A conservative Approach to India seated arbitrations or a necessary one?

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India has made many strides in the field of arbitration since the advent of the Arbitration and conciliation Act, 1996. However, India has a long way to go before it establishes itself as a prominent seat of arbitration in the international sphere. One such hurdle to pass is the eligibility of foreign nationals as counsels in India seated arbitrations. Many established arbitration jurisdictions, for instance, the English Arbitration Act 1996, German Code of Civil Procedure, the Swedish Arbitration Act 2019 (see post on the revised Act here) and the US Revised Uniform Arbitration Act, place no restrictions as to who may act as a party representative in an international arbitration. The UNCITRAL Model Law on International Commercial Arbitration also places no restriction on foreign nationals representing parties to an arbitration. Another notable institution, CIETAC[1] as under Article 22 of the CIETAC arbitration rules 2015 explicitly allows the same: *"[a] party may be represented by its authorized Chinese and/or foreign representative(s) in handling matters relating to the arbitration".*

In India, it was settled that Foreign Law offices will not be able to open offices and operate in the country vide an interim order in the landmark judgment of Bar Council of India vs. A.K. Balaji and Ors[2] (hereinafter referred to as 'Balaji Judgment'). The order is still in force. The operating portion of the order has been reproduced herein;

"In the meanwhile, it is clarified that Reserve Bank of India shall not grant any permission to the foreign law firms to open liaison offices in India Under Section 29 of the Foreign Exchange Regulation Act, 1973. It is also clarified that the expression "to practice the profession of law" Under Section 29 of the Advocates Act, 1961 covers the persons practicing litigious matters as well as non-litigious matters other than contemplated in para 63(ii) of the impugned order and, therefore, to practice in non-litigious matters in India the foreign law firms, by whatever name called or described, shall be bound to follow the provisions contained in the Advocates Act, 1961."

1 China International Economic and Trade Arbitration Commission

2 MANU/SC/0239/2018

In India, as stipulated under the Advocates Act 1961 (Act), Section 29[3] states that a foreigner is not entitled to practice law in view of the restrictions contained under the said Act. However, under the guise of different entities foreign lawyers were conducting seminars and conferences etc in India. Foreign law firms were also practicing the profession of law in India in violation of the Act. Thereafter, irked by the same, Writ petitions were filed before the Hon'ble Madras High Court (ie, AK Balaji vs. Government of India[4] (hereinafter referred to as 'Madras HC Judgment')) and Hon'ble Bombay High Court (ie, Lawyers Collective vs. Bar Council of India[5] (hereinafter referred to as 'Bombay HC Judgment')), seeking restrictions on such practices.

The Supreme Court, in the Balaji Judgment clarified various issues relating to foreign lawyers practicing in India, in the landmark judgment dated 13 March 2018. While the judgment did resolve a few issues relating to the practice of foreign lawyers practicing in India, many have felt that it took a step back in the furtherance of India seated arbitrations.

One of the arguments rendered in favour of the practice of foreign lawyers in India was that in other jurisdictions foreign lawyers are free to advice on their own system of law without nationality requirement or qualification of that country. One of the Respondents in the matter was an American law firm and submitted that it advises clients on international legal issues from different countries in India. That while there is no discrimination in the U.S. against Indian citizens practicing law in America but there is a prejudice against US attorneys practicing in India.

If foreign lawyers cannot have their firms established in India then that leaves them with little choice but to constantly travel for short durations. A party wishing to engage such counsels for their expertise may feel prejudiced as such counsels may increase their fees or perhaps refuse engagement.

With the advancement in the field of space explorations, art and technology, various specialised arbitrational institutions are cropping up around the word to resolve such disputes. Such niche institutions are expanding across sectors which deal with unique fields of arbitrations. Such sectors need highly specialized counsels who may be of different nationalities. It would seem that the future of

3 Advocates to be the only recognised class of persons entitled to practise law.—Subject to the provisions of this Act and any rules made thereunder, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, advocates
4 AIR2012Mad124

5 2010(2)BomCR753

such Institutions in India is unlikely if counsels and arbitrators are prejudiced against solely with respect to their nationality.

The Balaji Judgment has held that the expression "fly in and fly out" will only cover a casual visit not amounting to "practice". The judgement held that in case of a dispute whether a foreign lawyer was limiting himself to "fly in and fly out" on casual basis for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues or whether in substance she was doing practice which is prohibited can be determined by the Bar Council of India. That the Bar Council of India will be at liberty to make appropriate Rules in this regard including extending Code of Ethics being applicable even to such cases. However as of dated i.e. 13.02.2020, no such code of ethics or regulations have been adopted.

Shri Dushyant Dave, a notable Senior Advocate, in the Balaji case while representing the Respondents in the Appeal, rightly referred to Rules of certain Arbitration Institutions to the effect that the parties are free to be represented by an outside lawyer. It was submitted that by way of Convention in international commercial arbitrations, there cannot be any compulsion to engage only a local lawyer. Section 48(1)(b) of the Arbitration Act provides that enforcement of a foreign award can be refused if the parties were unable to present their case. The New York Convention Awards are governed by the First Schedule to the Act. Article-II provides for recognition of an arbitration agreement between the parties. Article-V(1)(b) provides that if the party against whom the award is invoked was not given proper notice or could not present his case, the award cannot be enforced. Section 53 of the Arbitration Act refers to Geneva Convention Awards which is regulated by the Second Schedule to the Act containing similar provisions. The fact that a party has to chose a local lawyer in India is clearly against the ethos of the Arbitration Act.

However, the Supreme Court in the Balaji Judgment held that there was no absolute right of the foreign lawyer to conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration. It was held that if the Rules of Institutional Arbitration apply or the matter is covered by the provisions of the Arbitration Act, foreign lawyers may not be debarred from conducting arbitration proceedings arising out of

international commercial arbitration in view of Sections 32[6] and 33[7] of the Advocates Act. However, they would be governed by code of conduct applicable to the legal profession in India.

As many foreign companies would prefer legal advice from internationally renowned counsels, they may feel discriminated against in Indian seated arbitrations. This would make foreign entities reluctant in choosing India as a seat of arbitration. While India is not alone in being prejudiced against lawyers with different passports, would this further deviate India's vision of being a prominent arbitration hub? Undoubtedly India as a preferred seat for International Commercial Arbitration would benefit the economy of the country and also further healthy competition amongst the legal fraternity.

Recently the Eighth Schedule (introduced by the Arbitration and Conciliation (Amendment) Act, 2019 listed various parameters/ restrictions on who may be arbitrators in the country *inter alia* which many notable lawyers and jurists found contrary to the ethos of the Arbitration and the Conciliation Act, 1996. The Section 43J and the Eight schedule was later omitted vide ordinance dated 04.11.2020 wherein the qualifications, experience and norms for accreditation of arbitrators are to be specified by regulations. It is only hoped that the regulations will be at par with other notable arbitration jurisdictions and in furtherance of the arbitration policy of India.

The Balaji judgement along with the recent Arbitration and Conciliation (Amendment) Act 2019 clearly emphasize a conservative approach to arbitration in India. While India does have a spectacular international standing in a large range of practice areas with internationally notable jurists and lawyers, allowing foreign trained lawyers will ensure that a party has the ability to appoint legal counsel with utmost autonomy. Statutes that compel a party to choose legal counsel from a certain country will further push parties to continue to choose other seats of arbitrations such as London and Singapore, perhaps even China.

[6] Power of Court to permit appearances in particular cases.—Notwithstanding anything contained in this Chapter, any court, authority, or person may permit any person, not enrolled as an advocate under this Act, to appear before it or him in any particular case.

[7] Section 33 - Advocates alone entitled to practise. —Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practise in any court or before any authority or person unless he is enrolled as an advocate under this Act.