

2013

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Recommended Citation

K. S., Harisankar. "Supervisory Jurisdiction of Indian Courts in Foreign Seated Arbitration: The Beginning of a New Era or the End of Bhatia Doctrine?" *The Arbitration Brief* 3, no. 1 (2013): 56-64.

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SUPERVISORY JURISDICTION OF INDIAN COURTS IN FOREIGN SEATED ARBITRATION: THE BEGINNING OF A NEW ERA OR THE END OF BHATIA DOCTRINE?

By Harisankar K S¹

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INTRODUCTION

For over 150 years, India has engaged in arbitration following the introduction of the Civil Procedure Code of 1859 which came into effect with its chapter on arbitration. However, the concept of *international commercial arbitration* (“ICA”) was then unknown. ICA first assumed significance in India due to the globalization and liberalization of the economy—the resulting phenomenal growth of commerce and industry—of the late twentieth century. Indeed, the Arbitration Act of 1940, which governed the field for nearly half a century, did not include provisions for ICA. The Act of 1940 was then replaced by a new legislation in 1996, with the Arbitration and Conciliation Act. The Arbitration and Conciliation Act of 1996 has subsequently been enacted with the hope of giving a new face to arbitration so that it does not replicate the civil courts, which suffer from the huge backlog of cases. Since the enactment of the present legislation, there has been a rise in ICA in the country. With the opening of foreign direct investment, the Indian legal system has been increasingly gaining momentum in ICA proceedings.

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Besides being a major investment destination, there has also been a visible trend of greater participation by India in the global economy.

Part I of the Arbitration and Conciliation Act of 1996—mirroring the jurisprudence fo the UNCITRAL Model Law (Model Law)—makes detailed provisions relating to both domestic arbitration and international commercial arbitration. The law makes it clear that “notwithstanding anything contained in any other law for the time being in force, in matters relating to all kinds of arbitration in India, no judicial authority shall intervene except as provided in the Act itself.”² But, paradoxically in any arbitral system, public courts may play a major role at various stages of a dispute: before the arbitration, during the arbitration, and even after an award has been rendered. Therefore, an absolute alienation of arbitration from the national courts is almost impossible. This is very much evident from the statistics of pre- and post-arbitration litigation brought before Indian courts. As such, certain questions relating to the conflict of laws, especially the issue of supervisory, or supportive, jurisdiction in international arbitration have become subjects of intense judicial debate.

I. The Nature of the Problem

Since the ratification of the Arbitration and Conciliation Act of 1996 (“the Act”), many provisions have been the subject of constant judicial disagreement. The actual difficulty originated from the reading of Section 2 (2),³ which outlines the scope of applicability of Part I of the Act. Judges have supplied unusual interpretations due to a deficiency in the definition of the scope. The conflicting views were about the application of Part I with respect to ICA in instances where the place of arbitration is outside India.⁴ This conflict existed in various high courts in

² See The Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE § 5 (1996), available at <http://indiacode.nic.in>.

³ See *id.* at §2 (stating that “this Part shall apply where the place of arbitration is in India.”).

⁴ See, e.g., *Marriott International Inc. v. Ansal Hotels Ltd.*, A.I.R. 2000 Del. 377 (DB) (endorsing the view that Part I of the Act would apply only to arbitrations where the place of arbitration is in India); *Dominant Offset Pvt. Ltd. v. Adamouske Strojirny AS*, (1997) 68 D.L.T. 157 (Delhi) (holding that the provision does not exclude the applicability of Part I to those arbitrations which are not being held in India); *Olex Focas Pvt. Ltd. v. Skodaexport Company Ltd.*, AIR 2000 Del.161 (Delhi). *But see East Coast Shipping v. M.J Scrap*, (1997) 1 Cal HN 444 (holding that Part I of the Act would apply only to arbitrations held in India).

India until the Supreme Court intervened with their decision in *Bhatia International v. Bulk Trading SA*.⁵ Therein, the Court held that, “Part I of the Act would also apply to international commercial arbitrations held outside India, unless the parties by agreement, express or implied, excluded all or any of its provisions.”⁶ However, the Supreme Court’s interpretation went against the mandatory language of Section 2(2) of the Act. The reasoning of the court, *inter alia*, included the view that the omission of the word ‘only’ makes Part I applicable to arbitrations seated in a foreign territory, which clearly deviated from the corresponding Model Law provision.⁷ This statement of law by the Supreme Court has resulted in Indian courts taking an unconventional path with respect to the supervisory jurisdiction in cases of international arbitration. Moreover, the decision has raised several concerns among the international trading community, raising an impression of Indian hostility toward international commercial arbitration.

A. The Principle of Implied Exclusion

The post-*Bhatia* decisions dealt with the doctrine of ‘implied exclusion’ exploring different criteria to determine the applicability of the Act with respect to the supervisory role of national courts in foreign seated arbitrations. Generally, the courts were reluctant to hold that Part I of the Act was inapplicable even when the seat was outside India or where the substantive law of contract was foreign law.⁸ However, in a number of cases, the courts took a pro-arbitration stance and held that “the parties had impliedly excluded the jurisdiction of Indian courts and the application of Part I of the Act.”⁹ Although the courts could not arrive at a fixed formula to apply the implied exclusion principle afforded by *Bhatia*, the courts never relied on the ‘selection of a foreign seat’ as a reference point, to prevent the overreach of Indian judiciary in an offshore arbitration.

⁵ (2002) 4 SCC 105.

⁶ *Id.*

⁷ See Art. 1(2) of the UNCITRAL Model Law: “The provisions of this Law, except articles 8, 9, 17, 32, and 36, apply only if the place of arbitration is in the territory of the State.”

⁸ See *Citation Info Wares Ltd. v. Equinox Corporation*, (2009) 7 SCC 220; see also *INDTEL Technical Services v. W S Atkins Pvt Ltd* (2008) 10 SCC 308.

⁹ See, e.g., *Max India Ltd v. General Binding Corporation*, 2009 (3) Arb LR 162 (Delhi).

There have been certain instances in the post-*Bhatia* era where courts were willing to accept the argument that the parties had opted out of the application of the Act. However, in these instances, courts have applied varying criteria. For example, in *Hardy Oil and Gas Ltd. v. Hindustan Oil Exploration Co. Ltd.*,¹⁰ Indian law and English law governed the main contract and arbitration agreement respectively. In this case, the arbitration was to be conducted according to the rules of the London Court of International Arbitration in England. The Gujarat High Court held that Part I was to be impliedly excluded because the parties had expressly chosen English law as the curial law of arbitration. Later, the Supreme Court came close to accepting the well-established seat theory of international arbitration¹¹ in *Dozco India v. Doosan Infracore Co. Ltd.*¹² However, it missed the opportunity in clearing up the anomalous situation. In the case of *Videocon Industries Ltd. v. Union of India*,¹³ the agreement provided for Indian law to be the proper law of contract and English law as the law of arbitration. The Court held that, by virtue of English law being the curial law, Part I was excluded. In *Yograj Infrastructure Ltd. v. Ssangyong Engineering & Construction Ltd.*,¹⁴ the agreement provided for the rules of the Singapore International Arbitration Centre as the procedural soft law for arbitration seated in Singapore. The Court held that Part I was excluded even though the parties had expressly stated that the substantive law of the contract would be Indian law. However, the confusion caused by the *Bhatia* decision was exacerbated and resulted in labelling India as an anti-arbitration jurisdiction when the Supreme Court annulled a foreign award in its decision *Venture Global Engineering v. Satyam Computer Services*

¹⁰ *Hardy Oil and Gas Ltd. v. Hindustan Oil Exploration Co.*, (2006) I.L.R (Guj.) 658.

¹¹ See also FA Mann, 'Lex Facit Arbitrum' in *International Arbitration – Liber Amicorum for Martin Domke*, P. Sanders (ed.) (The Hague, Martinus Nijhoff, 1967).

¹² *M/S Dozco India P. Ltd. v. M/S Doosan Infracore Co.* (2011) 6 S.C.C. 179 (India) (holding that "[i]n the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the 'seat' of the arbitration on the ground that, it is that country, which is most closely connected with the proceedings") (citing Michael Mustill & Stewart Boyd, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND* (2nd ed. 1989)).

¹³ *Videocon Indus. v. Union of India*, (2011) 6 S.C.C. 161 (India).

¹⁴ *Yograj Infrastructure Ltd. v. Ssangyong Eng'g & Constr. Ltd.*, (2011) 9 S.C.C. 735 (India).

*Ltd.*¹⁵ Pursuant *Venture Global*, an Indian court could hear challenges to a foreign arbitration award under Section 34 of Part I of the Act.

II. Judicial Treatment for the Ailment

On January 10, 2012, a five judge constitution bench of the Supreme Court started its proceedings in the case of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc.* (hereinafter *BALCO*).¹⁶ The Court reconsidered the controversial rulings in *Bhatia* and *Venture Global* pertaining to the scope of extra territorial application of Part I of the Act.¹⁷ The Court affirmed that the Act adopted the territoriality principle of the Model Law and accepted existing theories in international arbitration on Article V(1)(e) of the New York Convention (“the NY Convention”).¹⁸ The case involved several appeals dealing with the same, broader legal issue: whether the Indian courts can perform supervisory jurisdiction in arbitrations seated outside the country. The Supreme Court of India gave the answer in the negative. Essentially, the decision meant that the Indian courts could no longer make interim orders, remove or appoint arbitrators in arbitrations with seats outside or entertain annulment challenges to foreign arbitration awards.¹⁹ The following sections address certain pertinent issues relating to this broader legal question.

A. Silence and the Implication of License

The Court in *BALCO* deliberated in detail upon the significance of the missing word “only” in section 2(2). The word “only” would not have been significant had it not been used in Article 1(2) of the Model Law. The senior counsel for appellants contended that, since “only” is absent from the provision, the applicability of the Act is automatically

¹⁵ *Venture Global Eng’g v. Satyam Comp. Services Ltd.*, (2008) 4 S.C.C. 190 (India).

¹⁶ *Bharat Aluminium Co. v. Kaiser Aluminium Technical Serv. Inc.*, Civil Appeal No.7019 of 2005 available at <http://www.sci.nic.in/outtoday/ac701905p.pdf>.

¹⁷ See Karan S. Tyagi, A Second Look at International Arbitration, *The Hindu* (Dec. 11, 2011), <http://www.thehindu.com/opinion/lead/article2735659.ece?homepage=true> (last visited on 01/02/2013).

¹⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5, 10 June 1958, 330 U.N.T.S 4739.

¹⁹ Umer Akram Choudhary, *Marking their Territory: Bharat Aluminum v. Kaiser Aluminum Technical Services*, *Wolters Kluwer* (Sep. 13, 2012), <http://kluwarbitrationblog.com/blog/2012/09/13/marking-their-territory-bharat-aluminum-v-kaiser-aluminum-technical-services-2012/>.

extended to foreign arbitrations as well. The relevant question was whether the omission expresses the intention of the Indian Parliament to widen the applicability of Part I of the Act to arbitrations outside India. Rejecting this proposition, the Court held the omission of “only” in Section 2(2) of the Act does not indicate that Indian courts could supervise arbitration proceedings taking place outside India. Rather, the Court determined that the Act adopted a scheme different from the Model Law in this respect. In Article 1(2) of the Model Law, it was necessary to include the word “only” to clarify that, except for certain provisions, the Model Law would be applicable on strictly territorial basis. The exceptions stipulated in Article 1(2) of the Model Law were not enumerated in Section 2(2) of the Act, and therefore, the word “only” would have been superfluous there.²⁰

B. The Center of Gravity of Arbitral Process and the Seat Theory

A critical issue in any international arbitration is the location of the arbitral seat and the territoriality thesis. A major part of the judgment deals with the territoriality principle that forms the conceptual basis for Article 1(2) of the Model Law. Accordingly, the territoriality principle holds that the Model Law would only apply where the place of arbitration was in the contracting State. In most legal systems, the arbitration law of a state is territorial in scope, regulating arbitration proceedings that have their seat within the territory of that state and not the foreign arbitrations. In the Court’s decision in *BALCO*, the Court affirmed that the Act adopted the territoriality principle of the Model Law, which is abundantly clear from the scheme of the Act.²¹ The application of Part I is, therefore, restricted to arbitrations taking place in India. To quote from the Preamble of the Act itself, “[t]he seat of arbitration is intended to be the central point or its center of gravity.”²² Recognizing this principle to be applicable in the Indian context as well, the Court in *BALCO* endorsed one of the most fundamental concepts of international arbitration law.

On the other hand, the delocalization debate has certainly influenced and fuelled a movement away from the control of the domestic courts

²⁰ See Tyagi, *supra* note 17.

²¹ See The Arbitration and Conciliation Act, Preamble, No. 26 of 1996, India Code.

²² See Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell eds., 4th ed. 2004).

at the place of arbitration.²³ This form of delocalized arbitration can be practiced only if the state and its laws permit it. Here, the Court clearly identified the fact that Indian law does not recognize delocalized arbitration proceedings. If the parties have not selected the law governing the conduct of arbitration, the law of the seat of arbitration governs the arbitration proceedings as it is “most closely connected with the proceedings.”²⁴ Therefore, by agreeing to a seat or place of arbitration outside of India, the parties choose the laws of the seat of arbitration to govern the conduct of arbitrations. This is an issue of party autonomy and the Act allows parties to opt out of it by choosing the seat of arbitration in another country.

C. Enforcement and Annulment

The delocalized view separates the existence of award from the law of the country of origin or place of arbitration, by challenging the premise that any legal activity occurring within the territory is governed by the law of that country. However, the NY Convention tries to strike a balance between these two views by putting Article V(1)(e) in the text.²⁵ The Indian Parliament has adopted this provision in the form of Section 48(1)(e). The Supreme Court in *BALCO* correctly identified the ambiguity existing in this provision and held that the correct interpretation of Article V(1)(e) of the NY Convention is that an award can be challenged in “the country, under the law of which the award was made” only if the annulment action in “the country in which the award was made” is not available. The Court further specified that the terms “under the law” in Article V(1)(e) refer to the procedural law of arbitration proceedings rather than the substantive law of arbitration.²⁶ Therefore, an annulment action could only be brought in the country “under the law of which the award was made” in the rare situation where

²³ See Otto Sandrock, *To Continue Nationalizing or to De-Nationalize? That is Now the Question in International Arbitration*, 12 AM. REV. INT'L ARB. 301 (2001).

²⁴ See *Bharat Aluminum Co.*, Civil Appeal No. 7019 of 2005, ¶ 105 (citing Albert Dicey and John Morris, *The Conflict of Laws* (Stevens & Sons eds. 11th ed. 1987)); also see *supra* note 9.

²⁵ Article V 1(e) says that enforcement of a New York Convention award can be refused where it “has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”

²⁶ See *Bharat Aluminum Co.*, Civil Appeal No. 7019 of 2005, ¶ 153 (citing *Int'l Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera, Indus. Y Comercial*, 745 F. Supp. 172 (S.D.N.Y. 1990)).

parties have agreed upon a procedural law other than that of the arbitral seat.²⁷

CONCLUSION

The *BALCO* judgment, undoubtedly, is a restatement of international commercial arbitration law as envisaged under the Arbitration and Conciliation Act of 1996. This well-researched decision brought in conceptual clarity and straightened out certain contentious issues that existed for a long time, by declaring that Part I and Part II of the Act are mutually exclusive. However, there are still certain issues that need to be clarified because the Indian Supreme Court took a ‘hands-off’ approach by declining to “fill up the void” that existed in the arbitration regime.

I. Interim Measures

The Supreme Court categorically declared that Part I of the Act cannot be applied in an arbitration seated abroad. Thus, no party can make an application to a court in India for interim measures of protection under Section 9 of the Act (which comes under Part I). This decision puts the parties in a more dangerous situation than the *Bhatia* regime, where they had the freedom of opting out of all or some of the provisions of Part I. Read in the context of interim measures, the *Bhatia* rationale retained the freedom of the parties to approach the Indian courts under Section 9, unless it is excluded. Hence, the parties are now left remediless, as far as the interim relief is concerned, if the choice of seat is in a foreign country. Nevertheless, this verdict may prove to be a positive step as far as India’s dream to become a hub of international arbitration, because it is now mandatory to select an Indian seat to obtain an interim remedy from the court.

II. Prospective Overruling

Though the judgment has generally been received positively by the international arbitration community, there remains some reservations particularly with respect to the prospective overruling element of the decision. The concern arises from the fact that this decision will apply only to arbitration agreements which are concluded on or after

²⁷ *Id.* at ¶ 149 (citing Gary Born, *International Commercial Arbitration*, Chapter 21, (Kluwer Law International eds. 3d ed. 2009).

September 6, 2012.²⁸ The logical implication is that the courts in India still have the option of exercising their long arm jurisdiction to offshore arbitrations, with respect to arbitration agreements executed prior to this date. Given the existence of litigations pending in various Indian courts, this is likely to become a contentious issue in the near future as it envisages the creation of two parallel regimes. There will be anomalous situations when courts supervising arbitrations decide the matter either according to *Bhatia* doctrine or *BALCO* rationale depending on the date of formation of the arbitration agreement. However, the court's decision to apply the *BALCO* rationale only prospectively, can also be seen as an effort to balance the interests of the parties and avoid the miscarriage of justice by entirely washing away the possibility of an interim remedy. Nevertheless, the arbitration enthusiasts will have to wait and see how the Indian judges maintain these two parallel regimes in future.

²⁸ *Id.* at ¶ 200.