FOREWORD

Dr. Abhishek M. Singhvi*

The birth of a new journal, dedicated to arbitration, is undoubtedly an occasion to celebrate. While congratulating the editors of this enterprise heartily in this inaugural issue, I must remind them of the wag's naughty comment that a publication, like some other forms of human endeavour, may be a joy to conceive, but are invariably a pain to deliver. This salutary warning will remind them to constantly strive that extra bit and suffer that extra pain to maintain the quality and integrity of this journal.

Having recounted my own 'Memoirs of a Personal Journey Through Indian Arbitration Law'[1] in 2016 in another arbitration journal and having had the privilege of having appeared in a large number of the major arbitration judgements of the apex court, I am saddened by the degradation of this principal bypass to litigation, even after the enactment of the glittering United Nations Commission on International Trade Law ["**UNCITRAL**"] as far back as 1985.[2] The ABCD bedevilling litigation— **A**ccess, **B**acklog, **C**ost and **D**elay— has engulfed Indian arbitration despite seminars, sermons, legislative amendments and numerous Supreme Court judgements. Hence, non-arbitral ADRs— mediation, conciliation, lok adalats, ad hoc settlement procedures and so on—have developed and grown as further bypasses to the original bypass. That is good for ADRs, much needed in India, but it equally underlines the manifold failures of the Indian arbitral process, despite the fanfare surrounding the Arbitration & Conciliation Act, 1996 [*"***A&C Act***"*].

The 'Good, Bad and the Ugly' of Indian arbitration includes the absence of any uniform arbitration ethic and culture in a hugely diverse federal Indian constitutional and judicial structure. How an arbitration roster judge looks at an award—Part I or Part II– in Bombay High Court or the Supreme Court of India ["**SCI**"]is in practice very different from the district judge in Tuticorin or the trial judge in Gangtok or, for that matter in Hyderabad and Cuttack, where such awards first land up in their original jurisdiction. Some treat it as appeals against awards, some treat it as justifying middling

*Senior Advocate, Supreme Court of India; BA (Hons), St Stephen's College, Delhi University; MA (Cantab); PhD (Cantab). Abhishek Singhvi is a sitting third-term Member of Parliament; eminent jurist; former Chairman, Parliamentary Standing Committee on Law & Justice; former Additional Solicitor General of India; author of many books; frequent columnist; visible media personality; Senior National Spokesperson, Indian National Congress.

[1] Abhishek M. Singhvi, *Memoirs of a Personal Journey through Indian Arbitration Law*, 4(2) IJAL 14-27 (2016)
http://ww.ijal.in/sites/default/files/IJAL%20Volume%204_Issue%202_Abhishek%20Manu%20Singhvi.pdf.

[2] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985: AMENDED IN 2006 (Vienna: United Nations, 2008), https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

interference and a few others adopt hands off approach. Sensitisation of all judicial officers, especially at the lower echelons, at judicial academies and at academic interactions, is the need of the hour before we dream of India as an arbitral destination, in (false) comparisons to highly compact, uniform and consistent jurisdictions like Singapore, Hong Kong and many European fora.

Secondly, the zigzags of the judiciary, even at the higher levels, have contributed no less to the chaos and confusion. That unruly horse, public policy, which needs dexterous judicial riders, has had torturous U-turns, sometimes expansionist qua judicial interference, sometimes non-interventionist. Even a quick, cursory look at the judgments in the cases of *Renusagar*[3], *Saw Pipes*[4], *ONGC Geco*[5], and *Associated Builders*[6] will illustrate this. Limiting only to these four out of many more, it is clear that the first adopted the limited review approach [under the old law[7]], while the second opened the doors virtually fully to the error apparent doctrine, de facto synonymous with an appeal against an award, despite the stated object of the A&C Act to bury error apparent deep and strong! Again, as recently as 2014, *ONGC Geco* opened the doors wider than conceived, which necessitated the valiant and nuanced pullback by Justice Nariman in *Associated Builder*, since the latter was a smaller bench than the former.

Thirdly, the tragic and humongous waste of time before the *Bhatia*[8] doctrine was corrected by *BALCO*[9], after four long years, in between spawning a large quantum of progeny authored by hapless High Court judges who had to follow *Bhatia* or strain to distinguish it, illustrates the fundamental structural problem of Indian arbitration jurisprudence. Correction may inevitably happen, but since Keynes reminds us that in the long run, we are all dead, the time it takes for that corrective finality is enough to create legal destruction and mayhem at lower judicial levels in the interregnum. Fourthly, even when absolutely ridiculous and unacceptable consequences, arising from clumsy drafting, are corrected after passage of many years, we tend to turn full circle to the original sin.[10] The best example is the October 2015 legislative amendment to section 36 of the A&C Act [11], which resulted in "auto stay" of an arbitral award by the *mere fact of filing* a section 34 challenge without even a judicial stay. Despite correction by Justice Nariman in *BCCI case*[12], there was clear legal and judicial *deja vu* and

[3] Renusagar Power Co. Ltd. v. General Electronic Co., 1994 Supp (1) SCC 644 ["**Renusagar**"].
[4] ONGC v. Saw Pipes, 2003 (5) SCC 705 ["**Saw Pipes**"].
[5] ONGC Ltd. v. Western Geco International Ltd., 2014 (9) SCC 263 ["**ONGC Geco**"].
[6] Associate Builders v. DDA, (2015) 3 SCC 49 ["**Associate Builders**"].
[7] The Foreign Award (Recognition and Enforcement) Act, 1961.
[8] Bhatia International v. Bulk Trading, (2002) 4 SCC 105 ["**Bhatia**"].
[9] Bharat Aluminium Co. & Ors. v. Kaiser Aluminium Technical Service Inc., (2012) 9 SCC 552 ["**BALCO**"].
[10] The partial resurrection of *Bhatia* by 2015 amendment is a classic example of this.
[11] Arbitration and Conciliation (Amendment) Act, 2015.
[12] BCCI v. Kochi Cricket Pvt. Ltd. (2018) 6 SCC 287 ["**BCCI**"].

turning full circle by the 2019 amendment, which was again struck down by Nariman J. in the *HCC*[13] case. This is now followed by 2021 amendment to the A&C Act, which mandates the court to unconditionally stay the award if *prima facie* case allegation of fraud or corruption is made out in either the arbitration agreement or in the making of the award itself.[14] Honestly, I could go on, but will now turn to the recent seminal judgement of the apex court by a three-judge combination, authored yet again by Nariman J, in the so called *PASL Wind Solutions* case decided on 20 April 2021.[15] I tried hard to critique it and find faults within it, but to be honest I find it unexceptionable and flawless. Firstly, anything coming from the pen of an outstanding jurist and thinker like Nariman J., especially with his expertise in arbitration law, gives it huge presumptive validity. Secondly, it rightly decided something simple and elementary: two Indian nationals or two Indian registered corporate entities can nevertheless choose a foreign arbitral seat and apply the *lex loci* of that seat. The heart of the decision rightly holds, thirdly, that such a consensual and contractual decision does not fall foul of any general principle that two Indian parties choosing foreign arbitrators are violating public policy under sections 23 or 28 of the Contract Act.

Fourthly, in the *PASL* case, the court relied on Exception 1 to section 28 of the Indian Contract Act, which specifically excluded consensual references to arbitration from such public policy.

Fifthly, the court also relied heavily on the earlier Supreme Court judgement of *Atlas*[16] in 1999, which had clearly excluded arbitration references from section 28, but went further, and *dehors Atlas*, independently concluded, after Justice Nariman's typically comprehensive survey of the entire law on public policy, that such references to a foreign seated arbitration would not violate any letter or spirit of public policy arising from sections 23 or 28. On many other issues also, the *PASL* court has been clear and unequivocal.

Sixthly, it rightly holds that there is no basis of searching for or applying the "closest connection" test to ascertain seat, since that approach is apposite only for cases where there is lack of clarity regarding seat. The *PASL* case was clearly a case of crystal clarity, where a foreign seat was categorically contractually designated in writing and then further found as an arbitral finding by the sole arbitrator in a detailed ~~a~~ reasoned order. Incidentally, though the closest connection test could not possibly have arisen on the facts of the *PASL* case, I would have liked a definitive judgement by a three-judge bench

[13] Hindustan Construction Company v. Union of India, 2019 SCC Online SC 1520 ["**HCC**"].
[14] Arbitration and Conciliation (Amendment) Act, 2021, §. 2.
[15] PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd., 2021 SCC Online SC 331 ["**PASL**"].
[16] Atlas Export Industries v. Kotak & Company (1999) 7 SCC 61 ["**Atlas**"].

on the seat issue, after the confusion created by the clearly erroneous Supreme Court judgement in *Hardy Exploration* case[17]. However, that is another story altogether.

Seventhly, an equally significant finding, again correct and unexceptionable is that section 2(2) proviso added to the A&C Act by amendment with effect from 23rd October 2015, does not in ae way become a bridge between Part I and 2 of the Act and the latter two Parts, as already held earlier in *BALCO*, remain mutually exclusive. Eighthly, it holds that Section 2(2) was merely an amendment, as rightly held by the *PASL* court, to facilitate emergent interim relief by Indian courts to preserve the subject matter even of foreign seated arbitrations, where such subject matter is in India. It does not mean that Part 1 and 2, generally govern or affect or cross-fertilize each other. Valuable *travaux preparatoires* from diverse jurisdictions have been cited in the *PASL* judgement relating to the discussions on the New York Convention[18], to underline the contrast between other countries and India, with the former wanting to have some parts of the old Geneva Convention regime inserted into the New York Convention, especially qua national rooted arbitrations, which was not accepted by the New York Convention framers. Hence, ninthly, the *PASL* court holds that section 44 was born in the Indian Act as an implementation of Article 1 of the New York Convention, consciously making international awards "a national" or "non-national" with no territorial or nationality restrictions.

Tenthly, the *PASL* court also rightly rejects the argument that the words "unless the context otherwise requires" in section 44 would bring Part 1 arbitration principles [domestic or foreign] into Part 2 foreign seated arbitrations. It reiterates that the mutual exclusivity of Parts 1 and 2 cannot be breached, directly or indirectly, either by section 2(2) or the above words of section 44. For the same reason, eleventhly, the court held that section 44 does not change the focus from a seat focused provision to a person, domicile or nationality focused one. The absence of any caveat or reservation by India to the New York Convention is also noted in this regard.

Last but not the least and in my opinion, the most significant part of the judgement in its concluding paragraphs, in terms of long-term judicial policy and perspective, is the emphasis in the judgement on the vital necessity to revive, reinvent, reiterate and reinstall party autonomy into arbitration jurisprudence. It rightly calls party autonomy the 'backbone of arbitrations.' The five judges in *BALCO* are quoted in this regard. If these concluding paragraphs [101 to 104] are observed not only in letter but also in spirit, the bane of Indian arbitration— excessive interference, an appellate approach to awards, the subjective sense of justice of the hearing judge— should hopefully be a thing

[17] Union of India v. Hardy Exploration and Production (India) Inc., (2019) 13 SCC 472 ["**Hardy Exploration**"].
[18] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 UST. 2517, 330 UNTS 39 ["**New York Convention**"].

of the past. Whether the *PASL* spirit is in fact judicially followed is, however, a moot question qua which, given past Indian experience, I would still say that the jury is out.

In conclusion, I would again congratulate the editors for taking this laudatory initiative, and also all the expert contributors. But above all, I take this opportunity to invoke and commemorate the memory of Professor Gaillard, a preeminent persona in this field, who put his intellectual giant footprints on this entire subject faultlessly and flawlessly. The year 2021 has seen a big loss to the arbitration world by the demise of this great contributor to this subject. May his soul find eternal peace. Om Shanti.