ADVANTAGES OF A SWISS SEAT OF ARBITRATION FOR INTERNATIONAL COMMERCIAL DISPUTES INVOLVING INDIAN PARTIES

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1. INTRODUCTION

The purpose of this article is to provide an introduction to international arbitration in Switzerland for parties who may be contemplating arbitration to resolve international commercial disputes involving Indian parties. It also highlights the differences between the Swiss and Indian arbitration laws, and the residual role played by Indian courts when the seat of the arbitration is outside India.

An increasing number of international commercial contracts worldwide provide for arbitration as the agreed dispute resolution mechanism. This is also true of commercial contracts between Indian and foreign parties. In the Indian legal system, international commercial arbitration is available to parties provided the legal relationship between them qualifies as "commercial" and one of the parties is a foreign national, resident, body corporate, a company, an association or a body of individuals whose central management and control is exercised in any country other than India. Although the term "commercial" has not been defined anywhere, courts in India have taken the term to be broad-based dealing with any matters of trade and commercial contracts.

One of the most important choices to be made by parties to an international commercial contract when they include an arbitration clause is that of the seat of the arbitration. It is indeed the seat of the arbitration which will determine the procedural rules applicable to the arbitration, the extent to which the ordinary courts will be involved or will interfere in the arbitral process, as well as the degree to which an arbitral award is subject to challenge. The choice of the seat will also have impact on the duration and costs of the proceedings. Party autonomy being one of the cornerstones of international arbitration, parties are free to agree on the seat of arbitration.

While Indian arbitration law has undergone a rapid evolution in recent years, and the Indian government has taken steps towards developing India as an arbitration- and foreign investor-friendly country, Indian parties may not always be able impose a seat in India on their foreign counterparts, which usually prefer the arbitration to be seated outside India, often in a jurisdiction considered neutral to both parties. There might also be practical or tactical advantages for Indian parties themselves in choosing a

seat outside India, including in terms of the duration and costs of the arbitral process.

One of the foreign seats often chosen in practice by parties to international commercial contracts, including the Indian parties, is Switzerland. Indeed, Switzerland not only has the advantage of being both neutral and international, but more importantly, it also has a long-standing and well-established reputation for being a pro-arbitration jurisdiction. Two of its main cities, Geneva and Zurich, are regularly ranked among the preferred seats of arbitration worldwide.

This article explains why the distinctive features of international arbitration in Switzerland make it a seat of choice for disputes involving Indian parties. After briefly examining the laws governing the arbitration, this article focuses on the appointment and challenge of arbitrator, interim relief, the setting aside of the award, and the recognition and enforcement of the award. For each of these topics, the article provides a comparison of the relevant provisions of the Swiss and Indian arbitration laws, and the remedies available before Indian courts when the arbitration is seated in Switzerland. With respect to the Indian arbitration laws, the authors will focus only on arbitrations governed by the substantive law of India and/or Arbitration and Conciliation Act, 1996, as last amended by the Arbitration and Conciliation (Amendment) Act 2015 (the "**Indian Arbitration Act**").

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

"Any dispute, controversy or claim arising out of, or in relation to, this contract, including the validity, invalidity, breach, or termination thereof, shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution in force on the date on which the Notice of Arbitration is submitted in accordance with these Rules.

The number of arbitrators shall be three;

The seat of the arbitration shall be Switzerland

The arbitral proceedings shall be conducted in English

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

2. LAWS GOVERNING THE ARBITRATION

One of the reasons for the growth of arbitration is the flexibility which it affords the parties to choose not only the law governing the merits of the dispute, but also the law and rules applicable to the arbitral proceedings. However, as mentioned above, the choice of the seat of the arbitration has implications on the law applicable to the arbitration. It is therefore important to identify the various sources of law which come into play in the context of an international arbitration and how they are dealt with both in Switzerland and in India.

The main laws and rules which may apply in relation to an international arbitration seated in Switzerland or in India are (1) the arbitration law, (2) the arbitration rules, (3) the substantive law, (4) the law applicable to the arbitration agreement, and (5) the legal regime applicable to the recognition and enforcement of the award.

[**LALIVE Comment**: As the relevant laws/rules appear to be quite similar in Switzerland and in India, we suggest organising this section slightly differently than what you had initially suggested, i.e. by source of law rather than by jurisdiction. We have tried to adjust the sections on Indian law as required, but apologise in advance for any mistakes we may have made in doing so. We would be

grateful if you could review this section carefully and also check the references indicated in the footnotes to make sure they still make sense after the various changes.]

2.1 Arbitration law

The arbitration law (also referred to as the "*lex arbitri*") is the law of the seat of the arbitration and defines the general legal framework of the arbitration, including the constitution of the arbitral tribunal and the conduct of the arbitral proceedings.[1]

Switzerland

In Switzerland, international arbitrations are governed by Chapter 12 (Articles 176-194) of the Swiss Private International Law Act ("**PILA**"). Chapter 12 PILA sets out amongst other things the basic procedural principles, the mechanisms for appointing and challenging arbitrators in the absence of an agreement between the parties, and the grounds for setting aside the award. Chapter 12 PILA also governs the arbitrability of the dispute, irrespective of any more restrictive rules of law governing the substance of the dispute, the parties' national laws or the laws of the likely place of enforcement. Under Swiss arbitration law, only disputes relating to matters with an economical value may be submitted to arbitration. The scope of arbitrable disputes in Switzerland is quite broad as it covers any claims which have a financial value for one of the parties.

[**LALIVE Comment**: Would there be any issues in enforcing an arbitral award rendered by a tribunal seated in Switzerland in India if the dispute is not considered arbitrable under Indian arbitration law although it is under Swiss arbitration law? If so, on what basis, public policy?]

One of the main characteristics of the Swiss arbitration law is the fact that it affords parties the maximum autonomy and flexibility in structuring their proceedings. It also keeps the possibility of a judicial intervention other than in the support of the arbitral process to the strict minimum.

India

In India, international arbitrations are governed by the Arbitration and Conciliation Act 1996 (the "**Indian Arbitration Act**"), as amended by the Arbitration and Conciliation (Amendment) Act 2015, which took effect as of 23 October 2015 (the "**2015 Amendment**"). The Indian Arbitration Act is based on the 1985 United Nations Commission of International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the "**UNCITRAL Model Law**") and the 1980 UNCITRAL Conciliation Rules. Part I of the Indian Arbitration Act applies to arbitrations seated in India and governs the procedure, the setting aside of the award, and the arbitrability of the dispute. The procedural framework of the arbitration proceedings themselves (i.e. applicable procedural rules (as to which see Section 2.2 below) and any mandatory provisions of the relevant arbitration law) are referred to by Indian courts as "curial law".[2]

It is now well established that the designation of a Swiss seat excludes the application of Part I of the Indian Arbitration Act, with the exception of the provisions dealing with interim measures (as to which see Section 4 below), the assistance of the Indian courts in relation to the taking of evidence, and the remedies available in the event an Indian court refuses to refer the matter to arbitration.

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1 For India, see the Judgments of the Supreme Court of India in the cases of *Reliance Industries Ltd. v. Union of India* (2014) 7 SCC 603 and *Sumitomo Heavy Industries Ltd. v. ONGC Ltd*. (1998) 1 SCC 305.

2 For India, see the Judgments of the Supreme Court of India in the case of *Sumitomo Heavy Industries Ltd. v. ONGC* (1998) 1 SCC 305 (citing *Naviera Amazonica Peruana S.A. vs. Compania International De Seguros Peru*, 1988 (1) Lloyds Law Report 116); *Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd. &Anr.* (2015) 9 SCC 172; and *Reliance Industries Ltd. v. Union of India* (2014) 7 SCC 603.

2.2 Rules of arbitration

One of the distinguishing features of international commercial arbitration is party autonomy, which means that the parties are in principle free to decide on the procedural rules applicable to the arbitration within the limits of the mandatory provisions of the applicable arbitration law. Parties often chose to refer to the arbitration rules of organisations (institutional arbitration) which administer and supervise the arbitrations and offer a range of arbitration services. There are a number of reputable arbitration institutions, including for example the Swiss Chambers' Arbitration Institution (SCAI), the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC). Arbitrations which are not administered by an arbitration institution are referred to as "ad hoc arbitrations" and allow the parties to determine the arbitral procedure themselves.

2.3 The substantive law

The substantive law is the law governing the merits of the dispute. It is also referred to as the "applicable law" or the "proper law of the contract".

Switzerland

In arbitrations seated in Switzerland, the arbitral tribunal will apply the law chosen by the parties to govern the substance of the dispute.[3] In the absence of a choice of law by the parties, the arbitral tribunal shall apply the law with which the case has the closest connection.[4]

India

A similar approach is followed in international commercial arbitrations seated in India: the arbitral tribunal will apply the rules of law chosen by the parties to govern the substance of the dispute (also referred to as the "proper law of the contract").[5] However, the arbitral tribunal is not obliged to apply the conflict of law rules of the legal system designated by the parties.[6] In the absence of any such designation, the arbitral tribunal shall apply the rules of law that it considers to be appropriate in light of all the circumstances of the dispute.[7] Thus in India, the seat of arbitration decides the substantive law of India.

2.4 The law applicable to the arbitration agreement

The law applicable to the arbitration agreement is relevant both for the interpretation and assessing the validity of the arbitration agreement.

Switzerland

Under Swiss arbitration law, an arbitration agreement is materially valid if it conforms to any one of the following (1) the law chosen by the parties to govern the arbitration agreement; (2) the law governing the subject matter of the dispute, respectively, the principal contract; or (3) Swiss law.[8] This alternative test reflects Switzerland's pro-arbitration approach as it seeks to avoid, to the extent

[3] Article 187 PILA.
[4] Article 187 PILA.
[5] Section 28(1)(b)(i) Indian Arbitration Act.
[6] Section 28(1)(b)(ii) Indian Arbitration Act.
[7] Section 28(1)(b)(iii) Indian Arbitration Act.
[8] Article 178(2) PILA.

possible, the invalidity of the arbitration agreement. As for the minimal form requirements, they are set out by Swiss arbitration law, which requires an arbitration agreement to be in writing or in a form of communication allowing it to be evidenced by text, but does not require the signature of the parties.[9]

India

Under the Indian Arbitration Act, the law governing the substantive disputes is the same as the law applicable to the arbitral tribunal itself[10], unless specifically provided in the contract between the parties, for instance ICC Rules.

2.5 The law governing the recognition and enforcement of the award

Switzerland

In Switzerland, the recognition and enforcement of a foreign international arbitral award is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "**New York Convention**").[11]

India

In India, the recognition and enforcement of a foreign international arbitral award is governed by Part II of the Indian Arbitration Act which, inter alia, implements the New York Convention.[12]

See Section 6 below for further details on the recognition and enforcement of foreign international arbitral awards in Switzerland and India.

3. APPOINTMENT AND CHALLENGE OF ARBITRATORS

[**LALIVE Comment**: for the sake of completeness, we suggest adding a short passage on the challenge of arbitrators.] Although sections 13 and 14 of Part I of the Indian Arbitration Act deal with the challenge to the appointment of arbitrators, these provisions are not expressly available to Swiss seated arbitrations. However, at the time of enforcement or challenge to the award before an Indian Court.

The procedure for the appointment and the challenge of arbitrators is governed by the arbitration law of the seat of the arbitration.

Switzerland

In accordance with the principle of party autonomy, the parties are free to agree on the procedure for appointing the arbitrators of an arbitral tribunal seated in Switzerland.[13] In principle, any individual can act as arbitrator; there are no specific qualifications required. The arbitrator must however be both independent of the parties and impartial.[14] The parties are also free to decide on the number of arbitrators, usually one or three.

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9 Article 178(1) PILA.
10 Yograj Infrastructure Ltd. v. Ssangyong Engineering & Construction Co. Ltd. (2012) 12 SCC 359
11 Article 194 PILA.
12 Judgments of the Supreme Court of India in the cases of *Sumitomo Heavy Industries Ltd. v. ONGC Ltd*. (1998) 1 SCC 305, *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 Article 179(1) PILA.
14 Article 180(1)(c) PILA.

Where the parties have not agreed on the procedure for the appointment of arbitrators (neither directly nor by reference to institutional rules), they can apply to the Swiss court at the seat of the arbitration to act as appointing authority.[15] The Swiss court will then appoint the arbitral tribunal unless a summary examination of the case reveals that there is no valid arbitration agreement between the parties.[16]

A party may challenge an arbitrator in the following circumstances:[17]

i. the arbitrator does not meet the qualifications agreed upon by the parties;
ii. a ground for challenge exists under the rules of arbitration agreed upon by the parties or the arbitrator was not appointed in accordance with the applicable procedure; or
iii. circumstances exist that give rise to justifiable doubts as to the arbitrator's independence.

However, a party may only challenge an arbitrator it has appointed for reasons of which it becomes aware after the appointment has been made.[18]

The ground for challenge must be notified to the arbitral tribunal and to the other party without delay.[19] The parties are otherwise free to agree on the procedure for challenging an arbitrator,[20] including on possible time limits within which to do so. If the parties have not agreed on the procedure for challenging an arbitrator, including by reference to any arbitration rules, either party may apply to the competent Swiss courts at the seat of the arbitration for a decision on the challenge.[21] The decision of the Swiss courts on the challenge of an arbitrator is final.

India

The appointment and challenge of arbitrators in India is governed by Part I, Sections 11-14 of the Indian Arbitration Act. Section 11, which deals with the appointment of arbitrators, corresponds to Article 11 of the UNCITRAL Model Law. A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.[22]

The Indian Arbitration Act does not apply to the appointment or the challenge of the members of an arbitral tribunal seated in Switzerland, which, as set out above, is governed by Swiss Arbitration law. Where a party nonetheless seeks the assistance from the Indian courts regarding the appointment of an arbitrator in a foreign-seated arbitration, then such an application will, as a rule, be dismissed for lack of jurisdiction.[23]

4. INTERIM RELIEF

The procedure for obtaining interim relief and the type of relief available also varies according to the seat of the arbitration.

Switzerland

15 Article 179(2) PILA.
16 Article 179(3) PILA.
17 Article 180(1) PILA.
18 Article 180(2) PILA.
19 Article 180(2) PILA.
20 Article 180(3) PILA.
21 Article 180(3) PILA.
22 Section 11(1) Indian Arbitration Act.
23 Judgments of the Supreme Court of India in the case of *Antrix Corp Ltd. v. Devas Multimedia P. Ltd.*, Arbitration Petition No. 20 of 2011 (SC, 2013).

Arbitral tribunals seated in Switzerland may, at the request of a party, grant interim relief (provisional and conservatory measures) unless the parties have agreed otherwise.[24] Arbitral tribunals seated in Switzerland have broad discretion as regards the type of interim relief they can order. As a general rule, interim relief will only be ordered if the arbitral tribunal considers it necessary and appropriate to protect a party from harm which cannot be repaired (for example by an order for the payment of damages) in the final award.

The power of the arbitral tribunal to order interim measures does not prevent a party from seeking interim relief from a competent Swiss or foreign court, even after the arbitral proceedings have begun. In other words, there is concurrent jurisdiction between the arbitral tribunal and the courts to order interim relief. This means that a party could, for example, apply for interim relief before any other foreign courts, including Indian courts (as to which, see below), even if the arbitration is seated in Switzerland (for the Indian law perspective, see below). By applying to courts for interim relief a party will not be deemed to have waived its right to rely on the arbitration agreement. The Swiss court or foreign court seized with an application for interim relief will apply its own procedural law to determine the conditions for granting interim relief and the type of relief available. If interim relief is sought from the Swiss courts, the procedure will be governed by the Swiss Code of Civil Procedure ("**SCCP**").[25]

In practice, parties typically decide to request interim relief from the court instead of the arbitral tribunal in cases where the arbitral tribunal is not yet constituted and emergency arbitration, as provided under several institutional rules is not available, the interim relief is directed at a third party against which the arbitral tribunal does not have jurisdiction or there is a risk that the other party will not comply voluntarily with an order for interim relief granted by the arbitral tribunal.

In addition, the Swiss courts at the seat of the arbitration have jurisdiction for any assistance required by the arbitral tribunal or the parties in support of the arbitration.[26] The assistance of Swiss courts can for example be sought to enforce an order for interim relief issued by the arbitral tribunal, which lacks the power to enforce its own orders or impose sanctions in case of non-compliance with an order for interim relief.

An arbitral tribunal's order to grant interim relief is not open to challenge. A party may, however, request that the arbitral tribunal reconsider its decision. By contrast, orders rendered by Swiss courts on applications for interim relief is subject to appeal before the higher instance court within ten days from service.[27] The decision of the higher instance court can itself be appealed before the Swiss Supreme Court, Switzerland's highest court, provided the conditions for such an appeal are met.

India

In India, Section 9 of the Indian Arbitration Act deals with the power of the courts to grant interim relief. It is based on Article 9 of the UNCITRAL Model Law. Under Section 9 of the Indian Arbitration Act, a party may apply to Indian courts for certain interim measures, before, during or after the award has been rendered by the arbitral tribunal.

For a limited period of time, from 2012 to 2015, interim relief pursuant to Section 9 of the Indian Arbitration Act was not available to parties to an arbitration seated outside India. This was the result of a judgment rendered by the Supreme Court of India in in 2012 in the case of *Bharat Aluminum*

[24] Article 183 (2) PILA.
[25] Articles 248(d) and 261 *et seq.* SCCP.
[26] Articles 183(2), 184, 185 PILA.
[27] Articles 308 *et seq.* SCCP.

and Co. vs. Kaiser Aluminium and Co. (*BALCO*),[28] in which it held that Part I of the Indian Arbitration Act (including Section 9 governing interim relief) did not apply to any foreign seated arbitration. However, the situation changed with the entry into force of the 2015 Amendment. The 2015 Amendment abrogates the case law laid down in *BALCO* to a limited extent as it expressly provides that, even in relation to an international commercial arbitration with a foreign seat, a party can seek appropriate interim relief from the Indian courts under Section 9 of the Indian Arbitration Act. Accordingly, a Section 9 remedy would be available to parties to an international arbitration seated in Switzerland seated arbitration, provided the arbitration is governed by the 2015 Amendment.[29]

The type of measures available under Section 9 of the Indian Arbitration Act are generally for the protection, preservation or interim custody of goods, assets, properties, securing the amounts in dispute, appointment of interim receivers etc.

This provision may be particularly useful to a party to an arbitration in Switzerland in cases where the adverse party has assets in India and there is a risk that it will dispose of those assets.

An interim relief ordered by the Indian courts under Section 9 is subject to appeal under Part I, Section 37 of the Indian Arbitration Act.[30].

5. SETTING ASIDE OF THE AWARD

An important question when choosing the seat of the arbitration, is the grounds on which the award might be set aside at the seat of the arbitration once it has been rendered. This goes to the finality of the award, which is one of the key features and attractions of arbitration as dispute resolution mechanism.

Switzerland

The award rendered by an arbitral tribunal seated in Switzerland is final and binding upon its communication to the parties.

There is no ordinary appeal mechanism for an international arbitral award rendered in Switzerland. The main remedy is the setting aside of the award by Switzerland's highest court, the Swiss Supreme Court.[31] The application to set aside the award must be filed within 30 days from service of the award.[32]

There are only a limited number of grounds for setting aside an international arbitral award rendered in Switzerland, namely the following:

i. the arbitral tribunal was constituted irregularly (Article 190(2)(a) PILA);
ii. the arbitral tribunal erroneously held that it had or that it lacked jurisdiction (Article 190(2)(b) PILA);
iii. the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims (Article 190(2)(c) PILA);
iv. the principle of equal treatment of the parties and their right to be heard in adversarial proceedings was violated (Article 190(2)(d) PILA);
v. the award is incompatible with public policy (Article 190(2)(e) PILA).

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[29] Serial no. 26 of the 2015 Amendment.
[30] Section 2(2) of the Indian Arbitration Act makes the appeal provision of Section 37 also applicable to international commercial arbitrations, even if the place of arbitration is outside India.
[31] Articles 190 and 191 PILA.
[32] Article 100(1) of the Swiss Supreme Court Act.

The Supreme Court interprets each of the grounds set out above extremely narrowly. Importantly, in setting aside proceedings, the Supreme Court does not review the merits of the award, or the arbitral tribunal's assessment of the evidence produced in the arbitration. As a result, the threshold for the setting aside of an award rendered in Switzerland is extremely high, as confirmed by the low number of cases which resulted in the complete or partial setting aside of the award.

The setting aside proceedings before the Swiss Supreme Court are short by comparison with other jurisdictions as they typically take only four to seven months from the time of filing of the setting aside application. Setting aside proceedings usually do not prevent the award from being enforced in the meantime.

The parties may waive their right to apply for the setting aside of the award, provided neither party to the arbitration has its place of domicile or seat in Switzerland. This feature of Swiss arbitration law may be of interest in disputes involving one or several Indian parties, as it increases the finality of the award and allows the successful party to enforce an arbitral award rendered in Switzerland in less time and at less cost.

India

As in Switzerland, the grounds available to the parties in India for challenge of an award passed in Switzerland are limited. These grounds are available to parties when a foreign award is filed for enforcement against them in Courts in India[33]. These grounds are discussed in some detail in Section 6 below.

6. RECOGNITION AND ENFORCEMENT OF THE AWARD

The law governing the recognition and enforcement of an arbitral award is also extremely important, and especially so, in the case of an international commercial arbitration. This is because an award remains a dead letter until it can be enforced and compliance by the unsuccessful party can be ensured.

Switzerland

The New York Convention applies to the recognition and enforcement of all foreign arbitral awards in Switzerland, regardless of whether the state in which the award was rendered is a party to the New York Convention.[34] Accordingly, the New York Convention will apply to the recognition and enforcement in Switzerland of awards rendered in India.

Switzerland has a long-standing tradition of being a pro-enforcement jurisdiction. As a result, Parties who have obtained an award from an arbitral tribunal seated in India (or in another foreign state) should not, as a rule, face any particular difficulties in obtaining its recognition and enforcement in Switzerland.

A party applying for recognition or enforcement of a foreign award must include with its application the original or a copy of the arbitral award and arbitration agreement, together with any translations into the official language of the place at which enforcement is sought (French, German or Italian), in accordance with Article IV of the New York Convention. Swiss courts take a liberal, pragmatic and pro-enforcement approach to the New York Convention in practice. Thus, Swiss courts will only insist on strict compliance with the form requirements set out in Article IV of the New York Convention (authentication and certification) if the authenticity of the documents submitted with the

[33] Section 48 of the Indian Arbitration Act.
[34] Article 194 PILA.

application is disputed. Swiss courts will usually not insist on compliance with the translation requirement if the documents are in English.

Once Swiss courts are satisfied that the requirements of Article IV of the New York Convention are met, recognition and enforcement will only be denied on one of the limited grounds listed in Article V of the New York Convention. These grounds can be summarised as follows:

i. party incapacity or invalidity of the arbitration agreement (Article V(1)(a));
ii. no proper notice of the appointment of the arbitrator or the proceedings or party otherwise unable to present its case (Article V(1)(b));
iii. award of arbitral tribunal on matters beyond or outside of scope of arbitration (Article V(1)(c));
iv. irregular composition of the arbitral tribunal or procedure contrary to parties' agreement or, in the absence of such agreement, of the laws applicable at the seat of the arbitration (Article V(1)(d));
v. award not binding pursuant to the laws applicable at the seat of the arbitration or set aside at the seat (Article V(1)(e));
vi. non-arbitrability of the dispute (Article V(2)(a));
vii. award contrary to the public policy of the country in which its recognition or enforcement is sought (Article V(2)(b)).

In Switzerland, the threshold for successfully resisting recognition and enforcement of a foreign arbitral award on the basis of Article V of the New York Convention is extremely high and will only be met in exceptional circumstances.

India

Part II of the Indian Arbitration Act applies to the recognition and enforcement of foreign arbitral awards. For these awards to be recognised under Part II, they must have been rendered in a state which either ratified the New York Convention or the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards (the "**Geneva Convention**") and the Indian Central Government, being satisfied that it reciprocal provisions have been made, declared such state to be a territory to which the relevant convention applies by notification in the Official Gazette.[35]

In the case of Switzerland, which is a New York Convention state, the above conditions are met. As a result, awards rendered by an arbitral tribunal seated in Switzerland can be recognised and enforced in India directly, in accordance with Part II, Chapter 1, Sections 44-52 of the Indian Arbitration Act.

Section 47 of the Indian Arbitration Act is largely based on Article IV of the New York Convention and sets out the evidence a party has to produce in support of an application for the enforcement of a foreign award before Indian courts. Pursuant to this Section 47, a party must produce with its application: the original or a duly authenticated copy of the arbitral award, the original arbitration agreement or a certified copy thereof, as we all any such evidence as may be necessary to prove the award is a foreign, together with certified English translations where necessary.

Section 48 of the Indian Arbitration Act deals with the conditions requisite for enforcement of foreign awards. Section 48 mirrors the grounds to challenge the enforcement of a foreign award set out in Article V of the New York Convention. The conditions for enforcement 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.

[35] Sections 44(b) and 53(c) of the Indian Arbitration Act.

[**LALIVE Comment**: Consider adding a short paragraph on how the requirements of Sections 47 and 48 are implemented in practice by the Indian courts. In particular, are there any possible issues (e.g. public policy related, analysis of arbitrability) which parties to an arbitration seated in Switzerland should be aware of?]

If the Indian enforcement court is satisfied that a foreign award is enforceable under Part II, Chapter 1 of the Indian Arbitration Act, the award will be deemed to be a decree of that court[36]. Accordingly, the award can be executed under Order XXI of the Code of Civil Procedure, 1908 in the same manner as a judgment from an Indian court.

The decision of the Indian court regarding the enforcement of a foreign arbitral award is subject to appeal before the designated Indian appellate court.[37]

7. CONCLUSION

As we have seen, a Swiss seat of arbitration presents a number of advantages for international commercial disputes involving Indian parties. It offers parties an extremely flexible legal framework and keeps the intervention of Swiss courts in the arbitral process to a minimum. When Swiss courts do become involved this is in most cases in support of the arbitral process, and only at the request of a party or the arbitral tribunal, typically in cases relating to the appointment and challenge of arbitrators and interim measures.

Switzerland also lives up to its reputation for efficiency in the field of arbitration: once the arbitral tribunal renders its award, the award is final and binding. There are only limited grounds for setting aside the award; those are intended to guarantee the parties' minimal procedural rights and are only admitted restrictively. The setting aside proceedings themselves are relatively short (only four to seven months) and take place directly before Switzerland's highest court. Parties can also choose to waive in advance their right to apply for the setting aside of the award in Switzerland, which increases the finality of the award.

Even when the arbitration is seated in Switzerland, the Indian courts might still have a role to play. The recent developments in India's arbitration law, in particular the entry into force of the 2015 Amendment, offer parties to an international arbitration additional tools and protection by allowing them to seek interim relief before Indian courts even if the arbitration is seated outside of India. This can be particularly useful if one of the parties has assets in India.

The Indian courts might also be seized with an application to enforce award rendered by an arbitral tribunal seated in Switzerland. The enforcement of such an award in India is greatly facilitated by the fact that both Switzerland and India are signatories of the New York Convention. As a result, the grounds on which Indian courts may refuse to enforce an arbitral award rendered in Switzerland are limited.

[36] Section 49 of the Indian Arbitration Act.
[37] Section 50 of the Indian Arbitration Act.

Firms Profile[38]

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.

Lalive

LALIVE has been renowned for its expertise in international commercial arbitration for more than 50 years, and is recognized as a global leader in the field by the main legal directories and industry publications.

The firm's international commercial arbitration specialists regularly act as counsel or arbitrators in proceedings under all of the major arbitration rules, in all the major arbitration venues throughout the world and in a wide range of industries, including energy, telecommunications, construction and infrastructure, transportation, commodities, life sciences and biotechnology.

The firm has substantial expertise in assessing complex claims, managing voluminous cases, leading large teams of lawyers and experts in various jurisdictions, and cooperating closely with clients' in-house and local counsel. In addition, the legal expertise of LALIVE's lawyers, who together speak more than a dozen languages, covers several key jurisdictions other than Switzerland.

The firm also routinely advises and represents clients on the annulment, recognition and enforcement of arbitral awards in Switzerland and abroad, including in relation to preliminary steps such asset tracing and attachment orders.

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