FROM *BHATIA INTERNATIONAL* TO *DOZCO INDIA*: A RESPONSE TO VIDHU GUPTA'S 'STRETCHING THE LIMITS OF STATUTORY INTERPRETATION: CRITICAL REVIEW OF BHATIA INTERNATIONAL V. BULK TRADING'

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ABSTRACT

This is a response to Ms. Vidhu Gupta's comment in Vol. 5 of the *Nalsar Student Law Review* examining the justifiability of judicial intervention in international commercial arbitrations. The note examines the case of arbitrations held outside India and the judicial ruling in *Bhatia* which extends Part I of the Arbitration and Conciliation Act, 1996 to these proceedings. While agreeing with Ms. Vidhu's argument that the seminal decision of the Supreme Court in *Bhatia International* was wrongly decided, this paper substantiates that claim looking at entirely different reasons. To this end, post-*Bhatia* developments, especially the case of *Dozco India* has been analysed in considerable detail to discern the tenability and reach of *Bhatia* today.

INTRODUCTION

The Indian Arbitration and Conciliation Act, 1996[1], a concomitant of the post-liberalisation pro-'foreign investment' regime in India, replaced the 'outdated' 1940 Act with a law "more responsive to contemporary requirements."[2] Envisaging a restrained role for the judiciary, the new law attempts to promote party autonomy and speedier resolution of disputes. However, since arbitral awards lack *suo moto* enforceability, they are ineffective without institutional support from the judiciary. Striking the crucial balance between judicial intervention and arbitral autonomy is thus, the key to a just and efficient regime of arbitration.

In this paper, I respond to Ms. Vidhu Gupta's article in Vol. 5 of the *Nalsar Student Law Review* examining the justifiability of one such instance of judicial intervention - intrusion by Indian courts in international commercial arbitrations held outside India by making Part I of the Act applicable to these proceedings.[3] In

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1. No. 26 of 1996 [hereinafter the Act].
2. *See* Statement of Objects and Reasons, the Arbitration and Conciliation Act, 1996.
3. Vidhu Gupta, *Stretching the Limits of Statutory Interpretation: Critical Review of* Bhatia International v. Bulk Trading, 5 NALSAR STUD. L. REV. 140 (2010) [hereinafter Gupta, *Stretching the Limits*].

her insightful and thorough analysis of the decision in *Bhatia International v. Bulk Trading S.A.*[4], Ms. Vidhu applies tools of statutory interpretation to the Apex Court's reasoning, drawing the readers' attention to the questionable judicial lawmaking by the Court.

The controversy surrounding the scope of application of Part I of the Act hinges on the interpretation of Section 2(2) of the Act.[5] Though the Indian Act is substantially in conformity with the UNCITRAL Model Law in most respects, this provision marks a clear departure from the corresponding Article 1(2) of the UNCITRAL Model Law.[6] Interestingly, while the recent consultation paper proposing amendments to the Indian Act has suggested the addition of a proviso to Section 2(2) that brings the legislative scheme of the Indian Act closer to the UNCITRAL Model Law, the proposed amendment however, leaves the main provision of Section 2(2) un-amended.[7] A re-look at the legislative scheme as it stands today in light of the uneasy judicial interpretation placed on it by courts is hence timely and relevant in deciding whether these controversial amendments are necessary. Such a study is also bound to shed light on the potential response by the Indian judiciary to these amendments, if passed. In pursuance of these aims, this paper proceeds as follows. In Part I, I respond to Ms. Vidhu Gupta's critique of the leading Supreme Court decision of *Bhatia* agreeing in part, with her analysis. In Part II, I critically examine judicial developments post-*Bhatia*,.

I. CRITIQUE OF *BHATIA*

Applicability of Part I to international commercial arbitrations held outside India came up for consideration for the first time before a three judge bench of the Supreme Court in *Bhatia*. The Court held, based on the apparent absurd consequences that result from the non-applicability of Part I to such proceedings that, Part I of the Act applies, in the absence of an express or implied exclusion of the same to international commercial arbitrations even when they are held *outside* India. Ms. Vidhu develops a critique of each of the four grounds on which the Court in *Bhatia* concluded that Part I of the Act was applicable to international commercial arbitrations held outside India. My response to Ms. Vidhu's critique of the reasoning in *Bhatia* follows.

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4. (2002) 4 SCC 105 [hereinafter *Bhatia*].
5. § 2(2) of the Act declares that Part I applies where the place of arbitration is in India.
6. UNCITRAL Model Law, art. I, cl. 2, ("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."). UNCITRAL Model Law, art. IX ("It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.").
7. Proposed proviso to § 2(2) of the Act ("Provided that provisions of Sections 9 and 27 shall also apply to international commercial arbitration where the place of arbitration is not in India if an award made in such place is enforceable and recognized under Part II of this Act.").

A. Lacuna in the Act

The Court in *Bhatia* found that if Part I was not applicable to international commercial arbitrations held outside India, there would be no law in India governing international commercial arbitrations held in non-convention countries.[8] I agree with Ms. Vidhu that this view is entirely unsustainable, although for completely different reasons.

Interestingly, Ms. Vidhu's paper traces back the Court's reasoning on the apparent 'lacuna' in the Act to the expansive definition of the phrase 'international commercial arbitrations' in Section 2(1)(f) of the Act. She additionally points out that the Court's reasoning is flawed on account of its inattention to the general rule under the Constitution that places territorial restrictions on the scope of application any Parliamentary enactment.[9] However, in my view, the mere application of Part I of the Act to international commercial arbitrations held outside the country would not in itself fall foul of the rule of territoriality. This is because, it is now well-accepted that extra-territorial legislation is not impermissible as long as the enactment can claim a 'nexus' with the territory of India.[10] The Supreme Court has also clarified that as long as the 'nexus' is pertinent to the liability sought to be established, even its sufficiency is not justiciable.[11] The expansive interpretation of Section 2(2) of the Act, as the Court has clarified time and again, is relevant only when *at least* one of the parties is Indian – a pre-condition that ensures compliance with the requirement of territorial nexus.

My reasons for the incorrectness of the Court's view are however, different. *First*, since most of the trading nations in the world are signatories to either the New York Convention or the Geneva Convention,[12] the lacuna contemplated by the court would rarely ever arise. Even when it does, in light of the importance assigned to 'party autonomy' in arbitration law,[13] parties have the option of choosing the law that governs their arbitration. Hence, even when the seat of arbitration is a

8. This is because, according to Section 44 and Section 53, Part II of the Act applies only to those countries that have signed either the New York or the Geneva Convention.

9. Gupta, *Stretching the Limits*, *supra* note 3, at 145.

10. State of Bombay v. RMDC, [1957] SCR 874 ("…if there is a territorial nexus between the person sought to be charged and the State seeking to tax him the taxing statute may be upheld. Sufficiency of the territorial connection involve a consideration of two elements, namely, (a) the connection must be real and not illusory and (b) the liability sought to be imposed must be pertinent to that connection. It is conceded that it is of no importance on the question of validity that the liability imposed is or may be altogether disproportionate to the territorial connection. ").

11. Wallace Bros. v. Commissioner of Income-Tax, Bombay, AIR 1948 PC 118; Governor General in Council v. Raleigh Investment Co. AIR 1944 FC 51.

12. Redfern & Hunter, Law and Practice of International Commercial Arbitration 10 (3rd ed. 1999) [hereinafter Redfern & Hunter, Law and Practice].

13. *See id.*

non-convention country, the parties are not precluded from expressly making the provisions of Part I (or any other procedural law) applicable.

Secondly, in light of the limited role that domestic courts are expected to play in international commercial arbitrations, a law in India that governs arbitrations held outside the country is not an absolute necessity. According to the conventional rules of arbitration, the procedural law applicable is the law of the 'seat'.[14] This reduces the role of Indian courts to ensuring enforcement of the foreign arbitral award or granting interim measures with respect to property situated in the country.[15]

Thirdly, as regards enforcement of the award in India, as the Law Commission of India has recognised, nothing stops the parties from obtaining a judgment of a foreign court on the basis of the arbitral award and then filing a suit for its enforcement in India.[16] On these grounds, it is submitted that there was in fact no considerable lacuna in the Act that would justify a re-reading of the entire act.

B. Applicability to Jammu and Kashmir

The proviso to Section 1(2) of the Act[17] expressly makes Part I applicable to Jammu and Kashmir as regards international commercial arbitrations. According to the Court, in light of Section 1(2), non applicability of Part I to arbitrations held outside India would lead to an absurd result i.e. Part I extends to Jammu and Kashmir but not to the rest of India.

Disagreeing with the Court's reasoning, Ms. Vidhu points out that the purpose of the proviso is only to clarify that provisions of Part I are applicable to the State of Jammu and Kashmir only for international commercial arbitrations and not for domestic arbitrations. She derives considerable textual support for this view from the usage of the phrase 'only in so far as' in the proviso.[18] While I concur with her reasoning on the legislative intent underlying the proviso, I depart from her argument that this is determinative of its application. Stated differently, even assuming that the proviso was only intended to clarify that Part I provisions are inapplicable to Jammu and Kashmir as regards domestic arbitrations, the proviso evidently affirms the view that Part I is applicable to Jammu and Kashmir as regards international commercial arbitrations. Since the drafters have

14. Mustill & Boyd, The Law and Practice of Commercial Arbitration in England 72 (2nd ed. 1989) [hereinafter Mustill & Boyd, The Law and Practice].
15. Non-availability of interim measures is also the fourth ground for the decision in *Bhatia* and hence has been dealt with separately in this paper.
16. Law Commission of India, 176th Report on the Arbitration and Conciliation Act, 1996, at 28 (2001).
17. "Provided that Parts I, III and IV shall extend to the State of Jammu and Kashmir only in so far as they relate to international commercial arbitration or, as the case may be, international commercial conciliation."
18. Gupta, *Stretching the Limits*, *supra* note 3, at 146.

made no attempt to restrict the ambit of the phrase 'international commercial arbitration' as applicable only to those held in India, it is reasonable to interpret that phrase as including international commercial arbitrations held outside the country as well. If this is the case, then the Court's view that this would result in an absurd consequence i.e. Part I applies to Jammu and Kashmir but not to the rest of India as regards international commercial arbitrations held outside the country stands vindicated. Notably, this result is independent of the legislative intent underlying the proviso. My attempt in this paper is consequently, to explain the apparent paradox relating to the proviso to Section 1(2) of the Act on independent grounds.

First, the application of Part I to Jammu and Kashmir with respect to international commercial arbitrations held outside the country is necessary because, the Civil Procedure Code, 1908 and hence the enforcement mechanism provided therein, does not extend to Jammu and Kashmir.[19] The proviso to Section 1(2), it is submitted, is a legislative solution to this problem. Seen in this light, the import of the proviso to Section 1(2) is that it extends the applicability of the Code of Civil Procedure to Jammu and Kashmir through Section 36 (which falls under Part I) only in so far as enforcement of foreign arbitral awards made in non-convention countries requires. The combined effect of the proviso taken together with Section 36 of the Act as well as the relevant sections in the Code of Civil Procedure is thus that the mechanism for the enforcement of arbitral awards as provided by Section 36 r/w the Code of Civil Procedure would extend to Jammu and Kashmir even though the Code *per se* does not apply to the state.

Secondly, even assuming that there is a conflict between Section 2(2) and the proviso to Section 1, it is submitted that Section 2(2) will override Section 1. *Prima facie*, it might seem that the proviso to Section 1 being a special provision with respect to Jammu and Kashmir will override Section 2(2). However, it is submitted that the issue that the court was addressing in *Bhatia* was the impact of the *place of arbitration* on the applicability of Part I. While Section 2(2) specifically deals with the place of arbitration and provides that Part I will apply when the place of arbitration is in India, proviso to Section 1 is a general provision which does not specify whether the place of arbitration would have any impact on its applicability. Hence, it is submitted that the applicability of the proviso to Section 1 ought to be cut down by Section 2(2) to the extent of their conflict.

Finally, even assuming that the court's reasoning is accepted in its entirety, it is submitted that this would not justify the proposition that Part I applies to international commercial arbitrations held outside India. This is because, while

19. Code of Civil Procedure, 1908, § 1(3)(a).

Section 1 deals with the *territorial applicability* of Part I, Section 2(2) deals with the applicability of Part I to specified *arbitral proceedings*. In other words, the proviso to Section 1 only provides that Part I shall apply to the *territory* of Jammu and Kashmir.[20] Hence, the said proviso applies only when some part of the cause of action arises within the territory of the state. This does not mean that the procedure governing an international commercial arbitration held outside India would be governed by Part I. For instance, the proviso to Section 1 read with Section 11 of the Act cannot justify appointment of arbitrators by the Chief Justice of India in an international commercial arbitration held outside the country, even if one of the parties are from the state, because no part of the cause of action in such a case arises within the *territory* of Jammu and Kashmir.

C. Reconciling Sections 1, 2(2), 2(4) and 2(5)

The Court in Bhatia noted that Section 1 of the Act extends the application of the Act to the whole of India with no qualification as regards international commercial arbitrations held outside the country. This according to the Court is indicative of the application of Part I even to international commercial arbitrations, even those seated outside India. Ms. Vidhu rightly points out however, that Section 1 being a general provision, that too applicable to all four parts of the Act is necessarily overridden by Section 2(2), a special provision governing the applicability of Part I alone.[21]

Further, the Court also pointed out on a combined reading of Sections 2(2), 2(4) and 2(5) of the Act that the usage of phrases "every arbitration" and "all arbitrations" in Sections 2(4) and 2(5) respectively, denoted that Part I was to apply to *all arbitrations* irrespective of 'seat'. It is submitted that this is a wrong reading of the said provisions. This becomes amply clear on a reference to the corresponding Article 1(5) in the UNCITRAL Model Law.[22] The import of the said provision is that if any other law for the time being in force provides for arbitration according to its own provisions, the Act would not have the effect of overriding such enactment. In other words, a close reading of Sections 2(4) and 2(5) reveal that they apply only to arbitrations provided for by "any other enactment for the time being in force." Hence, the usage "every arbitration" in the said provision in fact refers to "every

20. This is clear from the marginal heading of the section, which reads "short-title, *extent* and commencement" as well as the section itself which provides that the Act applies to the whole of India i.e. territorial application of the Act.

21. Gupta, *Stretching the Limits*, *supra* note 3, at 147.

22. UNCITRAL Model Law, art. I, cl. 5 ("This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.").

arbitration provided for by any other enactment for the time being in force." Same is the case with Section 2(5) which has expressly been made subject to Section 2(4).

Further, even if the interpretation given to Sections 2(4) and 2(5) in *Bhatia* is accepted, on a harmonious construction of Section 2(2) on the one hand and Sections 2(4) and 2(5) on the other, the scope of Sections 2(4) and 2(5) will necessarily have to be curtailed so as to not render Section 2(2) redundant. In other words, if "every arbitration" and "all arbitrations" in Sections 2(4) and 2(5) are literally constructed, it would mean that Part I of the Act applies to all arbitrations irrespective of 'seat' and hence Section 2(2) would have no operation at all, which, in my view could not have been the legislative intent.

D. Non-availability of Interim Remedy

The final, and perhaps the most persuasive prong of the reasoning in *Bhatia* is that, since Part II of the Act does not have a provision corresponding to Section 9, if Part I were to be held not applicable to international commercial arbitrations held outside India, parties might be left with no interim remedy at all. Ms. Vidhu seems to indicate that though the Court's reasoning ran contrary to legislative intent, it is justifiable as application of Section 9 is an inevitable pre-condition for maintaining a "*fair and just arbitration procedure*."[23] My attempt here is however, to develop an alternative to the application of Section 9 that would facilitate the granting of interim injunctions without unreasonably stretching the applicability of Part I of the Act.

While Section 5 of the Act provides that no judicial authority in India shall intervene in arbitral proceedings except as specifically provided by the Act, this provision makes a clear departure from the Model Law by *restricting its applicability to Part I* alone.[24] Hence, if Part I of the Act does not apply to international commercial arbitrations held outside India, judicial intervention in such cases would not be restricted to what is specifically provided for by the Act. The impact of this would be that the remedy under the Code of Civil Procedure[25] for obtaining interim injunctions would be available to parties to prevent damage or dispossession of property situated in the country. This proposition is supported by the House of Lords decision in the *Channel Tunnel case*[26] and affirmed by the Supreme Court of India[27] to hold that even with respect to arbitral proceedings held outside the country,

23. Gupta, *Stretching the Limits*, *supra* note 3, at 149.
24. § 5 of the Act states that "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." [emphasis supplied].
25. Code of Civil Procedure, 1908, Order 39, Rule 1 and 2.
26. Channel Tunnel Group Ltd. v. Balfour Beatty Construction, (1993) 1 All ER 664.
27. Sundram Finance Limited v. NEPC India Ltd., 1999 (1) AD (SC) 51.

domestic courts have jurisdiction to grant interim relief for protection of the property in dispute or for restricting any undesirable action by the parties.

E. Other Reasons

Following from a critique of the reasoning in *Bhatia* in the previous Section, here I offer three additional reasons that point towards the incorrectness of the reasoning in *Bhatia*.

In accordance with the provisions of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, Section 48(d) of the Act provides that enforcement of a foreign award may be refused if either party furnishes proof that the arbitral procedure (in the absence of a contrary agreement) was not in accordance with the law of the 'seat'. The ruling in *Bhatia* runs completely contrary to this provision by holding that in the absence of a contrary intention, the law governing the arbitral procedure would be Part I of the Act and not the law of the 'seat'. Since this provision was not even considered by the court in *Bhatia*, it is submitted that the said ruling is in *per incuriam*.

Further, the decision in *Bhatia* runs contrary to all conventional norms of arbitration according to which, the law applicable to the 'seat' governs the procedure of arbitration, in the absence of a contrary intention of parties.[28] The ruling also belies the justification behind the said rule, which is that, courts in a country are likely to be more comfortable interpreting and applying their own laws[29] and hence, bringing in a foreign procedural law is likely to result in judicial confusion.

Finally, it is submitted that the ruling in *Bhatia* goes against the very purpose of the 1996 Act. To elucidate, assume that there is a country other than India with its arbitration laws in *pari materia* with the 1996 Act. If the reasoning in *Bhatia* is correct, in the absence of an express or implied exclusion of either of the laws by parties, Part I of *both the laws* should apply equally to an international commercial arbitration between parties belonging to these countries. However, the simultaneous application of both these laws resulting in the concurrent jurisdiction of courts of both these countries would not only result in absurd consequences, but also go against the objective of the 1996 Act which is to regulate judicial intervention in arbitral proceedings.[30]

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28. Mustill & Boyd, The Law and Practice, *supra* note 18, at 101; Redfern & Hunter, Law and Practice, *supra* note 14, at 34.
29. Fouchard et al., Fouchard, Gailard and Goldman on International Commercial Arbitration 55 (1996).
30. *See supra* note 2.

II. POST-*BHATIA* DEVELOPMENTS

Ms. Vidhu Gupta's article was written at a point in time when the only post-*Bhatia* decisions that dealt with the applicability of Part I were *Venture Global*[31] and *INDTEL*.[32] On an analysis of these decisions she notes very pertinently that it remains unclear whether mere specification of a foreign law is sufficient to exclude Part I or an express exclusion by the specification of a contrary provision in necessary. Part II engages with this and a number of other related questions viz. the correct meaning of phrases 'express' and 'implied' exclusion as contemplated by the Court in *Bhatia*, the view taken by post-*Bhatia* decisions on the harmonious construction of *Bhatia* and the scheme of inference of laws laid by the *National Thermal Power Corporation Case*,[33] and the impact of the latest decisions of the Supreme Court in *Dozco India*[34] on these issues. It is pertinent to observe that the ruling in *Bhatia* with respect to the applicability of Part I is attracted only in the absence of an "express or implied exclusion" of Part I by the parties. However, on a careful examination of a catena of later judicial decisions that interpret the ruling in *Bhatia*, it is submitted that these decisions have rendered the possibility of an "implied exclusion" slim.

In *Venture Global*,[35] a decision that in Ms. Vidhu's words "made explicit what was otherwise implicit in Bhatia"[36] the Supreme Court held that specification of the proper law of arbitration as a foreign law does not impliedly exclude Part I. This however does not flow from a mere extension of *Bhatia*, as the Court seems to presume since in that case, neither the law governing the contract nor the agreement was specified. Therefore, the question of whether specifying the proper law of contract or arbitration agreement would amount to "implied exclusion" did not arise for consideration in *Bhatia*.

Two decisions of the Supreme Court in 2009, *INDTEL* and *Citation Infowares*,[37] marked a radical shift from the scheme originally envisaged in *Bhatia*. In both *INDTEL* and *Citation,* though the proper law of contract and law governing the arbitration agreement were specified as foreign laws, seat of arbitration was not expressly indicated by the parties. Though in these cases, it was argued on the basis of the decision in *National Thermal Power Corporation* that the specification by

31. Venture Global Engineering v. Satyam Computer Services Ltd., AIR 2008 SC 1061.
32. INDTEL Technical Services v. W.S. Atkins PLC. AIR 2009 SC 1132.
33. National Thermal Power Corporation v. Singer Company, AIR 1993 SC 998.
34. Dozco India Ltd. v. Doosan Infracore P. Ltd., Arbitration Petition No. 5 of 2008.
35. *See supra* note 33.
36. Gupta, *Stretching the Limits*, *supra* note 3, at 156.
37. Citation Infowares Ltd. v. Equinox Corporation, 2009 (5) UJ 2066 (SC).

the parties of a foreign substantive law and proper law of arbitration was suggestive of an implied exclusion of Part I, the Court rejected this argument holding that after the decision in *Bhatia,* resort to the ruling in *National Thermal Power Corporation* could not be had. Thus, the impact of the decisions in *INDTEL* and *Citation* was to hold that specifying a foreign proper law of contract or law governing arbitration agreement does not 'impliedly exclude' Part I. As a corollary, 'implied exclusion' of curial law embodied in Part I[38] could result only when the parties expressly agree upon a foreign curial law inconsistent with Part I.

The impact of these decisions on the original scheme of applicability of Part I as envisaged in *Bhatia* was disastrous. While *Bhatia* intended the specification of an inconsistent foreign law to constitute 'express exclusion' and an ouster of Part I on the basis of an inference from foreign proper laws to be 'implied exclusion', after the decisions in *INDTEL* and *Citation*, the latter possibility was precluded. Thus, after these decisions, the threshold for an 'implied exclusion' was so high that it required express specification of an inconsistent foreign while, as a consequence of which, 'express exclusion' could result only when parties, in so many words 'exclude Part I'. This terminological confusion resulting from a wrong interpretation of *Bhatia* prompted several High Courts to hold that even if the proper law of the contract and the proper law of the arbitration agreement are expressly specified as foreign laws and even when the seat of arbitration is outside India, Part I is still not impliedly excluded.[39]

The greatest significance of the 2010 decision of the Supreme Court in *Dozco India* the latest in this line of cases is perhaps to set right this terminological confusion. In *Dozco India*, the parties had expressly specified the substantive law, proper law of arbitration agreement, and curial law, all of which were foreign laws. The seat of arbitration was also specified as Seoul, South Korea. The issue however, was whether an arbitrator could be appointment under Section 11 of the Indian Act under these circumstances. Before proceeding to examine the Court's holding, it is significant to note that its reasoning is premised on a rather controversial assumption; that the law governing appointment of arbitrators is curial law.[40] Taking no stance on the

38. This is because Part I in its entirety is neither curial law nor proper law of arbitration.

39. Frontier Drilling A.S. v. Jagson International Ltd., 2003 (3) Arb LR 548 (Bom); Hardy Oil & Gas Ltd. v. Hindustan Oil Exploration Co Ltd., (2006) 1 Guj LR 658; National Aluminium Company Ltd. v. GERALD Metals, 2004 (2) ALD 196.

40. Several parts of the judgment reflect this view. For instance, the Court cites passages from the treatise by Mustill and Boyd to indicate that "arbitrability of the dispute is to be determined in terms of the law governing arbitration agreement and the arbitration proceedings has to be conducted in accordance with the curial law." Court also relies on the same treatise as cited in Sumitomo Heavy Industries v. ONGC Ltd. AIR 1998 SC 825 to suggest that while the general obligations of parties to submit to arbitration are governed by the proper law of arbitration, the conduct of each individual reference is governed by curial law.

tenability of this view, I proceed to examine the implications of this decision for the scope of applicability of Part I. Turning to the pre-*INDTEL* understanding of 'express' and 'implied' exclusions, the Court accepted the respondent's contention that specification of a foreign curial law amounted to an *express exclusion* of Section 11 of the Indian Act.[41] Thus, the language of the arbitration clause according to the Court was sufficient to indicate exclusion of Part I. The most crucial limb of the Court's reasoning is however, its view on *INDTEL* and *Citation*. The Court distinguished both these decisions on the ground that in those cases "the parties had not chosen the law governing the arbitration procedure including the seat/venue of arbitration."[42] It follows from the above analysis of *Dozco India* that it was the express specification of a foreign curial law rather than specification of the seat of arbitration that proved decisive in that case. Further, it is also clear that *Dozco India* only addresses the issue of an 'express exclusion' i.e. by precluding the application of Part I of the Act by expressly specifying a foreign law. This decision consequently has no implications for the mode of 'implied exclusion' that was considered in *INDTEL* and *Citation*, both of which were, in my submission incorrectly decided.

The above analysis of judicial opinion on the scope of application of Part I points to several broad tendencies. While on the one hand courts have been imposing an unreasonably high burden for the exclusion of Part I, on the other, they have held that when the proper law of contract has been specified by parties, the proper law of the arbitration agreement could be presumed to be the same, in the absence of a contrary intention.[43] These opposing stands of the court are likely to work difficulties in the conduct of arbitral proceedings. The problem arises because the whole of Part I is not just curial law. Many provisions of Part I (Section 34, for instance) also govern the proper law of arbitration agreement.[44] Hence, when the proper law of the contract and proper law of the arbitration agreement are specified by parties as a foreign law and the curial law is not mentioned, it is not Part I in its entirety, but only those provisions thereof that constitute the *curial law* that would be applicable. In light of the close connection between the proper law of the arbitration agreement and the curial law and especially since boundaries between the two are blurred,[45] it is submitted that the above proposition will not only lead to judicial confusion but also create issues of non-compatibility between Part I of the Act and the applicable foreign law.

41. *Supra* note 36, ¶ 5.
42. *Id.* at ¶ 3.
43. Shin-Etsu Chemical Co. v. Aksh Optifibre Ltd., AIR 2005 SC 3766; Sara International Ltd. v. Arab Shipping Co. Ltd., OMP No. 325/2005 decided on 27.01.2009 (Delhi High Court).
44. Sumitomo Heavy Industries v. ONGC Ltd., AIR 1998 SC 825.
45. *Id.*

Hence, it is submitted that when the substantive law of the contract and the proper law of arbitration agreement are specified as being the same as the law governing the seat of arbitration, the curial law must be presumed to be the same and not Part I of the Act. While using the law governing the seat as curial law is justified by the fact that courts are likely to be more comfortable applying their own laws and using the proper law of contract or the proper law of arbitration agreement (when they are the same) as the curial law is supported by concerns of compatibility (as argued above), it is important to note that there is no such policy justification in favour of the applicability of Part I.

Conclusion

This paper responds to a critique of *Bhatia* by Ms. Vidhu Gupta in her article published in Vol. 5 of the *Nalsar Student Law Review*. While she explores several themes in her comprehensive critique, my response does not exhaust the host of arguments she mounts against *Bhatia*. My attempt has been to present a different perspective on some of the pertinent issues that she addresses in her piece.

While I am in complete agreement with Ms. Vidhu's view on the incorrectness of the ruling in *Bhatia*, it may be noted that our reasons significantly differed. Consequently, the first part of this paper, engaged with the careful analysis presented by Ms. Vidhu of the four-pronged reasoning in *Bhatia* that led the Court to its conclusion. Arguing that none of these four reasons stand scrutiny, it is additionally suggested that the ruling is not only *per incuriam* with Section 48(d) of the Act, but is also unjustified on grounds of policy. In the second Part, the focus was on gauging the extent to which Ms. Vidhu's analysis of post-*Bhatia* developments have been modified by judicial decisions after the publication of her article. Bringing out the contradictory stands adopted by the court as regards the applicability of Part I on the one hand and the presumption of proper law governing arbitration on the other, it is argued that post-*Bhatia* decisions have raised the threshold for exclusion of Part I to an unreasonable degree. While the latest Supreme Court decision in *Dozco India* attempts to set right the terminological confusion pioneered by *INDTEL*, I argue that the former dealt with an entirely different issue from *INDTEL* and *Citation*.

The questions considered in this paper are likely to cause considerable judicial perplexity in the days to come since the true import of the proposed amendments to Section 2(2) of the Act cannot but be determined on the basis of the relevant provisions in the legislation as it exists today. However, the broader issue of the Indian legal regime governing judicial intervention in international commercial

arbitrations is plagued by several related questions that beg exploration in greater detail - whether the rule applicability of Part I laid down in *Bhatia* violates the requirement of territorial nexus under Article 245 of the Constitution - a theme Ms. Vidhu repeatedly revisits, the desirability of separate legislative regimes governing domestic and international arbitrations, and finally, the potential response of the international business community to the adventurist stance of the Indian judiciary, to list a few.