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by S. Rai and A. Dwivedi

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Looking Through the Transnational Theory of Arbitration: Imagining Future Possibilities for Indian Law

Sumit Rai[1]& Abhishek Dwivedi[2]

Abstract

Is India poised to be the next international arbitration hub? This paper suggests that it could, but needs some course correction. The authors present a hypothesis that the seat theory of arbitration is undergoing a dialectical evolution. In this process, it is using the transnational theory (as its negation) to evolve into a more capable concept to tackle the challenges of modern international arbitration. India needs to create appropriate jurisprudential ecosystem to allow it to participate and contribute in this next phase of international arbitration's evolution, rather than play catch-up, as it did in the past. Recent debates on false premises such as two Indian parties' liberty to choose foreign seat and inventing a flawed concept of seat in domestic arbitration point to certain concealed conceptual landmines that must be deactivated at the earliest.

1. Introduction

Consider this hypothetical: an international award in an airport construction dispute in favour of an Indian party and against a State owned entity of Maldives has been set aside. The Maldivian court, being the court of the seat reasoned that the ICC rules under which the arbitration was held was not a valid choice under Maldives law. The State owned entity of Maldives has a lot of assets in India. The Indian party seeks enforcement of the set-aside award in Indian courts. What should the Indian courts do and why?

There are other similar questions: (a) Let's assume that in the earlier hypothetical, at the initial stages of the arbitration, the Maldives court granted anti-arbitration injunction on grounds that the Indian party was in default of its tax obligations. It was not, therefore, allowed to make any claims against a State owned entity under Maldives law. Should the arbitrators suspend the arbitration? (b) There are expert witnesses on a technical issue led by both parties. Arbitrators have ordered hot tubbing instead of traditional cross examination. The Indian party makes an application to the tribunal that it must allow traditional cross examination of the experts. It contends that not doing so would amount to denial of the right to cross examine the other party's witness, vitiating the entire trial. What should the tribunal do? (c) After the award was rendered, the Maldives party filed a challenge against the award in the court of the seat, which admitted the petition and stayed the award. In the meantime, Indian party moved for enforcement in Paris, where the Maldives party has some assets. Maldives party argued that the operation of the award has been stayed by the court of the seat. What should the Paris courts do?

In pondering over these questions, think not of what these courts or the tribunals *are* likely to do. Start with considering, based on pure logic and jurisprudential principles, what they *ought* to do. Despite approaching it on first principles, the answers will differ – and therein lies the

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gap within which one can play with some dialectical possibilities of the future development of law. This paper seeks to explore that gap and apply the findings particularly to Indian law.

The purpose of this paper is not to answer these hypothetical questions. The purpose is to draw attention to certain axiomatic principles which otherwise sound academic and inconsequential in practice – without the contemplation of which, any answer to the above questions would be speculative.

Any debate of the day about the future of Indian arbitration is bound to focus on the immediate factors influencing it – such as the recent amendments,[3] the shift in policy towards investment arbitration,[4] and recurring pro-arbitration stand of Indian courts in recent decisions. These are all important and valid points, which indicate the immediate direction of the law.

In this paper, we engage in a different look at the future – a future slightly more distant. We first establish the importance of the two theories of arbitration – seat theory and transnational theory. We then show that the evolution of the seat theory is already underway. From this perspective, we investigate what changes, if any, are necessary in Indian law to allow it to participate in this evolutionary process. It could helpfully contribute to it, rather than play catch up like it did in the *Bhatia International*[5] to *BALCO*[6] chronicle.[7] The attempt of this paper is to introduce some ideas into the current debate, which if addressed appropriately could truly let India be a hub of international arbitration – which in our view is determined more in the attitude of a jurisdiction rather than their statistics and infrastructure.

2. Seat Theory and Transnational Theory of Arbitration

There are different ways to look at the jurisprudential foundation of international arbitration. Not surprisingly, therefore, it leads to a difference in how one views the authority of arbitrators and the status of its final result, i.e. the award. These theories have been debated for quite some time now amongst academics, but in the last decade or so have found their way in the mainstream debates as well. One of the most accessible summaries (and exposition) of these theories can be found in the works of Prof. Emmanuel Gaillard.[8] He has categorized them into three representations of international arbitration:

> a. *The Seat Theory:* In this viewpoint, the legitimacy of arbitration and the authority of arbitrators are derived from the law of the seat of arbitration. International arbitration is seen as rooted in the legal system of the seat of arbitration.
>
> b. *The Enforcement Theory:* The second viewpoint, which Prof. Gaillard calls the Multilocal or Westphalian view considers the legitimacy of the entire arbitration

[3] Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016).
[4] Model Text for Indian Bilateral Investment Treaty (India, December 2015), available at https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.
[5] Bhatia International v. Bulk Trading SA [2002] 4 SCC 105 (Indian Sup. Ct.) ("Bhatia").
[6] Bharat Aluminium Company Limited v. Kaiser Aluminium Technical Services Inc [2012] 9 SCC 552 (Indian Sup. Ct.) ("BALCO").
[7] For a brief summary of the Bhatia International to BALCO period, see Matthew Townsend and James Rogers, Supreme Court of India Clarifies the Power of Indian Courts to Intervene in Foreign-Seated Arbitrations, (2013) 1 ASIAN DISP. REV. 24.
[8] EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (BRILL, 2010).

process as a *post facto* ratification by a particular State which accepts its final result by recognising and enforcing it. This representation has remained in the realm of academic discussions and for the purposes of this article, will not require further consideration.

c. *The Transnational Theory:* The third representation is the transnational view of arbitration. This viewpoint suggests that international arbitration is not rooted in any one national legal system but derives its legitimacy from the international legal order. In other words, arbitrators sitting in international arbitration are not meant to apply or enforce the laws of any particular state (not even of the seat of arbitration). They are meant to conduct the proceedings in a manner that is consistent with the rules that are considered to be universally acceptable by the collective of nations.

Presently, the seat theory is the prevailing fulcrum of the law of arbitration in almost all jurisdictions except France. However, the life of an idea is dynamic. It must evolve over a period of time – admit new thoughts and shed dead weight. Has that time come for the seat theory? Our hypothesis suggests, yes.

3. The Hypothesis: From Seat's Tyranny to Its Benevolent Guardianship

It is our hypothesis that the seat theory has already entered a phase of dialectical evolution.[9] We suggest that elements of the transnational theory which stand in contradiction to the principles of seat theory are acting as its negation helping its dialectical evolution into something more prepared and more complete to tackle the challenges of modern international arbitration.[10]

We believe that in this process, the status of seat as the 'centre of gravity' is giving way to the concept of seat acting as a 'trustee' of international arbitration. Thus, seat retains the exclusive jurisdiction to supervise an arbitration and censure its result, but only by application of international minimum standards of due process and public policy. Seat would completely lose the right to impose its domestic legal philosophy on international arbitration at the end of this evolution. In the end, it would be the benevolent guardianship of the seat and not its tyranny.

Like any idea, the seat theory itself was a synthesis in the dialectical process of international arbitration. It found the traditional conflict of law principles too unpredictable. International arbitration needed consistency. The concept of a juridical seat of arbitration (as opposed to the seat in the physical sense, i.e. venue) evolved as a legal fiction solely to signify the choice of law of arbitration. As a consequence, it also selected the municipal courts that would have supervisory jurisdiction over such arbitration. Evolution of this legal fiction spared us the confusion in determining these questions by reference to tangibles such as the place where the hearings are held or where the award is rendered.

[9] We have applied Hegelian dialectics to arbitration theory in order to develop this hypothesis. At the risk of over-simplification, Hegelian dialectics is a process of 'overcoming' that preserves what it overcomes. For a quick accessible introduction, see LLOYD SPENCER AND ANDRZEJ KRAUZE, INTRODUCING HEGEL (Icon Books UK).

[10] We borrow here from Zizek's understanding of Hegelian dialectics, when he suggests "What if, for Hegel, the point, precisely, is to not 'resolve' antagonisms 'in reality', but simply to enact a parallax shift by means of which antagonisms are recognized 'as such' and thereby perceived in their 'positive role?" Borrowing from him, we suggest that the transnational theory should be viewed as a positive influence on the traditional seat theory. SLAVOJ ZIZEK, THE SUBLIME OBJECT OF IDEOLOGY at xviii (Verso 2008).

The seat theory continues to serve well, but in an evolving global scenario, international arbitration came to face new challenges where seat theory struggled to find answers consistent with its theoretical underpinnings. In the process, it has had to evolve.[11] The next section looks at some such challenges and the impact seat theory and transnational theory respectively have on these issues.

4. Modern Challenges Through the Prism of the Two Theories

The intent of this section is to show through real examples that theories of arbitration are not simply academic, they have significant practical impact on important questions that have arisen in modern international arbitration scenarios. These examples also help to emphasize our hypothesis that the seat theory is in the process of transcending itself – thanks to helpful disruptions from the transnational theory.

a. Discretion of Arbitrator over the Proceedings

In the hypothetical relating to the right of cross examination posed at the beginning of this paper, would the seat theory allow sufficient space to the tribunal to exercise its discretion in determining the objection? Will the answer not depend on the where the seat lies? Should the answer to such questions differ depending on where the seat lies?

When viewed from the perspective of the seat theory, the answer will depend on a review of the arbitration law of the seat. In order to find the discretion in favour of the arbitrator, one will have to first locate something similar to Article 19 of the Model Law in the law of the seat[12] – which would cut the umbilical cord of international arbitration from the local procedural and evidentiary rules. But that would only be a starting point. Next, one will need to understand how the local courts have interpreted such a provision and what scope have they laid out to such independence. For example, if the local court has taken a view that allowing cross examination of any witness in an arbitration is one of the principles of natural justice, a violation of which could put the entire decision making process into question - the discretion we are looking for is in serious threat.

Let's now look at this from the viewpoint of the transnational theory. From this perspective, the first hurdle is already crossed. Being rooted in the international legal order, the arbitrator does not derive its powers from the law of the seat and naturally enjoys the discretion to shape the process and procedures before it - the only restriction being that it must confirm to international public policy, or in other words, an internationally accepted sense of fair procedure or due process. Therefore, all that the arbitral tribunal will need to decide is whether replacing cross examination with hot tubbing for experts leads to a denial of due process. Tribunal will be free to give weight to the actual benefits and or compromises that the choice of hot tubbing as against cross examination entails – without having to speculate about how the seat court might treat the question. Since hot tubbing allows a more open discussion on

[11] See, HEGE ELISABETH KJOS, "Territorialized and Internationalized Arbitral Tribunals", APPLICABLE LAW IN INVESTOR STATE–ARBITRATION (Oxford University Press 2013) for an interesting and helpful summary of the interplay between delocalized arbitration and seat theory.

[12] Article 19, U.N. Comm. on Int'l Trade Law, UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985) ("Model Law").

technical issues, retains opposing parties right to question (though not in the structure of a formal cross examination), and is more efficient – tribunal will find no difficulty rejecting the objection.

Having outlined the outcome from the two perspectives, let us now look at what is most likely to happen if such a question in fact arose before a seasoned international arbitration tribunal not seated in France. The tribunal is likely to reach its outcome on the basis of the reasoning we have outlined above under transnational theory, and peg it on the Article 19 Model Law equivalent provision of the seat. If it is faced with inconvenient precedents under the law of seat to the contrary, it is likely to force its way through by distinguishing them on some ground or pretext.

Since the focus of this article is the potential evolution of Indian law, let us look at this from the perspective of an international arbitration seated in India. Section 19 of the Arbitration and Conciliation Act, 1996 is *pari materia* to Article 19 of the Model Law.[13] Therefore, the question before the tribunal would be whether there are precedents under Indian law to the contrary. There are no precedents that hold that hot-tubbing of experts is impermissible. There are, however, a catena of decisions couched in the strongest words indicating that a refusal of opportunity to cross examine a witness is an inexcusable violation of the principles of natural justice. There are also decisions which indicate in the spirit of any common law court, that Indian courts will always look at the substance and not form in determining this question. In substance, it would boil down to whether an Indian court is likely to accept that the process of hot tubbing does not lead to denial of cross examination 'in substance'.

Surely, no international arbitration tribunal would like to be in this situation - where the potential validity of an entire trial involving huge time and cost investment will depend on how well it guesses the approach an Indian court is likely to take in the future.

If the seat theory was to pick up ("*aufheben*") and evolve the idea of Article 19 to not only disassociate the arbitral procedure from the law of seat but also accept that an international arbitration tribunal has the discretion to tailor the process before it without reference to the law of seat – limited only by an internationally accepted sense of due process – it would provide an immediately acceptable solution to this conundrum. At the same time, it would not have disturbed the architectural framework of the seat theory that currently holds international arbitration in its place.

b. Tribunal's Relationship with National Courts

If the court of the seat of arbitration grants an anti-arbitration injunction - or for that matter any other direction - the seat theory would dictate that the arbitration tribunal be absolutely bound by it. From the perspective of the seat theory, since an arbitral tribunal derives its authority from the law of the seat, a tribunal would hardly have any space to manoeuvre around any such orders of the seat court.[14]The transnational theory, on the other hand, will allow the tribunal to determine what orders are reasonable and must be followed and what orders are an overreach and should be ignored – guided by its source of authority, i.e. the international legal order. For instance, if the order directs the arbitral tribunal not to proceed on grounds that *prima*

[13]S. 19, Arbitration and Conciliation Act, 1996 (No. 26 of 1996) ("Indian Arbitration Act").
[14]Alexander J. Belohlávek, Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth (2013) 31(2)ASA Bulletin 262 (the author lists out the various issues that are solely to be determined by the law of the seat).

facie evidence suggests the arbitration itself is collusive and meant to defraud a third party – the tribunal might be more inclined to follow it than an order directing the same on the basis that no claims can be made by a company against a State entity until all tax demands are satisfied.

The other half of this important equation is how the national courts view arbitration tribunals. For instance, there is a unique constitutional perspective under Indian law, where the higher courts (i.e. the High Courts and the Supreme Courts) enjoy certain special powers. The High Courts in India have been granted certain constitutional powers to supervise the proper functioning of any subordinate courts or tribunals. Additionally, the High Courts and Supreme Court have the power to issue writs to *inter alia* any "*authorities within the territory of India*".[15]Not surprisingly, it has been argued that an arbitral tribunal would qualify as a "tribunal" under Art. 227 of the Constitution and / or as "any other authority" under Article 12.[16] Given the complexities of constitutional law and its evolution through precedents, it has led to conflicting answers - some High Courts believe arbitration tribunal would be included within this constitutional scheme while others believe they do not.[17] Be that as it may, if the debate was settled in favour of arbitration tribunals falling within the constitutional framework, it will seriously impede the ability of Indian law to adopt solutions from the transnational side of the divide to these difficult questions.

Again, developing our hypothesis, we suggest that the solution does not need a foundational restructuring but only an evolution of the seat theory. For instance, if section 5 of Indian Arbitration Act,[18](equivalent to Art. 5 of Model Law) was to be interpreted to mean that in an international arbitration, no court can pass any orders directing the tribunal to do or not to do anything, it could lead to a result that recognizes an international arbitrator's independence from the diktats of the seat court while conducting an arbitration. At the same time, it would retain the seat court's powers to supervise gateway issues and results coming out of this process in the form of challenge to award or appeal against tribunal's orders for interim relief. Such interpretation in turn is bound to inform the debate under Indian constitutional law in favour of finding international arbitration tribunal being outside the constitutional scheme.

c. *Enforcement of Award Annulled at Seat*

To those uninitiated to this topic, the very idea of an award being enforced when it has been set-aside at the seat might sound incredulous. If raised in a jurisdiction that considers seat of arbitration not only as the centre of gravity but the fountainhead of the entire arbitration process, it is a reasonable presumption to make that if the seat itself considers an award as being vitiated by an illegality and annuls it, it should be considered a nullity in law – incapable of being enforced.

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[15]This power is conferred to the Indian Supreme Court by article 32 and to High Courts by article 226 of the Constitution of India.

[16]Mangayarkarasi Apparels Pvt. Ltd. v. Sundaram Finance Ltd., Pattullos [2002] SCC OnLine Mad 323 (Madras High Ct.); Awasthi Construction Co. v. Govt Of NCT Of Delhi &Anr. [2012] SCC OnLine Del 5443 (Delhi High Ct.).

[17] Anuptech Equipments Private Limited v. Ganpati Co-op. Housing Society Limited, [1999] SCC OnLine Bom 54 (Bombay High Ct.) (High Courts of Bombay, Patna and Allahabad have extended the writ jurisdiction to arbitrators).

[18] S. 5, Indian Arbitration Act ("Extent of judicial intervention. -Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part").

In the process of considering this question, French law gave express recognition to the transnational theory of international arbitration. However, France is not alone in having found ways to enforce awards annulled at seat - it is given company at least also by the United States, and Netherlands[19].

It is interesting to note the distinction in the approach of the French and US courts in arriving at the decision to allow enforcement of an award annulled at the seat. The starting point in both cases is the NYC[20]. French courts were able to effectively bypass it by invoking art. VII of the NYC – which allows the more favourable local provision to be applicable.[21]By applying art. VII, the French courts reached the local law which has very few grounds for refusing enforcement of a foreign award. Importantly, an award having been annulled at the seat is not one of them. The only potential ground that could then be applied was 'international public policy'.

While considering whether enforcement of an award annulled at the seat amounted to violation of international public policy, the French courts held that an international arbitration award is not rooted in the legal order of the seat and has an independent existence. Therefore, it does not become a nullity simply because it has been set aside at the seat. The enforcement of such award is therefore not opposed to international public policy, they found.

As they say, Rome was not built in a day. This jurisprudential journey in France started with *Norsolar*[22] in 1984, withstood major turbulence during two rounds of *Hilmarton*[23], and was finally consolidated in *Chromalloy*[24]. Subsequently, there has been severe damage to the credibility of this position when it maintained itself against all odds during the *Putrabali*[25] saga.

Putrabali raised eyebrows because it showcased the extremes of the "*inadequacies of the mechanical application of the internationalist approach*", as one author has called it.[26] Most of what happened in *Putrabali* had already happened in *Hilmarton*, i.e. the French courts had allowed enforcement of first award (annulled at seat) and not the subsequent award in the same dispute by applying principles of res judicata. What tilted the scale for the critics in *Putrabali* was the specifics of the case – the first time an application for enforcement of the first award was moved before the French courts was after the second award had been rendered. Therefore,

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[19]Yukos Capital SARL v. OAO Rosneft, Gerechtshof Amsterdam (Amsterdam Court of Appeal) LJN: BI 2451, 200.005.269 (28 April 2009) s 3.5; (2009) 34 YB Com Arb 703.) (the Amsterdam Court of Appeal held that the annulment of the award by Russian Court was insufficient to render the award unenforceable in the Netherlands. The Court noted that the annulment was obtained through a process that was not an impartial and independent judicial process); See also, Maximov v. NLMK, Amsterdam Court of Appeal, 200.100.508/01, 18 September, 2012.

[20]CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, (adopted 10 June 1958, entered into force on 7 June 1959). 330 UNTS 38, 21 UST 2517; 7 ILM 1046 (1968) ("NYC").

[21]ibid art. VII.

[22]Norsolor SA v. PabalkTicaret Limited Sirketi, Cour d'appel de Paris (Court of Appeals) France, 1 10192 (19 November 1982), (1986) 11 YB Com Arb 484.

[23]Hilmarton Ltd v. Omnium de traitement et de valorisation - OTV, Cour de Cassation (Supreme Court) France, 92-15.137 (23 March 1994), (1995) 20 YB Com Arb 663.

[24] République arabe d'Egypte v. Société Chromalloy Aero Services, Cour d'appel de Paris (Court of Appeals) France, 95/23025 (14 January 1997).

[25]PT Putrabali Adyamulia (Indonesia) v. Rena Holding and others, Cour de Cassation (Supreme Court) France, 05-18.053 (29 June 2007), (2007) 32 YB Com Arb 299.

[26]Manu Thadikkaran, Enforcement of Annulled Arbitral Awards: What Is and What Ought to Be? (2014) 31(5) J. OF INT'L ARB. 575.

the concerned party making such application participated in the entire second round of arbitration and when the award was rendered against it, reverted to the first award and sought its enforcement in France. Yet, the French courts allowed the enforcement application simply because the first award was the one moved first for recognition. The two awards were contradictory to each other – which did not seem to matter. The approach adopted made it clear that the French courts would be happy to enforce either of the two awards – depending on which was moved first. Whatever coloured glasses one may wear, *Putrabali* was a situation far from ideal. It exposed the shortcomings of the transnational approach – at a time when it was just about gaining some currency.

The approach of the courts of the United States has been less exotic but equally interesting. Contentions seeking enforcement of annulled award has been made in the US in various cases, but except in the case of *Chromalloy*[27], it has found no success. The *Chromalloy* exception is thanks to a clause in the contract that provided that the parties shall have no recourse to the award in appeal or otherwise. Relying on that intention of parties, the US courts held that any annulment of the award – even by the court of the seat – would be ineffective. This was a case where Egyptian courts set aside an award that required the Egyptian government to make certain payments to an American corporation. This fact set indicate why the US courts might have gone on a limb to find an exception that does not sit well with its otherwise well-reasoned jurisprudence on this issue – in particular with its clear exposition of the underlying philosophy of seat theory and the primacy of seat courts.

In *Baker Marine*[28], the US courts dealt with two arguments amongst others - first, that art. VII NYC allows more favourable provisions of the FAA to be applied. Second, that art. V(1)(e) by use of the word "may" allows the court a discretion. US courts did not reject either of the arguments on principle but found they did not apply in the manner contended. The argument with respect to Art.VII is a bit surprising, because unlike French law, the FAA simply refers to the NYC grounds and cannot be said to have any more favourable provisions. The discretion argument, though accepted, did not lead to enforcement because the court found that there was no good reason presented before it to show that the Nigerian court in annulling the award acted contrary to Nigerian law.

In the *TermoRio*[29] case, the US court refused to enforce an award set aside by the Columbian courts, which was also the seat. This case is important in assessing the fundamental approach of the US courts. The temptation to find an exception was immense - the award had been set aside because the arbitration was to be held under Columbian law, which did not expressly permit application of ICC Rules. The annulment benefited the local party and ostensible suspicion of local bias could not be ruled out. However, US courts held that in the absence of the annulment decision being tainted or being not authentic or being such that it contradicted the very basic notions of justice, US courts would be bound by principles of comity to follow the annulment decision of the seat court[30]. It also cogently explained the difference between primary and secondary jurisdiction under the scheme of the NYC. The court held that the seat-

[27] Chromalloy Gas Turbine Corp v. The Arab Republic of Egypt, 939 F Supp 907 (DDC 1996).
[28]Baker Marine (Nig) Ltd v. Chevron (Nig) Ltd, 191 F3d 194 (2nd Cir 1999).
[29]TermoRio SA ESP v. Electranta SP, 487 F3d 928 (DC Cir 2007).
[30] Interestingly, the UK High Court in Nikolay Viktorovich Maximov v. Open Joint Stock Company "Novolipetsky Mettalurgichesky Kombinat" [2017] EWHC 1911 (Comm) adopted a similar approach focusing entirely on whether the annulment decision of the Russian court should be recognized and not on whether the award has become a nullity on being annulled at seat.

court had primary jurisdiction over the award and had unlimited powers with respect thereto. On the other hand, all other jurisdictions were secondary and must usually follow a decision to annul the award by the primary jurisdiction by not allowing the same to be enforced in the secondary jurisdiction.

The debate around these decisions, whether the French approach or the US approach, mostly focuses on the interpretation of the text of NYC. Interesting and relevant as that might be, it is clear that there is something more fundamental in play in the decision making process by the courts. Helpfully, both courts have categorically put in black and white their fundamental approach to the question. The French courts expressly stated that an international award is not rooted in any national legal order and continue to exist despite any annulment at seat. This is evidently consistent with the transnational theory. When viewed from this perspective, the approach of the French courts in the various cases is predictable.

The US courts on the other hand read unlimited powers with courts of seat - which they categorise as the primary jurisdiction. Citing principles such as comity of courts, US courts hold that an annulment decision at seat ought to be respected and an award so annulled ought to be refused enforcement. Again, this is clearly consistent with the seat theory.[31] It is interesting to note that the US courts look at the issue not simply as a matter of enforcement of an award but also from the perspective of the impact of a foreign court decision and circumstances in which such decision could be ignored. This is an aspect that the French courts have not considered.

Enforcement of annulled awards is an issue that tests both the seat theory and the transnational theory at their seams. Both have offered interesting solutions but with obvious limitations. This leaves space for a synthesis that must ensure justice without compromising certainty. At present, the French approach to annulled awards – by an almost blind application of the transnational theory – is predictable, but expressly stays away from even attempting to consider whether it leaves behind a just result. Additionally, this predictability does not foster any certainty for the international arbitration architecture. As long as the remedy to seek annulment exists, a mechanical application of transnational theory to enforce even annulled awards in *Putrabali* style is bad news for international arbitration. Whatever might be the case against annulment, one would agree that it is not a remedy disappearing anytime soon from arbitration statutes.[32]

As far as the approach of the seat theory, as reflected in decisions of the US courts is concerned, there is more predictability for international arbitration. One would expect that an annulled award will be treated as a nullity – and the US courts have leaned heavily towards that. However, the approach has been inconsistent. One can see the usual tendency of common law courts to retain an element of discretion to be exercised taking into account "all circumstances" in specific facts of each case. While accepting that an award set aside at seat should be treated as a nullity, it allows enquiry into areas such as whether the annulment decision is "authentic", whether the annulment decision is not contrary to the law of the seat, whether the annulment

[31] Pieter Sanders, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1959) 6 NETHERLANDS INT'L L. REV. 43, 55. ("Courts will...refuse the enforcement as there does no longer exist an arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement").

[32] Albert Jan van den Berg, Should the Setting Aside of the Arbitral Award be Abolished? (2014) ICSID REV.1. (after a detailed review of the issues involved, notes that the remedy of annulment cannot be done away with in the present legal framework).

decision violated basic notions of justice[33], whether the annulment decision is contrary to an agreement between parties, etc. – none of which is ever going to be an easy issue for an enforcement court to determine in the first place.

Another issue that is highlighted in the recognition of this discretion is that it is a mask behind which the theoretical shortcomings of the seat theory attempts to hide. The fundamental tenet of seat theory is that international arbitration derives its legitimacy from the law of the seat. If that is so, how can there be any discretion left for anyone if the seat determines that the award of such an arbitration is a nullity? However much we may try, the use of "may" in art. V(1)(e) of NYC does not detract from this apparent contradiction.

What is evident from the above debate about enforcement of annulled awards is that the theoretical approach to international arbitration can have far reaching consequence. It may lead to immortality of an international award, which can survive annulment assaults with no trouble. On the other hand, it can lead to the tyranny of the seat where perfectly good international awards are set aside for whimsical reasons.

Applying our hypothesis, we believe that this issue presents the most difficult challenge in the *sublation* process for the seat theory. It cannot be pegged on the interpretation of some provision alone and will require a more holistic approach. We believe confluence of two factors can make the seat theory evolve into what can tackle this situation better: first, the annulment jurisprudence will need to limit itself to international due process and international public policy. In an international arbitration, where most often the choice of seat is determined by nothing but neutrality, there is no interest for the law of the seat to impose any local standards to an international award. If the standard for annulment becomes international, it should be easier to find homogeneity over time. Secondly, the theoretical underpinnings of the seat theory itself will have to progress from seat being the legal root of an international arbitration to equating it with that the role of a trustee, hosting such arbitration for the benefit of the international community.

International arbitration is likely to involve actors from various States and interests of entities from various States. Therefore, there is something extremely artificial about letting a neutral jurisdiction dictate terms to every aspect of such arbitration simply because it was chosen as the juridical seat. The reason seat theory yet remains the dominant force is because international arbitration often needs court assistance. If access to courts in all the multiple jurisdictions was available to international arbitration, it would bring chaos. Seat determines the exclusive court – for gateway issues and for post award challenges. However, instead of viewing this as a power that the seat wields because the arbitration is rooted in its legal system, can we not view it as a responsibility that the seat holds "in trust" for the community of nations by juristically hosting the international arbitration within its legal system? Does this parallax shift not free the seat theory from the constraints of the law of seat and yet retain the benefits of certainty that a localized arbitration offers?

[33]Corporaciòn Mexicana de Mantenimiento Integral, S De RL de CV (Comissa) v. Pemex-Exploraciòn y Producciòn, Case1 10 cv-00206-AKH (27 August 2013).

5. Preparing Indian law to Participate in the Evolution

The process of evolution of the seat theory that we speak of in this paper is not something that can be controlled at a legislative level. It is a slow yet dynamic process invisible to the eyes[34] – and in most cases too subtle to be tangible. All that can be actively done is to create the environment for it, to clear identifiable hurdles if any.

India contributes significantly to the case load of international arbitration both in terms of number of disputes and quantum in dispute– which is only likely to grow in the coming years. The share of its contribution in the growth of its jurisprudence and participation in that process has, on the other hand, been disproportionately low. In order to correct this, and in the ambition to make India an international hub for arbitration, one is immediately drawn to improvement of certain tangible factors such as presence of international standard institutions, appropriate infrastructure, streamlined and time-bound disposal of arbitration related cases by Indian courts, etc. We agree that these are important. We believe, though, that there is something at a more fundamental level that prevents Indian jurisprudence to view international arbitration in the light in which most evolved jurisdictions do. We seek to address some of the most important tweaks that we suggest is necessary if India is to participate in the dialectical development of the seat theory – and in the process evolve a more robust domestic jurisprudence on international arbitration.

a. Amending the Truncated Definition of International Arbitration

Taking the King's advice, let's begin at the beginning[35] – the definition of international arbitration. Model Law provided three situations in which an arbitration could qualify as international: (a) involvement of parties from more than one jurisdiction (first criterion); or (b) seat of arbitration not being the place of business of all parties (second criterion); or (c) the subject matter of the commercial relationship being most closely connected to a State other than the place of business of all parties (third criterion). This is not the definition that Indian Arbitration Act adopted.

Indian Arbitration Act adopted a unitary definition providing a single test – residence of parties. If at least one party to an arbitration is not resident of India, the arbitration will qualify as an international commercial arbitration – and *only* this will qualify as international arbitration under Indian law. This definition adopts the first of the three criteria contemplated in the Model Law, rejecting the other two.

The second criterion under Model Law characterizes an arbitration as international on the basis of the choice of seat. In our view, this is a circular definition. Seat is itself a concept that applies only to international arbitration and its function is basically to designate the *lex arbitri*.[36] To provide that if parties from one State choose a different State as seat, that alone would qualify such arbitration as international is to put the cart before the horse. Therefore, Indian law did well to avoid incorporating this definition.

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[34] We are reminded of the famous words from THE LITTLE PRINCE by ANTOINE DE SAINT-EXUPERY "And now here is my secret, a very simple secret: It is only with the heart that one can see rightly; what is essential is invisible to the eye".

[35] "'Begin at the beginning,' the King said, very gravely, 'and go on till you come to the end: then stop.'" was the King's advice to White Rabbit in LEWIS CARROL'S ALICE IN WONDERLAND.

[36] See, GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1535 (Kluwer L. Int. 2014).

The problem lies in rejection of the third criterion. International commercial arbitration is essentially in the realm of private international law. Therefore, the definition of international arbitration must coincide with the coverage of private international law – it simply cannot operate outside it. Private international law allows parties the freedom to choose the law applicable to them as well as the freedom to subject their disputes to a jurisdiction of their choice. It is a settled principle (at least in common law jurisprudence) that private international law operates only when there is an 'international element' present. International element is understood to mean that either parties from multiple jurisdictions are involved or the subject matter is beyond local territory. The first and third criteria in the Model Law definition of international arbitration cover this space. In rejecting the third criterion, Indian law has created a strange situation – by application of conflict of law principles, it would allow two Indian parties dealing with a subject matter outside India to choose foreign law and jurisdiction but due to a truncated definition of international commercial arbitration, an arbitration between these parties will not qualify as international arbitration.

False premises lead to false debates – the debate currently ongoing in India is whether two Indian parties can choose a foreign seat.[37]While at least one High Court decision found in favour of respecting such choice, it is well understood that this will not be the last word on the issue.[38]In order to answer an incomplete question which cannot have a correct answer, both experts and courts have twisted concepts to fit the size of the debate. In our view, the question is not whether two Indian parties can choose a foreign seat. The question is whether a domestic arbitration can be seated outside India. When put in those terms, the fallacy of the question is striking.

The simple answer should be that a foreign seat is *by definition* not available to domestic arbitration. But when the definition itself is the problem, the debate is bound to move to wrong territories. Given the truncated definition, this question needs to have qualified answers. Two Indian parties can choose foreign seat if they are dealing with a subject matter involving foreign element, because only in that situation will they have a right to choose a foreign *lex arbitri* and subject their arbitration to the exclusive jurisdiction of a foreign court. In effect, a domestic arbitration in India where the subject matter is international should be allowed to be seated outside India – following the settled conflict of law principles. Unfortunately, in the confusion of a debate that deals with false definitions, there is a risk that Indian arbitration jurisprudence will get caught up in unknown domains – the way we did with *Bhatia International* – which will not bode well with keeping pace with the development of law in evolved jurisdictions.

We therefore recommend that to create the situation where Indian law does not stray into false debates, it is important that the definition of international commercial arbitration is amended to include the third criterion of the Model Law definition to bring it in sync with conflict of

[37]Sasan Power Ltd. v. North American Coal Corp Private (India) Limited [2016] 10 SCC 813 (Indian Sup. Ct.) (the Supreme Court was expected to settle this question in the case. However, citing 'foreign element to the contract', and 'parties' lack of insistence on the issue' the Court refused to address the same).
[38]Sasan Power Limited v. North American Coal Corporation India Private Limited [2015] SCC OnLine MP 7417 (Madhya Pradesh High Ct.). Cf.M/s Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Private Limited [2015] SCC OnLineBom 7752 (Bombay High Ct.) (the court seems to suggest that it agrees with the contention that two Indian parties cannot choose a foreign seat, but stops short of categorically stating so).

law principles.

b. There is no Such Thing as "Seat" of Domestic Arbitration

As discussed above, seat of arbitration is a concept that evolved to bypass the necessity to apply conflict principles in determining the *lex arbitri* in each international arbitration proceeding. Its sole function in international arbitration is that choice of seat of arbitration *ipso facto* determines the *lex arbitri* – no matter where the venue of arbitration is, no matter where the deliberations are held by the tribunal, and no matter where the award is published. It is a legal fiction that needs no tangible connection with anything physical. It goes without saying, therefore, that seat of arbitration is a concept alien to domestic arbitration.

Owing to a legislative error in Indian law, the idea that there can be a "seat" of domestic arbitration has gained some currency in precedents.[39] In the process, it threatens further confusion of fundamental concepts in trying to deal with this aberration which does not have a parallel in other jurisdictions.

In the process of adopting art. 20 of the Model Law into section 20 of Indian Arbitration Act[40], the legislature made two mistakes – (a) it sub-divided art. 20(1) of the Model Law into two sub-sections[41] and (b) it failed to make necessary adaptation in the language of this provision to account for the fact that the Indian Arbitration Act was adopting the Model Law to be equally applicable to domestic arbitration.

The first error of sub-division of the sub-section creates an unnecessary focus on the first sentence of art. 20 of Model Law, i.e. "*[t]he parties are free to agree on the place of arbitration*". One must remember that the entire Model Law, including this provision, is only to apply when the seat of arbitration is determined to be in that particular State. This is also the position under Indian law in section 2(2) of the Indian Arbitration Act. If that be so, it would be superfluous to say "*…parties are free to agree on the place of arbitration*" without immediately adding that if they have not so agreed, "*…the place of arbitration shall be determined by the arbitral tribunal…*". The only purpose of art. 20(1) of Model Law was to empower the arbitration tribunal to fix the seat when parties had not so chosen, while acknowledging that the parties had the freedom to do so. The disjoint structuring of these two sentences in the Indian Arbitration Act has led to the courts to find more meaning to it than there exists – reading it to mean that when the seat is in India, parties are free to choose the seat of arbitration to be any particular place within India. This interpretation, relying on an erroneous structuring of the section combined with the federal structure of Indian polity, gives content to a concept which is opposed to the very idea of its genesis.

Secondly, section 20(1) in the Indian Arbitration Act fails to provide the caveat that it is to apply only in international commercial arbitration. Section 28 of the Indian Arbitration Act,

[39]Indus Mobile Distribution Private Ltd. v. Datawind Innovations Private &Ors [2017] SCC OnLine SC 442 (Indian Sup. Ct.); BALCO at [96].

[40]S. 20, Indian Arbitration Act: "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".

[41] Art 20(1) of Model Law is S. 20(1) and 20(2) of Indian Arbitration Act.

for example, clearly specifies that parties are free to choose the law applicable to their dispute but only in case of international commercial arbitration. Similarly, the parties' freedom to choose the seat ought to have been qualified in case of international commercial arbitration – as it would have no meaning in the case of purely domestic arbitration.

Thanks to these aberrations, and thanks to the issue of jurisdiction which often becomes a vexed question given India's federal structure, seat of arbitration has been supplied artificial meaning in the context of domestic arbitration – and this process continues every day in Indian courts given the frequency with which the issue arises. The latest misstep in this direction was a recent decision of the Supreme Court that held that even in domestic arbitration, the choice of a particular place as seat (for instance Mumbai) would amount to an exclusive jurisdiction clause – ignoring completely the entire statutory scheme for selection of the particular local court once the seat was in India. In the process, the court draws heavily from precedents relating to international arbitration where the Supreme Court has held that seat is akin to an exclusive jurisdiction clause. Like the *Bhatia International* debate, this is another example where repeated attempts by the courts to over interpret a mistake in legislation is bound to muddle Indian jurisprudence on fundamental concepts. And both with *Bhatia International* and this debate, the concept under attack has been seat. Therefore, if Indian law continues to struggle to find its feat within the well settled and fundamental tenets of the seat theory, it is more likely to play catch up than lead the way.

Given that a constitutional bench in *BALCO* itself has given content to the meaning of seat of arbitration in domestic context,[42] the only way to correct the course is by a legislative intervention.

c. An Independent Legislation for International Arbitration

Will it help if India has an independent legislation for international commercial arbitration? We have come to the conclusion, somewhat reluctantly, that this might be necessary if India is to keep pace with the evolving international arbitration jurisprudence.

While the Model Law expressly provides recommendations for a legislation for "international arbitration", India consciously adopted the legislation for all arbitration seated in India[43]. One of us in an earlier paper had made a case in support of this decision[44]. Simply put, the idea was that what was good for international arbitration should also be good for domestic arbitration as well. The other main reason to support a unitary approach to legislation was the concern that if domestic arbitration jurisprudence was completely separated from international arbitration jurisprudence, Indian courts were likely to read in significantly higher interventionist powers in domestic arbitration.

Unlike most other jurisdictions, domestic arbitration in India plays a significant role within the polity. India has been struggling, given an overwhelming litigant population, to ensure that the

[42]BALCO at [96].
[43] The Statement of Objects and Reasons to the Indian Arbitration Act notes, "Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation."
[44]Sumit Rai, Proposed Amendments to the Indian Arbitration Act: A Fraction of the Whole?, J. INT. DISP. SETTLEMENT (2012) 3(1) 169("6. Should the Indian Act be bifurcated?").

judiciary is able to dispense justice in time.[45] The systemic delays in Indian courts have been criticized often. Domestic arbitration helps create a robust alternate to court trials, thereby helping the overcrowded dockets of the courts. Therefore, from an Indian perspective, it is important that domestic arbitration jurisprudence evolves with time and ensures that arbitration does not become a prequel to what will eventually be a full blown litigation. In the earlier paper, one of us had suggested a piggy-back approach – let domestic arbitration remain close to international arbitration in Indian jurisprudence so that it continues to benefit from the increasing deference the higher courts in India were showing to international arbitration. The proponents of the two legislation theory in India primarily wanted to carve out a larger role for Indian courts in domestic arbitration – particularly in the grounds available to challenge the award.

The debate has become somewhat academic because the two legislation proponents have won despite the single legislation continuing. In the recent amendments, some changes have been introduced which apply different provisions in relation to certain aspects to domestic and international arbitration when seated in India. One such provision relates to challenge of award – introducing patent illegality as a ground for domestic arbitration.[46]Other changes are positive for international arbitration, for instance, provision of direct access to higher courts in India for international arbitration.[47]In summary – the recent amendments to Indian statute makes sure that a piggy-back approach won't work for domestic arbitration any longer. If that is so, it is our contention that a single legislation has lost its purpose entirely and will from hereon only hinder the evolution of Indian law in the right direction.

There are two reasons why in light of the above, we suggest that an independent legislation for international arbitration is necessary in India – the first reason is to enable a positive and the second is to prevent a negative.

The first reason is that without an independent legislation, it is extremely difficult for international arbitration jurisprudence in India to be able to view international arbitration in its full glory – as it evolves. If the courts continue to view their role in international arbitration seated in India as that of a "supervisory jurisdiction" – a fallacious term to begin with – then accepting the evolving trend becomes difficult. As is our stated hypothesis in this paper, we believe the seat theory is in the process of a dialectical evolution using transnational theory as its negation. We believe it is likely to evolve into diluting the status of seat. From being the legal system in which international arbitration is rooted to the seat playing a trustee on behalf of the rest of the world. As a trustee, it discharges a responsibility (as against exercising a power) to ensure international arbitration remains within international minimum standards of due process and public policy.

Such evolution, by definition, cannot happen by the stroke of a pen through legislative amendment. It can only slowly creep in over time through judicial interpretations. That process will remain stifled in India unless we free the international arbitration regime from the clutches of a legislation under which courts are required to apply the same statutory text to both domestic and international arbitration. More fundamentally, while it is compatible to view domestic and international arbitration seated in the same State to be the similar in most respects in the eyes

[45]See, e.g., The Indian Express, District Courts: 2.81 Crore Cases Pending, 5000 judges short across India (15 January 2017), available at http://indianexpress.com/article/india/district-courts-2-81-crore-cases-pending-5000-judges-short-across-india-4475043/.
[46]S. 34(2A), Indian Arbitration Act (inserted by Act 3 of 2016, S. 18).
[47]S. 2(1)(e), Indian Arbitration Act (substituted by Act 3 of 2016, S.2 for Cl(e)).

of law from the traditional concept of seat theory; it will be entirely incompatible to be treat it so once one accepts that seat is to play a diluted role of a trustee in international arbitration.

The second reason is implicit in some of the discussion we have had hereinabove. Common legislation has led to incorrect application of concepts of international arbitration in domestic context - such as seat in domestic arbitration. Similarly, the fallacious debate as to whether domestic arbitration can be seated outside India is a result of reading what was meant for international arbitration into domestic arbitration. If anything was learnt from the *Bhatia International* to *BALCO* saga, it is that such mistakes are likely to lead to collateral damage to jurisprudence on issues far beyond what they immediately concern.[48]With the amended Indian law having accepted an entirely new ground to challenge awards in domestic arbitration, there is no good reason left to risk such damage. Indian law will do well to carve out a different legislation for international arbitration seated in India and for enforcement of foreign award. The current legislation could be amended appropriately to suit the special demands of Indian domestic arbitration – so that the advances made under the 1996 legislation is not entirely lost.

6. Conclusion

The primary purpose of this paper is to illustrate two things. First, to suggest that the seat theory is itself changing its character. In this process, it is putting transnational theory to positive use through a dialectical process, and evolving not into a distinct and new entity but into "*what [it] should become in order to be fully what it is*".[49]

The second purpose was to sound a cautionary note for Indian law. Having caught up with the traditional seat theory[50] and with an overall positive verdict on its recent amendments, understandably India is currently in a self-congratulatory mood. It is, however, an irrational leap of faith to start posturing as the next international arbitration hub. We have attempted to show in this paper, that Indian law is in serious threat of lagging behind once again in the evolutionary process of international arbitration – unless it creates the right jurisprudential ecosystem for international arbitration to grow in sync with transnational trends. We hope that this time around, changes will pave way for the future rather than play catch-up with the past.

Indian law has taken great strides in the last decade and is well poised to play a role in the evolution of transnational jurisprudence of international arbitration which is consistent with the overwhelming number of disputes with an Indian connection. It is time that we move ahead of the celebrations, and get back to the work at hand – which by its very nature will remain an eternal work in progress. In this paper, we have tried to supply in some detail the "why" for continuing legal reform of arbitration law in India with some hints at the "how" – but, as Nietzsche famously said "*[h]e who has a why to live can bear almost any how*".

[48]See supra **Error! Bookmark not defined.** ("3.C. Collateral Damage by Bhatia International").
[49]See supra **Error! Bookmark not defined.** at xi.
[50] In 2012, BALCO finally brought India in sync with the transnational concept of seat, which had gone into an entirely unknown territory with Bhatia International and subsequent apex court decisions trying to deal with that error.