

COURT ASSISTANCE, INTERIM MEASURES, AND PUBLIC POLICY: INDIA'S PERSPECTIVE ON INTERNATIONAL COMMERCIAL ARBITRATION

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INTRODUCTION

Arbitral autonomy largely depends on the degree in which the courts involve themselves in the arbitration process. Yet, arbitration should not be entirely impervious to court assistance for its very efficacy may sometimes depend on the involvement of the courts. Be it through an order to compel arbitration, the designation of arbitrators, or even the issuance of conservatory measures, courts often help effectuate arbitral justice.

For a long time now, authors have discussed and debated India's status as a pro or anti arbitration forum. Naturally, a large portion of the analysis has revolved around whether the involvement of India's courts constitutes intrusion or assistance. In other words, whether Indian

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courts respect the parties' choice to resort to arbitration or whether Indian courts have been reluctant to relinquish certain control over the arbitral process.

This article discusses Indian Courts' prerogatives regarding the supervision of international commercial arbitration and the enforcement of arbitral awards.² In light of recent inconsistent judgments rendered by Indian courts, this article argues for greater precaution and care when drafting arbitration agreements or enforcing arbitral awards in India. Indeed, it is essential for practitioners involved to some degree with arbitration in India to be aware of some of the complexities that arise in relation to the enforcements stages of both the arbitration agreement and the arbitral award.

First, the article briefly provides background regarding Indian arbitration, and sets out the salient features of the Arbitration and Conciliation Act of 1996 (hereinafter, "the 1996 Act"). Second, it argues that jurisprudential inconsistencies have created confusion as to the scope of judicial intervention in Indian arbitration law. Finally, it recommends that courts take steps to facilitate arbitration in India by refraining from unnecessary interference with the arbitral process.

I. Background

A. The Historical Development of Arbitration Laws in India

Rooted in ancient times, arbitration has had a long history in the Indian sub-continent. In the past, communities would often submit their

² The Arbitration and Conciliation Act governs both domestic and international commercial arbitration in India, and is divided into separate parts. *See generally* The Arbitration and Conciliation Act, No. 26 of 1996, India Code (2000) [hereinafter the 1996 Act], available at http://www.netlawman.co.in/acts/arbitration-conciliation-act-1996.php#PART_I. Part I deals with arbitration in general, while Part II deals specifically with the enforcement of foreign awards. In Part II Chapter 1, "foreign award" is defined as, "an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule [i.e. the New York Convention] applies, and (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said [New York]Convention applies." *Id.*

disputes to wise men referred to as *panchayat*.³ The informal *panchayat* arbitration system has been used to resolve many disputes and continues to play an important role in the more remote villages of India.⁴ With respect to commercial disputes, references to arbitration can be traced back to the Bengal Regulations, enacted in 1772 during British rule.⁵ These Regulations provided that a dispute could be submitted to a court of arbitration so long as the parties consented to the arbitration, and the dispute arose out of lawsuits for accounts, partnership deeds, or breach of contract.⁶

Later, three more modern instruments were implemented to regulate commercial arbitration in the Indian subcontinent: (i) the Arbitration (Protocol and Convention) Act 1937,⁷ (ii) the 1940 Indian Arbitration Act,⁸ and (iii) the 1961 Foreign Awards (Recognition and Enforcement) Act.⁹ The Arbitration Act of 1937 dealt solely with the enforcement of foreign arbitral awards, and was later replaced by the 1961 Foreign Awards Act, which implemented the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards.¹⁰ The 1940 Indian Arbitration Act dealt with domestic arbitration and greatly resembled the 1934 English Arbitration Act. In an effort to modernize the regulatory

³ Krishna Sarma, Momota Oinam & Angshuman Kaushik, *Development and Practice of Arbitration in India—Has it Evolved as an Effective Legal Institution* (Freeman Spogli Inst. For Int'l Studies, Working Paper No. 103, 2009), http://iis-db.stanford.edu/pubs/22693/No_103_Sarma_India_Arbitration_India_509.pdf; see *infra* note 5 and accompanying text (discussing history of commercial arbitral disputes).

⁴ Justice Dr. M.K. Sharma, *Conciliation and Mediation*, Delhi Mediation Centre, <http://delhimediationcentre.gov.in/articles.htm#introducing> (last visited May 29, 2012).

⁵ Mrinalini Singh, *Renovating the Bridge*, Legal Service India (Mar. 15, 2012), <http://legalservicesindia.com/article/article/renovating-the-bridge-1062-1.html>.

⁶ *Id.*

⁷ The Arbitration (Protocol and Convention) Act of 1937, India Code (2000) available at <http://www.helpinelaw.com/docs/THE%20ARBITRATION%20%28PROTOCOL%20AND%20CONVENTION%29%20ACT,%201937>.

⁸ The Arbitration Act, No. 10 of 1940, India Code (2000), available at <http://www.indiankanoon.org/doc/1052228/>.

⁹ The Foreign Awards (Recognition and Enforcement) Act of 1961, India Code (2000), available at <http://www.indiankanoon.org/doc/1695780/>.

¹⁰ The Foreign Awards (Recognition and Enforcement) Act of 1961, India Code (2000), available at <http://www.indiankanoon.org/doc/1695780/>.

¹⁰ See preamble to The Foreign Awards (Recognition and Enforcement) Act of 1961.

framework that governed arbitration in India, the Legislature passed the 1996 Act, thereby repealing the three instruments mentioned-above.¹¹

B. Salient Features of the Indian Arbitration and Conciliation Act of 1996

The primary purpose of the 1996 Act was to encourage arbitration as a cost-effective dispute resolution mechanism, reflected in the preamble to Act.¹² Thus, the 1996 Act was constructed to provide a modern arbitration instrument respecting both the New York Convention and the UNCITRAL Modern Law on International Commercial Arbitration (the “Model Law”).¹³ Indeed, it not only acknowledges the importance of the Model Law but also recognizes the need for uniformity in arbitration legislation throughout the world.¹⁴

The 1996 Act is divided into two parts. Part I addresses domestic and international commercial arbitration, and applies “where the place of arbitration is in India.” Part II of the 1996 Act applies to arbitration proceedings outside of India, thus providing the applicable rules when parties are seeking enforcement of the foreign arbitral award within India. Consequently, the 1996 Act establishes an important distinction between what is considered domestic arbitration, and what is considered foreign arbitration.¹⁵ The 1996 Act goes beyond distinguishing between domestic and foreign awards by specifying and defining international

¹¹ See the 1996 Act (“ . . . An Act to ‘consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.’”).

¹² See *id.* (stating, “. . . [whereas] the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations; [and whereas] it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules . . .”).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Compare *id.* § 2(7) (“An arbitral award made under this, Part shall be considered as a domestic award.”), with *id.* at Part II (dealing with the enforcement of foreign awards).

commercial arbitration.¹⁶ However, falling within this definition, alone, does not take an arbitral dispute and subsequent award from the realm of domestic to foreign.¹⁷ Instead, any arbitral proceeding, including those defined as international commercial disputes, remain domestic—for purposes of the 1996 Act—so long as the place of arbitration is in India.¹⁸ Accordingly, the 1996 Act is indifferent to the international nature of the dispute covered by arbitration—the distinction stems solely from the *situs* of the arbitral proceeding.¹⁹

C. Judicial Intervention under the Indian 1996 Act

The 1996 Act has contributed to the modernization of the regulatory framework for arbitration in India.²⁰ With respect to court intervention, the 1996 Act provides similar provisions to Article 5 of the Model Law,²¹ which limits the courts' involvement in international arbitration to matters for which the Model Law has made express provision. In fact, the 1996 Act states, “[n]otwithstanding 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.”²² The 1996 Act was thus enacted to make arbitration more efficient and curtail

¹⁶ See *id.* § 2(f) (“... ‘international commercial arbitration’ means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—(i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country. . .”).

¹⁷ See *id.* § 2(7) (“An arbitral award made under this, Part shall be considered as a domestic award.”).

¹⁸ See *id.* § 2(2) (“Scope. This Part shall apply where the place of arbitration is in India.”).

¹⁹ See *id.* § 44 (defining “foreign awards” as disputes arising in territories where the New York Convention applies) (emphasis added); see also *supra* notes 15-18 (distinguishing between domestic and foreign awards).

²⁰ See Singh, *supra* note 5 (stating that the 1996 Act has unified the legal regime surrounding arbitration, as well as improving arbitral efficiency).

²¹ See generally UNCITRAL Model Law on International Commercial Arbitration, United Nations Commission on International Trade Law, adopted Dec. 11 1985, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

²² The 1996 Act, § 5.

the court interferences that the 1940 Act allowed.²³ However, the Act does not completely forbid court interference in all circumstances; it in fact allows judicial intervention in quite a few situations.²⁴ Specifically, courts may: refer a dispute to arbitration where there is an arbitration agreement;²⁵ issue interim orders;²⁶ appoint or fire arbitrators;²⁷ provide assistance in evidence-gathering;²⁸ set aside an award;²⁹ enforce an award by decree;³⁰ grant appeals against certain orders;³¹ direct the delivery of an award;³² and, refer a dispute to arbitration in insolvency proceedings.³³

Unlike in the past, when Indian courts frequently interfered with arbitration proceedings and awards (international and domestic)—under the notion that it was the duty of courts to keep arbitrators within the law³⁴—the 1996 Act establishes certain judicial limitations. The very purpose of § 5 of the 1996 Act was to provide certainty regarding the extent of judicial intervention. Further, § 8(1) mandates courts to compel arbitration and stay arbitration proceedings where the parties have referred their dispute to a valid arbitration agreement. Yet the mere existence of provisions favoring arbitration does not guarantee an absolute respect of the arbitral process, which may be subject to many dilatory tactics initiated by a party wishing to delay or hinder the arbitration. Judicial intervention may thus be a true asset to counter such dilatory tactics and help effectuate the parties' intent to arbitrate their dispute. In fact, in some instances, it may be the only viable alternative for the party whose rights are breached.

²³ See Singh, *supra* note 5 (finding that the 1996 Act reduces the need for judicial intervention and grants greater autonomy to arbitral tribunal decisions).

²⁴ See *infra* notes 25-33 (discussing individual provisions of the 1996 Act).

²⁵ The 1996 Act, § 8.

²⁶ *Id.* § 9.

²⁷ *Id.* § 11.

²⁸ *Id.* § 27.

²⁹ *Id.* § 34.

³⁰ *Id.* § 36.

³¹ *Id.* § 37.

³² *Id.* § 39.

³³ *Id.* § 41.

³⁴ Fali S. Nariman, Remarks, *India and International Arbitration*, 41 GEO. WASH. INT'L L. REV. 367, 370-71 (2009).

II. Analysis

A. Applying Part I Provisions to Arbitrations Exclusively Governed by Part II: Extending The Scope of Judicial Intervention

As stated above, the 1996 Act limits judicial intervention to only those matters expressly mentioned in the Act.³⁵ Usually, judicial intervention is narrowly tailored to situations in which the court's involvement is necessary to assist the arbitral process. In that aspect, the 1996 Act clearly reproduces the Model Law. Yet, with respect to judicial intervention, the Act departs from the Model Law in a distinct way, whereas the Model Law applies only to international commercial arbitration, the 1996 Act applies to international, foreign, and domestic arbitrations.³⁶ This has given rise to some complications and uncertainties regarding the 1996 Act's scope—particularly those related to the granting of interim measures by national courts in the context of international commercial arbitrations.

Part I of the 1996 Act governs only those arbitrations seated in India. This encompasses arbitrations considered as international commercial arbitrations pursuant to § 2(1)(f), so long as the seat is within Indian territory.³⁷ Accordingly, section 9, which provides for interim measures and mirrors the Model Law's approach, applies to domestic arbitral proceedings. Although Article 1(2) of the Model Law states that its provisions “apply only if the place of arbitration is in the territory” of the State, it also makes exceptions and clarifies that this limitation of the scope of the Model Law does not apply to other articles.³⁸ In fact, the other articles of the Model Law apply to international arbitrations,

³⁵ The 1996 Act, §5

³⁶ See *supra* notes 15-19 (discussing the distinction made between domestic, international, and foreign).

³⁷ In that respect, the 1996 Act departs from the Model Law under which foreign arbitration is subsumed within the broader category of international arbitration. Art 1 of UNCITRAL Model Law on International Commercial Arbitration, United Nations Commission on International Trade Law, adopted Dec. 11 1985, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

³⁸ For example, it does not apply to § 8 (arbitration agreement and substantive claim before court), § 9 (arbitration agreement and interim measures by court), § 17(H) (recognition and enforcement), § 17(I) (grounds for refusing recognition or enforcement), 17J (Court-ordered interim measures), 35 (Recognition and enforcement) and § 36 (grounds for refusing recognition or enforcement).

even where the seat of arbitration is abroad. There is therefore a substantial difference between Indian court involvement through interim measures—limited to domestic arbitrations—and the Model Law provisions that allow the issuance of interim measures to arbitral proceedings located outside the court’s country. This distinction is further illuminated by Part II of the 1996 Act, which fails to provide for interim measures. Reading the plain language of the 1996 Act necessarily results in the understanding that issuance of interim measures is strictly limited to arbitrations seated in India—Indian courts will not have jurisdiction to issue interim measures to support an arbitration held outside India.

The question of whether § 2(2) stripped Indian courts’ jurisdiction to issue interim measures in international commercial arbitrations held outside India was decided in the seminal case of *Bhatia International v. Bulk Trading S.A.*³⁹ In *Bhatia*, the Supreme Court attempted to resolve the ambiguity of § 2(2) by taking the bold view that despite its contrary wording, the entire Part I of the Act was also applicable to international commercial arbitration held outside India,⁴⁰ thereby indisputably going against the conceptual and architectural demarcations established by the 1996 Act between foreign and domestic arbitrations. To support its holding, the Court reasoned that it was necessary to determine whether the language of the 1996 Act was so plain and unambiguous as to admit only one interpretation.⁴¹ One may however question what ambiguity exactly lies in “Scope. This Part shall apply where the place of arbitration is in India.”⁴² Yet, finding that the language was ambiguous, the Court engaged in a lengthy discussion about the purpose of the 1996 Act, reasoning that “[t]he conventional way of interpreting a statute is to seek the intention of its makers.”⁴³ What appears to be the driving force behind the Court’s decision is its belief that adhering to the plain language of the 1996 Act would culminate in untenable results.⁴⁴ Thus, the *Bhatia* judgment rendered Part I—meant to deal with domestic

³⁹ (2002) 4 S.C.C. 105.

⁴⁰ See *Bhatia*, (2002) 4 S.C.C. at 110 (providing that courts in India would have jurisdiction even in respect of an international commercial arbitration because an ouster of jurisdiction cannot be implied, it has to be express).

⁴¹ *Id.* at 108.

⁴² The 1996 Act, § 2(2).

⁴³ *Bhatia*, (2002) 4 S.C.C. 105.

⁴⁴ See *id.* at 107-08 (wherein the Court listed undesirable consequences of not expanding the scope of Part I, e.g., stating that it would mean that there is no law in India governing such arbitrations).

arbitration in India—applicable to arbitrations located outside India. Although the intention of the court may have been to assist arbitration by rectifying the anomaly between the Model Law and the 1996 Act, it may have gone too far in expanding the scope of Part II by making Part I applicable to arbitration outside the territory of India.⁴⁵ The decision of the Court is in sharp contrast to the Model Law considering that the Model Law itself does not contemplate granting such broad powers to national courts.⁴⁶

While the *Bhatia* decision has been hailed for attempting to assist international commercial arbitration in interpreting the 1996 Act according to the New York Convention and the Model Law, others have criticized it for overreaching and judicial “law-making.”⁴⁷ Extending the powers of Indian national courts to international commercial arbitrations held outside India also opened up the possibility of challenging foreign-rendered awards in Indian courts. Thus, the *Bhatia* judgment may have inadvertently vested Indian courts with powers beyond those envisioned by the drafters of the Model Law, and which could potentially be adversely utilized against arbitration.

The *Bhatia* decision has been described as “well-intentioned” but “seriously flawed,” and “manifestly erroneous”⁴⁸ because of its failure to read Part I—applicable to arbitrations seated in India—separate from Part II, which deals exclusively with arbitrations seated outside India. In doing so, the court failed to follow the letter of the law and instead relied on its own conception of the 1996 Act’s intent.⁴⁹ It is arguable whether the Court’s understanding of the “spirit of the act” is in line with the relevant legislative purpose of rendering arbitration more efficient—including limiting judicial interference.

In subsequent decisions, *Bhatia*’s rationale was upheld. For example, in *Venture Global Engineering v. Satyam Computer Services Limited*,⁵⁰ the Supreme Court of India held that a party in India could challenge an international arbitral award under section 34, which provides for the grounds to set aside an award, even if the award was rendered outside

⁴⁵ Especially considering that the Model Law itself does not contemplate granting such broad powers to national courts.

⁴⁶ See *supra*, Part C (discussing Article 5 of the Model Law, which limits the courts’ involvement in international arbitration).

⁴⁷ Nariman, *supra* note 34, at 376.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ (2008) 4 S.C.C. 190.

India.⁵¹ But, the Court went on to state that such challenge was only possible if the parties agreement did not expressly or impliedly exclude the applicability of either the challenge provision specifically (i.e., section 34), or Part I altogether.⁵² Thus, jurisprudential construction of the 1996 Arbitration Act by Indian courts has created situations outside of those contemplated by the Model Law.

Perhaps with this in mind, the Supreme Court of India in *Bharat Aluminum v. Kaiser Aluminum*,⁵³ has begun to hear consolidated appeals that may reverse the controversial Indian judgments increasing the power of national courts to intervene in international arbitration seated outside Indian jurisdiction.⁵⁴ The hearing commenced on January 10, 2012, with observations from the Supreme Court that it was of the prima facie view that its judgment in *Bhatia* should be reconsidered.⁵⁵ The outcome of this case may provide an impetus to bring Indian jurisprudence into the pro-arbitration realm.⁵⁶

B. Setting Aside Awards on “Public Policy” Grounds Under The Indian 1996 Act

The enforcement of an arbitral award is a fundamental stage in which judicial intervention is justified and unlikely to be forbidden. Naturally, the breadth of judicial scrutiny may vary depending on the court’s construction of the grounds available to challenge the award—whether such challenge occurs as an objection to the enforcement or as an independent action to vacate the award. Additionally, the more favorable the jurisdiction is toward arbitration, the more restrictive the interpretation of those grounds will be. On the other hand, extending the

⁵¹ *But see* Promod Nair, *A New Year, A New Start in India*, Kluwer Arbitration Blog (Jan. 11, 2012), <http://kluwerarbitrationblog.com> (stating that the Supreme Court and various High Courts in the country have subsequently sought to narrow down the scope of the decision, as well as display greater willingness in recent years to infer implied exclusions of the Indian Arbitration Act in relation to arbitrations seated outside India).

⁵² *Venture*, (2008) 4 S.C.C. 197.

⁵³ 2005 A.I.R. 21 (Chh.) 1.

⁵⁴ The original appeal was brought by India’s Bharat Aluminum against Kaiser Aluminum Technical Services; however, ten other appeals have been joined, all raising the same issue.

⁵⁵ *See* Nair, *supra* note 51 (discussing the Court’s initial observations).

⁵⁶ *Id.*

scope of the grounds available to challenge or oppose the enforcement of an award will increase judicial scrutiny in arbitration.

The scope of the court's degree of intervention during the award's enforcement stage has generated much debate in India, particularly regarding section 34 of the 1996 Act, which pertains to the conditions for vacating an award. Courts have been especially conflicted with what constitutes public policy for purposes of setting an award under the Act. In *Renusagar Power Co. v. General Electric Co.*,⁵⁷ the Indian Supreme Court looked to American jurisprudence for guidance as to what constitutes public policy.⁵⁸ Specifically, the Indian Supreme Court adopted the approach taken by the Second Circuit in U.S. in *Parsons & Whittemore Overseas Co. Inc. v. Societe Generale De L'Industrie Du Papier (Rakta) and Bank of America*,⁵⁹ a case in which the court cautioned against an expansive construction of the public policy defense.⁶⁰

The Indian Supreme Court further referred to *Scherk v. Alberto-Culver Co.*,⁶¹ noting that in addressing international arbitration agreements, the U.S. Supreme Court has disapproved a refusal by the courts of one country to enforce an international arbitration agreement as well as the "parochial concept that all disputes must be resolved under our laws and in our courts."⁶² The Indian Supreme Court likewise pointed to *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc.*,⁶³ a case in which the U.S. court held that enforcement of the agreement was required by notions of international comity, respect for foreign tribunals and the need for predictability in resolving commercial disputes.⁶⁴

The Supreme Court of India concluded that the public policy exception should be construed narrowly; it is only satisfied when the award violated (i) the fundamental policy of Indian law; (ii) the interest of

⁵⁷ (1994) 1 S.C.C. 644.

⁵⁸ *Id.* at 666.

⁵⁹ 508 F.2d 969 (2d Cir. N.Y. 1976).

⁶⁰ *See id.* at 973 ("An expansive construction of this [public policy] defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement... We conclude, therefore, that the convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice.")

⁶¹ 417 U.S. 506 (1974).

⁶² *Renusagar*, (1994) 1 S.C.C. at 667 (citing *Scherk*, 417 U.S. at 519).

⁶³ 473 U.S. 614 (1985).

⁶⁴ *Id.* at 628-29.

India; and (iii) the justice of morality.⁶⁵ Yet, *Rensugar*'s narrow public policy precedent may be subject to certain controversies, especially since this Court has partially expanded the scope of what amounts to public policy under section 34 of the 1996 Act.

Indeed, *Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd.*,⁶⁶ also included challenges where the award was "patently illegal."⁶⁷ The court further defined "patently illegal" as an award contrary to the substantive provisions of the applicable law, the provisions of the 1996 Act, or the terms of the contract.⁶⁸ Such a broad interpretation of public policy has been criticized as arming Indian courts with "potentially limitless judicial review."⁶⁹ This expansive power of judicial review is the exact opposite of what the 1996 Act was intended to effectuate when enacted.⁷⁰

The expansion of the scope of public policy continued in *Venture*. In this case, an arbitral tribunal seated in London rendered an award in favor of an Indian company, Satyam Computers Services Ltd. and against a U.S. based company, Venture Global Engineering.⁷¹ Venture Global Engineering tried to resist enforcement of the arbitral award in the United States but failed.⁷² It then challenged the arbitral award in an Indian court on public policy grounds submitted pursuant to Part I § 34 of the 1996 Act.⁷³ Both the trial and High Court, on appeal, rightly held that Venture Global Engineering was not entitled to challenge a foreign award in India since any action to set aside an award under section 34 is strictly limited to awards rendered in India.

However, on further appeal to the Indian Supreme Court, the Court held that, as valid precedent, the *Bhatia* decision permitted the American company to challenge foreign awards in India pursuant to Part I of the 1996 Act—this is so, even though Part I applies only to arbitral awards made in India.⁷⁴ Moreover, according to Part II of the 1996 Act, foreign

⁶⁵ *Rensugar*, (1994) 1 S.C.C. at 668.

⁶⁶ (2003) 5 S.C.C. 705.

⁶⁷ *Id.* at 714-15.

⁶⁸ *Id.* at 715.

⁶⁹ Dipen Sabharwal, *Another Setback for Indian Arbitration (and Foreign Investors)*, INT'L DISPUTES Q. 1, 6 (Spr. 2008), www.whitecase.com/files/upload/fileRepository/IDQ_Spring_2008.pdf

⁷⁰ *Id.*

⁷¹ *Venture Global Eng'g v. Satyam Computer Servs.*, (2008) 4 S.C.C. 190, 191.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 197.

awards brought to India “would be enforceable. . . and treated as binding for all purposes on the persons as between whom it was made” unless such enforcement was refused on one or more of the grounds set out in Part II section 48.⁷⁵ Thus, reading Part I as expanding the scope of Part II completely contravenes and circumvents the provisions of section 48, because whereas section 48 focuses on enforcement, section 34 deals only with refusing an award.⁷⁶ This means that, absent the winning party’s submission to Indian courts to enforce its award, the losing party has no recourse in an Indian court.⁷⁷ For these reasons, the decision in *Venture Global* has been characterized as not just wrong but also “quite inexplicable.”⁷⁸

Because the 1996 Act was promulgated to modernize India’s arbitral regulatory framework as well as to provide certainty regarding the extent of judicial intervention, effectuating the Act requires courts to implement a more pro-arbitration approach. By keeping this goal at the forefront of judicial decision-making, Indian courts would understand that—notwithstanding “ambiguous” language—the purpose of the 1996 Act is to assist India in complying with its international obligations under the New York Convention. This would result in more consistent judicial compliance.

CONCLUSION

Designed to echo the Model Law, the 1996 Act was tailored to assist India in complying with its international obligations under the New York Convention. However, in addressing both domestic and international commercial arbitration in the same legislation, the Act has faced obstacles. In certain key provisions, the text of the 1996 Act has also veered away from the text of the Model Law. The result has been that over the years, Indian courts have rendered a myriad of decisions that are often blatantly inconsistent with each other and with the letter of the law. Additionally, in many instances, these courts reached conclusions

⁷⁵ See The 1996 Act, Part II §§ 46, 48 (discussing the enforceability and non-enforcement of foreign arbitral awards).

⁷⁶ See *id.* § 48 (“Enforcement of an award *may be refused*,” on the grounds provided for in this section) (emphasis added).

⁷⁷ Compare language in Part I § 34 of the 1996 Act (“Application for setting aside arbitral award”), with language in Part II § 48 (“Conditions for enforcement of foreign award”).

⁷⁸ Nariman, *supra* note 34, at 376.

that were most likely never intended by the drafters of the 1996 Act or the Model Law. To facilitate international commercial arbitration in India, domestic courts would need to take a more pro-arbitration approach, while following the limits and scope recommended by the Model Law. If the 1996 Act is based on the Model Law as its preamble suggests, these courts should be more sensitive to international arbitration practice. Indian courts should be mindful that international commercial arbitration was designed as an alternative forum for dispute resolution—a forum to which commercial parties bargaining at arms length have chosen to resort.

As has been demonstrated by this Article, the role of the courts is to assist the arbitration process to the maximum extent possible, and not to take the dispute resolution process away from the arbitral tribunal. If this fundamental notion is heeded, many of the present controversies may be mitigated by the national courts providing due assistance to arbitration. Finally, until the Supreme Court of India decides on the consolidated appeals in *Bharat*, it would be prudent for counsel to advise interested parties to expressly exclude the application of Part I of the 1996 Act to their arbitration agreements thereby effectively preventing Indian courts from unduly interfering with arbitration proceedings seated outside India.