Arbitrations between Indian and overseas parties, where the seat of arbitration is in China. It further discusses the issues faced by foreign companies trying to obtain reliefs and remedies in India and China as well as with the enforcement mechanism for China Seated arbitrations in both countries.

Arbitration owes its popularity amongst investors primarily because it holds four distinct advantages over other dispute redressal mechanisms. Arbitration offers parties a great deal of confidentiality and privacy. Since arbitrations are more or less about party autonomy, parties are free to agree to the procedures concerning arbitrations, including the seat of arbitration. Arbitrations can be both institutional as well as ad-hoc arbitrations. Various institutions such as London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), Singapore International Arbitration Centre (SIAC), China International Economic and Trade Arbitration Commission (CIETAC) etc. also administer arbitrations, and carry their own rules of procedure for arbitration. However, this article deals with the basic law governing arbitrations in China as well as India in respect of China seated arbitrations.

For ready reference we are reproducing a model clause below, as per which the seat of arbitration would be China and the substantive law is Indian:-

"*Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.*

The seat of arbitration shall be Beijing, China

The language to be used in the arbitral proceedings shall be English

The governing law of the contract would be the substantive law of India"

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LEGAL SYSTEMS GOVERNING AN ARBITRATION

The seat of arbitration carries with it, implications regarding the law which is attracted to the proceedings of the arbitration. This is why it is important to understand how both jurisdictions deal with different systems of law applicable to an agreement.

China

Under the Chinese legal system for a foreign-related arbitration seated in China, rules of the applicable law can be perceived from the four main aspects set out as below:

1. For validity of the arbitration agreement, it is explicitly addressed by the Judicial Interpretations on Chinese Arbitration Law of the Supreme Court of China[1] that the applicable law should be the law selected by the parties by agreement, otherwise the law of seat of arbitration shall apply.
2. For substantive issues, the Law on Application of Law in Foreign-related Civil Relations[2] allows the parties to select by agreement the applicable law, either domestic law or foreign law, to govern the contract, provided that such selection does not violate any Chinese mandatory provisions or the social and public interests of China. The law most closely associated with the contract shall apply by default of an agreed selection.
3. For procedural issues, it is generally recognized that the Chinese Civil Procedural Law[3], the Chinese Arbitration Law[4] and related judicial interpretations, as well as the arbitration rules of the selected arbitration institutions will be applied in China seated arbitrations. However, instead of a direct application of rules of the selected arbitration institutions, the currently effective arbitration rules of CIETAC[5] (CIETAC Rules) gives an implication that arbitration rules selected by the parties by agreement shall prevail unless the agreement violates mandatory procedural provisions.
4. For recognition and enforcement of the awards made in China, the governing laws are the Chinese Civil Procedural Law, the Chinese Arbitration Law and related judicial interpretations. The Number 5 Circular of the Supreme Court of China in 1987[6] (the Circular) is to be applied specifically for the recognition and enforcement of foreign arbitral awards. Application of the Circular will be further discussed in this article.

India

In the Indian legal system in an arbitration containing a foreign element, there are three different systems of law which govern the arbitration[7]:

[1] Interpretation of the Supreme People's Court on Certain Issues Concerning the Applicability of the Arbitration Law of the People's Republic of China, 2006.
[2] Law of the People's Republic of China on Application of Law in Foreign-related Civil Relations, 2010.
[3] Civil Procedure Law of the People's Republic of China, amended in 2017.
[4] Arbitration Law of the People's Republic of China, 1995.
[5] CIETAC Arbitration Rules, amended in 2015.
[6] Circular of Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China, 1987.
[7] Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd. &Anr. (2015) 9 SCC 172.

1. The law governing the substantive law of the contract[8] which is the law governing substantive issues in dispute in the contract. Also referred to as "substantive law", "applicable law", or "proper law of the contract".

2. The law governing the existence and proceedings of the arbitral tribunal[9], which is the law governing the conduct of the arbitration proceedings. It is also referred to as the "curial law" or the "lexarbitri". This is the law which is derived from the seat of arbitration.

3. The law governing the recognition and enforcement of the award[10] is the law which governs the enforcement, as well as filing or setting aside of the award and is also the law which governs the arbitrability of the dispute.

Furthermore, in absence of any other stipulation in the contract, proper law is the law applicable to the arbitral tribunal itself[11]. Also the *lexarbitri* and the law governing the recognition and enforcement of the award are one and the same in absence of an intention/stipulation to the contrary[12]. The place of the arbitration generally specified in a contract determines the seat of arbitration unless contrary intention is apparent from the contract.

In the Indian legal system, an International Commercial Arbitration is defined as an arbitration arising from a legal relationship which must be considered commercial, where either of the parties is a foreign national or resident or is a foreign body corporate or is a company, association or body of individuals whose central management or control is exercise in some other country, or a government of a foreign country[13].

An International Commercial Arbitration may either be seated in India, or be seated in a foreign country, and this article focuses on International Commercial Arbitrations seated only in China. The implication of the Chinese seat is that Part I of the Arbitration and Conciliation Act, 1996 (the Indian Act), which is the curial law in India, is excluded for such arbitrations, barring certain exceptions discussed later.

INTERIM RELIEF FROM THE COURT

The mode of obtaining Interim Reliefs would vary depending on the seat of arbitration, as already explained above. The nature of interim relief sought by the parties may vary based on the facts and circumstances of the dispute. In certain situations the effective provision of interim reliefs may involve directions to third parties also.

China

It is generally recognized by the Chinese law that the parties to the arbitration may apply for preservation of property or evidence as interim remedies before or during the arbitration. The CIETAC Rules provide a new mechanism for the interim reliefs under which the parties, in

[8] Reliance Industries Ltd. v. Union of India (2014) 7 SCC 603.
[9] Reliance Industries Ltd. v. Union of India (2014) 7 SCC 603.and Sumitomo Heavy Industries Ltd. v. ONGC Ltd. (1998) 1 SCC 305.
[10] Sumitomo Heavy Industries Ltd. v. ONGC Ltd. (1998) 1 SCC 305.
[11] Yograj Infrastructure Ltd. v. Ssangyong Engineering & Construction Co. Ltd. (2012) 12 SCC 359.
[12] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc (2012) 9 SCC 552; Enercon (India) Ltd. and Ors.v. EnerconGmbh and Anr. (2014) 5 SCC 1.
[13] Section 2(1)(f) of the Indian Act.

addition to the right to apply for the aforementioned preservations, may also apply for emergency relief pursuant to the CIETAC Emergency Arbitrator Procedures.

Article 81 and Article 101 of the Chinese Civil Procedural Law lay down the provisions on the pre-arbitration preservation of property/evidence. Such preservation is to be applied by the interested party directly with the court only if the legitimate right of the interested party might be irreparably damaged, or the evidence might be destroyed or difficult to obtain later on due to an urgent situation. Specific rules on the pre-arbitration preservation of property include a compulsory security for the preservation to be provided by the applicant, and a strict timeline of 30 days to formally file the arbitration application after enforcing the preservation.

Article 68 of the Chinese Arbitration Law and Article 272 of the Chinese Civil Procedure Law respectively prescribes on the preservation during a foreign-relate arbitration. Unlike the pre-arbitration preservation proceedings, both provisions require the application to be filed with the foreign-related arbitration institution first and forwarded to the court by the arbitration institution afterwards.

India

In India, Section 9 of the Indian Act governs the power of the courts to grant interim relief. It is based on Article 9 of the UNCITRAL Model Law[14]. Under Section 9 of the Indian Act, a party is permitted to apply to Court for certain interim measures, before, during or after making of the award by the Tribunal. Although Section 9 is a part of Part I of the Indian Act, owing to a recent amendment[15], the position has been substantially changed. Before the amendment of 2015, the law with respect to seeking interim relief from court was governed by a judgment[16] of the Supreme Court of India. The judgment clearly laid down that Part I of the Arbitration and Conciliation Act (of which Section 9 is a part) would be inapplicable to any foreign seated arbitration. However, the 2015 amendment, in effect, nullifies the law laid down in BALCO to a limited extent and holds that even in an International Commercial Arbitration having a foreign seat, a party can approach Indian courts under Section 9 and get appropriate relief. The modification made by the amendment in case of Foreign Seated Arbitrations is a welcome change. However, from the scheme of the Act it is clear that Sections 9, 27 and 37(1) (a) and 37 (3) of the Act would apply only to arbitrations having seat in such countries with which India has reciprocal arrangements in terms of the Act.

Therefore a Section 9 remedy would be available for a Chinese seated arbitration, only if the arbitration has been commenced after the coming into effect of the amending act[17].

The nature of reliefs sought under Section 9 are generally for protection, preservation or interim custody of goods, assets, properties, securing the amounts in dispute, appointment of interim receivers etc.

This provision gives a huge relief to parties in cases where assets of parties to the Chinese seated arbitration are located in India and there is a fear of disposal. Similarly, the Appeal

[14] United Nations Commission of International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985.
[15] Arbitration and Conciliation (Amendment) Act, 2015.
[16] Bharat Aluminum and Co. vs. Kaiser Aluminium and Co. (2012) 9 SCC 552. (BALCO)
[17] Serial no. 26 of Arbitration and Conciliation (Amendment) Act, 2015.

against an Order passed in a Petition filed under Section 9 would also lie to Indian courts only as per the amendment[18].

APPLICATION FOR APPOINTMENT OF ARBITRATORS

The procedure for appointment of arbitrators in both territories is once again dependent upon the seat of arbitration. A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

China

Section 2 "Composition of the Arbitral Tribunal" of the Chinese Arbitration Law sets forth the general provisions on appointment of arbitrators. Each party can select or authorize the chairman of the arbitration commission to appoint an arbitrator, whereas the third arbitrator, as the presiding arbitrator of an arbitral tribunal composed of three members, or the arbitrator of a sole-arbitrator tribunal, is to be jointly selected by the parties or appointed by the chairman of the arbitration commission jointly authorized by the parties.

a. A more specific appointment process is regulated by the rules of the selected arbitration institution. The CIETAC Rules require the arbitrators to be appointed from the Panel of Arbitrators provided by CIETAC, and certain factors, e.g. the applicable law, the seat of arbitration, the language of arbitration, the nationalities of the parties shall also be taken into consideration for the appointment.

India

The appointment of Arbitrators in India is governed by Section 11 of the Indian Act, Article 11 being the concomitant provision of the UNCITRAL Model Law. As far appointment of Arbitrators in a Chinese seated Arbitration is concerned, Part I of the Indian Act has no application and there is no exception carved out in the act itself. In these cases, it is the domestic law of China which would be relevant, as explained above.

The only relief on this front which a party can obtain in the case of a Chinese seated arbitration is, that in case an Indian court is seized of a matter in respect of which an arbitration agreement exists, it can refer the parties to arbitration[19].

APPLICATION FOR CHALLENGING/ENFORCEMENT OF THE AWARD

The law governing the enforcement/challenge to the award is extremely relevant, and especially so, in the case of an International Commercial Arbitration. This is because an award remains a mere dead letter until it can be enforced in the relevant country and compliance can be ensured.

China

The enforcement/challenge to the award of foreign-related arbitration made by a Chinese arbitration institution is governed by the Chinese Arbitration Law, the Chinese Civil Procedural Law and the respective judicial interpretations. The Circular is applied, upon China's reservation statement of the New York Convention[20], in recognition and enforcement of awards made in territory of another state, or awards not considered as domestic awards in China.

[18] Section 2(2) of the Act makes the appeal provision of Section 37 also applicable to International Commercial Arbitrations, even if the place of arbitration is outside India.
[19] Section 45, the Indian Act.
[20] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

According to Article 70, Article 71 of the Chinese Arbitration Law and related provisions of the Chinese Civil Procedure Law, the award of a foreign-related arbitration made by a Chinese arbitration institution can be applied with the Chinese court for enforcement once the award comes into effect. Challenges to the award can be filed by either party within a statutory period. More specifically, the court can rule to cancel the award or not enforce the award upon the request of the entitled party, provided that the award is proved to meet one of the following circumstances.

1. No written arbitration clause is included in the disputed contract or no written arbitration agreement has been reached subsequently.
2. The respondent was not served with the notice of appointing the arbitrator or attending the oral hearings, or was unable to give statement due to reasons other than the respondent's own fault.
3. Formation of the arbitral tribunal or the arbitration proceedings violated the arbitration rules;
4. The subject matter of the arbitration exceeded the scope of the arbitration agreement or the arbitral authority of the arbitration institution; or
5. The court determines that execution of the award will violate the social and public interest.

Another type of arbitral award is the award of a China seated arbitration made by a foreign arbitration institution. The Chinese law has no explicit provisions on the recognition and enforcement of this type of award, but in certain cases where ICC awards made in China were reviewed by the Chinese courts for recognition and enforcement, such awards were identified as "awards not considered as domestic awards" and reviewed through application of the New York Convention[21].

India

In an arbitration seated in a foreign territory, Part II of the Indian Act is applicable. Part II of the Act deals with enforcement of certain foreign awards in India. These awards are either awards passed in New York Convention Territories, or Geneva Convention Territories, China being a New York Convention Country. In 2012, the government of India declared that the People's Republic of China, including the Hong Kong Special Administrative Region and the Macau Special Administrative Region, is a territory to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") applied for the purpose of enforcement of foreign arbitral awards in India. The formal notification was published in the official Gazette of India.[22]

Section 44 of the Indian Act provides that in order for a foreign award to be recognized as such under Part II, Chapter I (New York Convention Awards) certain conditions need to be fulfilled, which are as under:-

i. The territory should be signatory to the New York Convention
ii. The Indian Central Government should have notified in the Official Gazette that it has reciprocal provisions with such a territory.

Since, in the case of China, both the above conditions are met, the awards are directly recognizable in India and no separate mechanism needs to be followed.

[21] For instance, the ICC award 14006/MS/JB/JEM was enforced by Ningbo Intermediate People's Court in 2009 through application of the New York Convention.
[22] http://www.egazette.nic.in/WriteReadData/2012/E_502_2012_018.pdf

Section 47 of the Indian Act provides that a party while applying for the enforcement of a foreign award, apart from the procedural aspects of certification and authenticity, has also to produce such evidence as is necessary to prove that the award fulfils the conditions as stated above.

Furthermore, Section 48 of the Indian Act provide the grounds to challenge the enforcement of a foreign award which include party incapacity, invalidity of agreement under the law of the seat, absence of proper notice to the party regarding appointment, or inability of a party to represent his case, non arbitrability of the dispute, matters beyond scope of arbitration, wrong composition of tribunal, or that the award has not become binding as per the law of the seat, or is against the public policy of India.

Once the award has survived the challenge and the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court[23]. After this stage it can be executed under Order XXI of the Code of Civil Procedure, 1908 in the same manner as a decree from an Indian court.

APPEALS ARISING FROM ORDERS OF INTERIM RELIEFS OR ORDERS OF ENFORCEMENT OF FOREIGN AWARDS

China

In China, appeal to the order of interim reliefs given by a court is only allowed in the form of application with the court for a review in accordance with Article 108 of the Chinese Civil Procedure Law. Enforcement of the order will not be suspended during the court review period.

Appeal to the order on not enforcing an arbitral award is prohibited by Article 478 of the Judicial Interpretation of Chinese Civil Procedure Law[24]. Instead, the parties may choose to re-enter into a written arbitration agreement and submit the dispute to arbitration or bring a lawsuit to the competent court. In scenario of a foreign award, the order on denial of recognition and enforcement of the foreign award by the court should be subject to a mandatory double review by the Higher Court and the Supreme Court[25] and the final order cannot be appealed neither.

India

It follows from the discussion above that an interim relief is given under Section 9, then automatically an appeal against such Orders would lie to Indian Courts under Part I, Section 37 of the Indian Act. Similarly, in case an order of an Indian court in respect of a challenge to an award passed in China under Part II needs to be appealed, Section 50 of Act would become applicable and again the Appeal would lie in India.

However, in a scenario, where Indian courts have not been approached for execution/enforcement/challenge from the award passed in China, then Indian Courts would not have any role to play in the appeal process either.

Conclusion

To conclude it may be said, that the courts in both countries would play different roles in International Commercial Arbitrations seated in China. Firstly it needs to be determined which is

[23] Section 49 of the Indian Act.
[24] Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China, 2015.
[25] Article 2 of Circular of the Supreme People's Court on Issues in the People's Courts' Handling of Foreign-related Arbitrations and Foreign Arbitrations, 1995.

the seat of arbitration and which is the curial law which is attracted. Thereafter for different remedies, different courts can be approached.

Contracts relating to foreign investments in Mainland China usually provide that any dispute arising between the parties should be settled by friendly negotiation, failing which the dispute should be referred to arbitration. Foreign related arbitrations in China are mainly administered by China International Economic and Trade Arbitration Commission (CIETAC), although many other arbitration commissions may accept foreign related arbitration cases.Moreover, the 2015 amendment has given more leeway to Indian courts as far as Interim reliefs are concerned, thus providing additional protection to China based parties vis-s-a-vis Indian players. In view of the above, India is fast becoming an arbitration and foreign investor friendly country.

Firms Profile[26]

Singhania & Partners LLP

A sharp rise in international business transactions, Global bidding for contracts and Foreign direct investment many Companies have to deal with International Arbitrations. Parties that are signatories to international contracts often want to avoid using the home courts of one of the parties in order to ensure neutrality as well as unbiased decisions thus avoiding the problem faced due to unfamiliar or unpredictable local court procedures. Singhania and Partners LLP has strong experience in handling International arbitrations keeping the seat in India and outside India like Singapore, U.K, China, Switzerland, Canada and many more. The Firm also provides consultation at the time of negotiation of contracts to incorporate effective arbitration clauses. We conduct both institutional and ad hoc arbitrations. The firm is a member of TerraLex which is a premier network of law firms offices worldwide. The membership of TerraLex provides the firm with trusted advisors in more than 153 jurisdictions in cross-border matters.

Zhong Lun Law Firm

Zhong Lun's litigation and arbitration team boasts a wealth of experience in handling litigation, arbitration, enforcement and all kinds of emergencies in relation thereto, and is without a doubt a cut above other contenders in the industry.

Zhong Lun is recognized as one of the firms appearing in the largest number of cases before the Supreme People's Court of China. We also have extensive experience when it comes to arbitration cases before China International Economic and Trade Arbitration Commission (CIETAC), Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC), Beijing Arbitration Commission, Shanghai Arbitration Commission and Shenzhen Arbitration Commission. In addition, more than ten of our partners serve as arbitrators for HKIAC, CIETAC, Beijing Arbitration Commission and other local arbitration commissions.

Our broad client base encompasses both domestic clientele and a great number of industrial heavyweights from abroad, whom are deeply impressed with and praise us for our excellent language abilities, communication skills, expertise, commitment and seamless cooperation.

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