INTRODUCTION

In an astounding decision that spawned over a hundred and ninety pages, a five judge bench in unison held that Part I of the Act would apply only to arbitrations whose seat was in India. In doing so, it is imperative to recollect that the one of the first signatories to the New York Convention, 1958 was India and that the Indian Parliament gave ratification to this enactment through the Foreign Awards (Recognition and Enforcement) Act, 1961 to expedite and encourage transnational trade by providing for prompt settlement of disputes arising in trade through arbitration. In spite of this fact, the Indian Courts have enforced the power to set aside or quash an arbitral award, under domestic law, though the award was made beyond of India, provided that domestic law administered the arbitration contract. Moreover, in a series of largely hyped decisions, domestic courts also claimed the power to reject or rescind an award, under the local law, even if the award been granted outside of India, provided that Indian law governed the arbitration agreement. These decisions were antagonistic to the constitution of the New York Convention, which grants termination activities exclusively in the arbitral seat and to the unanimity of international authority; they fascinated a substantial amount of domestic and international unsavory reputation.

The issue of whether part I of the arbitration act applies extraterritorially has excited much comment. For the purposes of this introduction it will suffice to make a few general observations and take note of the manner in which the law has evolved and to today. Particularly important is the scope of an exception that was created in Bhatia international case that allows parties to expressly or impliedly exclude the applicability of the act to international commercial arbitrations which seats outside India.

\[1\] Renusagar Power Co. Ltd. v. General Electric, A.I.R. 1985 SC 1156
\[3\] National Thermal Power Corp. v. Singer, A.I.R. 1993 SC 998 (India)
The general principal is unquestionably that the arbitration is governed by the law of the seat of arbitration. An exception to this rule is found in the model law article 1(2) provides that provision of the law except articles 8, 9, 35, 36 apply only if the place of arbitration is within the territory of the state. The Indian act however does not provide for exceptions and section 2(2) provides that part I of the act applies where the place of arbitration is India, without creating exceptions for 8, 9, 35, and 36.

Observed in this light, the Chief Justice of India's recent decision to constitute a constitutional bench to hear challenges to the Court's earlier parochial rulings opens the most important chapter in the legal battle to convert the Indian judicial system into a pro-arbitration regime. The constitutional bench reference was made in the case of Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. A two-judge bench of the Supreme Court had earlier in this case expressed reservation on the correctness of the operating precedent laid down in Bhatia International v. Bulk Trading S.A. (Bhatia International), and subsequently followed in Venture Global Engineering v. Satyam Computer Services (Venture Global) and other cases. Thereafter, in accordance with judicial discipline and propriety, the two-judge bench referred the matter to a three-judge bench setting out the reasons why it could not agree with the three-judge bench operating judgment in Bhatia International.

THE ERED DECISION OF Bhatia International v. Bulk Trading

It must be noted that the underlying principle behind the Indian Arbitration and Conciliation Act, 1996 (“1996 Act”) was to “minimize the supervisory role of the courts in the arbitral process.”\(^5\) However, Bhatia International, decided by the Supreme Court in 2002, laid the foundation for an excessively interventionist role of the judiciary in international arbitrations, thereby negating the intent of the 1996 Act. Part I of the 1996 Act lays down the law governing domestic arbitrations, whereas Part II, entitled ‘Enforcement of Foreign Awards,' relates to enforcement of foreign awards in international commercial arbitrations under the New York Convention and the Geneva Convention\(^6\). The question was whether an application filed under Section 9 of the Act in the Court of the third Additional District

---

\(^5\) Supra note 14

\(^6\) India’s Surprising Economic Miracle, The Economist, (2\(^{nd}\) October, 2010) p 9
Judge, Indore by the foreign party against the appellant praying for interim injunction restraining the appellant from alienating, transferring and/or creating third party rights, disposing of, dealing with and/or selling their business assets and properties, was maintainable.\footnote{Sunil Malhotra, “Enforcement of Arbitral Awards” ICA’s Arbitration Quarterly, 2006, Vol 4, at page 20}

The Supreme Court referred to the similar provision in UNCITRAL Model law i.e. Art.1(2) which reads as follows:

“The provisions of this law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.”

The Supreme Court highlighted the word ‘only’ and observed as follows:

“Thus Art. 1(2) of the UNCITRAL Model Law uses the word “only” to emphasize that the provisions of that law are to apply if the place of arbitration is in the territory of that State. Significantly, in Section 2(2) the word “only” has been omitted. The omission of this word changes the whole complexion of the sentence. The omission of the word “only” in Section 2(2) indicates that this subsection is only an inclusive and clarificatory provision.”

The three-judge bench concluded that “the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply”.\footnote{Bhatia International V Bulk Trading A.I.R. 2002 SC 1432}
SUBSEQUENT JUDGEMENTS

In *INDTEL Technical Services v. W.S. Atkins PLC*\(^9\), the issue was the appointment of an arbitrator in an arbitration application filed under section 11(9) of the Act. The parties in that case had chosen the proper law of contract as the law of England and Wales but the proper law of arbitration was not specified. The respondent argued that in the absence of the proper law of arbitration being chosen by the parties, it must be presumed from the proper law of contract. The Court rejected this contention on the ground that it was bound by the decision in *Bhatia* which had clearly held that in the absence of express or implied exclusion by parties, Part I of the Act would be applicable to International Commercial Arbitrations outside India.

In *Venture Global Engineering v Satyam Computers Services*\(^10\), the Supreme Court was of the opinion that the Indian Courts had the power to set aside foreign awards if the same were in opposition, or were contrary to the ‘public policy’ in India. The Apex court relied upon the ruling of Bhatia International and held: “*That the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to hold that where such arbitration is held in India, the provisions of Part-I would compulsorily extent permitted by the provisions of Part-I.*

**Consequences of the Bhatia Judgment and subsequent cases:**

The ruling of the Apex Court in the Case of Bhatia International (Supra) opened flood-gates of litigation and defeated the very purpose of Arbitration as an ‘alternate dispute resolution’. The judicial interpretation given by the Court rendered the principle of ‘Non-intervention of Courts’ otiose and redundant. The above mentioned decisions literally strangled the growth of Arbitration in India. The reputation of India for its laws on Arbitration was tarnished and foreign investors and companies considered dealing with Indian companies or individuals risky. The parties to arbitration were left to wonder whether there is an incentive to incur the

\(^9\) (2008) 3 Arb LR 391
\(^10\) *A.I.R. 2008 SC 1061.*
time and expense of arbitrating their disputes in the first instance if such disputes are to end up in court anyway. The precedents laid down by the Apex Court in Bhatia International, Venture Global and the various cases that followed, have been seen as major set-backs and disincentives for any foreign entity to deal with or invest in the Indian economy.

The unfortunate potential consequence of *Bhatia International*, delivered in the context of the power of Indian courts to grant injunctions and other interim measures in foreign arbitrations, can hardly be exaggerated. In what came to be one of the most criticised decisions of the Supreme Court in recent times, the decision in *Venture Global*, paved the way for much increased judicial interference by Indian courts.

**Brief Facts and Issues Involved in BALCO**

It all began when Bharat Aluminum Co. filed an appeal before the Division Bench and it was put for trial before a three Judge Bench as one of the judges in the Division court realized that the finding in Bhatia International and Venture Global was erroneous and the other judge differed with that thought. Consequently it was instructed to be placed on January 10, 2012 along with other similar matters before a constitutional bench.

(i) The vital issue therefore that was before the two judge Bench of the apex court in Bhatia and before the Constitutional Bench in BALCO, was if the omission of the word “only” from the Indian Statute gave rise to the repercussion that Part I of the Act would apply even in some circumstances where the arbitration was done abroad.

(ii) Even if Part I did apply to arbitrations carried out outside India, the most major effects would have been that Indian Courts would be competent to discard foreign awards pursuant to section 34 of the act and permit provisional relief pursuant to sec-9 of the act and pursuant to sec-11 of the act can also assign an arbitrator.
AN ANALOGY BETWEEN BHATIA INTERNATIONAL CASE & BALCO CASE

The position determined by the Supreme Court in Bhatia International now stands overridden after BALCO case. The principal reason provided by the apex court in Bhatia and the answer of the Constitutional Bench in BALCO is the law now.

Some of the reasons and their counters in Balco were that in Bhatia the court held that the word “only” was excluded from section 2(2) and such exclusion was not unintended. Such an exclusion would be rendered dismissed if the word “only” was to be read in to the Section. Countering this in Balco, the apex court relying on the discussions at the time of drafting Article 1(2) of the Model Law, the apex court held that the use of “only” was to make sure that the exclusions were to Article 1(2) alone, i.e. Articles 8, 9, 35 & 36, had extra territorial function. While Section 2(2) of the Act, did not make any reference to these exceptions, there was no necessity to use the term “only”. Related stipulations subsist in Switzerland and UK, and in the rulings of these republics as well the word “only” has been scrapped. Additionally, the structure of the Act made it profusely clear that the Act was to only have territorial effect.

In Bhatia, it was indicated that if Part I does not apply, an award of Tribunal in a country that is party to neither the Geneva or New York Convention will be unenforceable in India because it is neither a domestic or a foreign award, and this “void” could not have been projected by the Parliament. It was answered in Balco stating that the Parliament has deliberately not provided a procedure for implementation of a non-convention award by not counting such an award inside the meaning of a “foreign award” in Sections 44 and 53. That being so, the Courts cannot offer an implementation system for such awards by reckoning them to be domestic awards. There is as a result no gap that needs to be filled.

The Supreme Court in Bhatia, it was said that a party is entirely solution less if Part I does not apply to arbitrations conducted outside India as the party would not be able to apply for interim relief in India even though the properties and assets are in India. Thus a party may not be able to get any interim relief at all. But this was reversed in Balco saying that the parties will have a solution before the Courts at the seat of arbitration. Merely, because this remedy may be arduous does not mean that the party is left remediless. While the parties of their own accord chose the

---

11 JUSTICE R.S. BACHAWAT, LAW OF ARBITRATION AND CONCILIATION BOOK, LEXISNEXIS INDIA. (5th Ed., 2010).
seat, they are considered to have willingly selected the consequences of such a selection. Accordingly, the parties those are left solution less, needs to be tackled by not the Courts but the legislature.

THE PRESENT SCENARIO AND THE IMPLICATIONS FROM THE BALCO CASE

Firstly, no temporary aid u/s 9 of the Act or Order 39 of the CPC\textsuperscript{12} would be available where the Seat of Arbitration is outside India. As provisional directions from foreign courts and tribunals are not enforceable in India such a state would leave overseas parties remediless.\textsuperscript{13} The major assertion of the appellant for enforceability of Section 9 was not to leave any party remediless and right interpretation being adopted in Bhatia International. The enforceability of Part I was encompassed only to the point of granting temporary reliefs and not annulment as the same would incite extra-territorial functions. Section 9 of the Act acts in aid of the arbitration proceedings and provides interim reliefs before or during arbitration or at any time after the making of award but prior to the enforcement of the award under Section 36 of the Act. The Court held that Section 36 being applicable only to domestic awards, pertains only to arbitrations with Indian seat, thereby Section 9 cannot be made applicable to arbitrations held abroad in breach of the territoriality principle determined under Section 2(2) of the Act. It was further explained that if parties willingly chose a foreign seat, it would be inferred that aftermaths of such selection would be known to them and non-validity of Section 9 would not make them remediless. To sum up, the court held that first, section 9 is under Part I and so cannot merely be indorsed "a special status". Second, no similar proviso is to be found in Part II., the powers under section 9 are based on proceedings under section 36 i.e. enforcement of a domestic award. Finally, to spread section 9 extra-territorially "would be to do vehemence to the policy of the territoriality declared in Section 2(2) of the [Indian] Arbitration Act".\textsuperscript{14}

\textsuperscript{12}The Code Of Civil Procedure, 1908, (Act No. 5 of 1908).
\textsuperscript{13}Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc.,C.A. No. 7019/2005at pp.1
\textsuperscript{14}Bharat Aluminum Co.v.Kaiser Aluminum Technical Services Inc.,C.A. No. 7019/2005 at para163
The Supreme Court of India took the position that parties who have selected to have their arbitration abroad "are impliedly also understood to have selected the basic incidents and outcomes of such selection"\textsuperscript{15}. In any occasion, the Apex Court felt that if this professed any problems to parties then that was a matter to be determined through legislation.\textsuperscript{16}

Secondly, as a result of this judgment, the seat of arbitration, now gained vital value for regulating the enforceability of Part I of the Act. In particular, it confirmed that Part I of the Act accepted the territorial principle incorporated by the UNCITRAL Model Law\textsuperscript{17} and the law of the arbitral seat rules the manner of the arbitration.\textsuperscript{18} Section 28 was a disputed law provision\textsuperscript{19} which sketches a peculiarity between domestic arbitrations, international arbitrations seated in India and foreign arbitrations and their appropriate conflict of laws rule. The expression "where the place of arbitration is situated in India" is hence "not suggestive of the fact that the purpose of Parliament was to give an extra-territorial function to the first Part of the Indian Arbitration Act."

Thirdly, the judgment also illustrates a discrepancy between the seat of arbitration and the place of arbitration. It, thus anticipates a condition where even though the parties have provided for a specific place for arbitration, some of the trials themselves may be conducted in other territories as may be suitable to all. As, the Act authorizes the parties to select the place of arbitration. The Court inferring Section 20 of the Act relating to place/seat of arbitration has explained that if seat of arbitration is India, parties are open to choose any place or venue within India for performing the arbitration trials. Yet, the said stipulation is to be read with Section 2(2) of the Act to realize the enforceability of territoriality principle. In the lack of parties failing to choose the law governing arbitration proceedings, the same would be administered as per the law of the country in which arbitration is held, having the keenest association with the proceedings. The Apex Court has differentiated the notion of "seat" and "venue" and clarified their implication in arbitration proceedings. The discrepancy between seat and venue of arbitration supposes implication when foreign seat is allotted, with the Act as the main law regulating the arbitration proceedings. In

\textsuperscript{15}Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc., C.A. No. 7019/2005 at para 166
\textsuperscript{17}Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc., C.A. No. 7019 at pp. 69
such situation, Part I would be unsuitable to the extent contradictory with arbitration law of the seat. Fourthly, this judgment also ensures that foreign award, can no longer be questioned by an Indian body u/s 34 of the Act and that the party which seeks to oppose the application of the award has to show one or more grounds set out in section 48 and the Supreme Court also held that the power for the Indian courts to annul or dismiss an award found in section 34 of the Act. Section 34 is under Part I of the Indian Arbitration Act and is therefore only enforceable to awards made in the country. To resolve otherwise would be to incorporate section 34 into Part II of the Indian Arbitration Act and therefore contrary to the Indian Parliament's intention to confine section 34 to arbitrations and their awards held and made within India. The Supreme Court also pointed out the mischief that would happen if there were parallel authorities to dismiss awards and noted that it "would be a method for litigation and bewilderment ". Here, they pointed to the Venture Global case which incarnated the type of disarray which would be designed by two court systems, in two different countries, implementing concomitant jurisdiction over the same question. And Lastly, the judgment has a prospective nature to it i.e. to all the arbitration agreements effected after September 6, 2012, leaving parties with arbitration agreements effected before 6 September 2012 subject to the Court’s Bhatia verdict and its scions. And this would be the biggest downbeat one can depict from this verdict is its embracing of the doctrine of prospective overruling. The Court has made its decision valid only to the arbitration agreements executed after the current judgment i.e. post September 6, 2012. However the doctrine of prospective overruling is accepted in India, but the application of the same in the present situation would lead to more confusion. By gauging the applicability of the current judgment to the implementation of an arbitration agreement the court has released a goldmine of doubts. For example, if an arbitration agreement in executed in March, 2012 and the differences under the same arise in December, 2016 the parties under that contract would be bound by the law laid down by Bhatia International and Venture Global indicating to two sets of rules running analogously in India. In effect, for the parties, who disputed the law laid down by Bhatia International and have been victorious in their dispute, will be nonetheless subject to the said law laid down by Bhatia International for adjudication of their challenges undecided before the date of this verdict. This is to a certain extent a glitch that has been built.

CONCLUSION

The Sting in the tail is that *BALCO* only applies to arbitration agreements proposed into after 6 September 2012, it will take a while for its broad influence to work its means through as many contracts entered into preceding to this date will have terms left to run, even before differences arise. Even with this limitation, it will be fascinating to see how the Courts rule on pre-*BALCO* arbitration contracts and the contracts of Part I of the Act in light of the clear verdict of the Hon’ble Supreme Court in *BALCO*.

The Court could have attained its purpose of preventing uncertainty due to overriding of Bhatia International and Venture Global by curbing the enforceability of the Court’s verdict only to the cases arising in future and forbidding its enforceability to the cases which have achieved conclusiveness. This would be a more suitable usage of the doctrine of prospective overruling. Nonetheless, the decision is still a triumph for practicality and comity and will bring much cheered conviction to those doing trade with Indian enterprises where their agreements provide for arbitration with a non-Indian seat. It is also good update for overseas arbitration consultants as it will endure to inspire the choice of non-Indian seat arbitrations.