

# STRETCHING THE LIMITS OF STATUTORY INTERPRETATION: CRITICAL REVIEW OF *BHATIA INTERNATIONAL V. BULK TRADING*

Vidhu Gupta\*

## Abstract

*Bhatia International v. Bulk Trading* is one of those rare judgments which in one single stroke managed to completely change the face of a legislation, in this case the Indian Arbitration Law. Eight years later, the repercussions of the Bhatia Case are still being felt. It is because of this, that this researcher chose to analyze the Bhatia Case through the lens of statutory interpretation tools employed by the judiciary in order to determine as to how defensible the Court's interpretation of the text of the Indian Arbitration Act of 1996 was as well as to predict the impact of the judgment on subsequent interpretations of the Act.

## I. INTRODUCTION

Arbitration has become the preferred mode for dispute resolution because of various advantages offered by it like simple and speedy procedure, low cost, confidentiality, etc. Initially, arbitration in India was governed by the Indian Arbitration Act, 1940<sup>1</sup> but because of numerous flaws within the Act, courts started intervening in arbitral proceedings defeating the primary purpose for undertaking arbitration proceedings in the first place. Thus, in 1996, India enacted its new Arbitration and Conciliation Act, 1996<sup>2</sup> to remedy the faults of the 1940 Act.

The 1996 Act was mainly based on the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules 1976. It had four parts:

- A. Part I deals with domestic arbitrations where the seat of arbitration is in India;
- B. Part II with enforcement of New York and Geneva Convention awards in India;
- C. Part III with Conciliation; and
- D. Finally, Part IV deals with certain supplementary provisions.

But, this scheme of the Act has been drastically changed due to judicial innovation by the Supreme Court starting from the case of *Bhatia International v. Bulk Trading*<sup>3</sup> hereinafter called the *Bhatia Case*. In this case, the Hon'ble Court

\* Student, V Year, B.A. LL.B. (Hons.), NALSAR University of Law, Hyderabad.

<sup>1</sup> Hereinafter referred to as the 1940 Act.

<sup>2</sup> Hereinafter referred to as the 1996 Act.

<sup>3</sup> (2002) 4 SCC 105.

creatively interpreted the Act to extend the application of provisions of Part I to foreign arbitrations<sup>4</sup> also with disastrous consequences as subsequent case law continues to demonstrate.

The author attempts to understand the evolution of the Indian Arbitration Law by analyzing the *Bhatia Case* through the lens of statutory interpretation tools employed by the judiciary and impact of the judgment on subsequent interpretations of the 1996 Act. This research paper has been divided into six parts. Part I introduces the concept behind the paper while Part II describes the Apex Court's decision in *Bhatia Case* in detail. In Part III, the author goes on to analyze as to whether the so called 'inevitable' consequences, to avoid which the narrow interpretation of Section 2(2) was rejected by the Court, were in fact possible or were they merely a story spun by the Court in order to justify its judicial lawmaking. Part IV presents author's opinion on how defensible was Court's interpretation of the text of the Statute. In Part V, the author discusses the consequences of the *Bhatia Case* by scrutinizing subsequent judgments and finally, presents the conclusions in Part VI of the research paper.

## II. BHATIA INTERNATIONAL V. BULK TRADING

**FACTS:** The parties to a contract containing arbitration clause resorted to arbitration in accordance with the rules of International Chamber of Commerce to be conducted in Paris. The respondent in the case (foreign party) wanted to ensure that in the event of a favourable award it would be able to recover its claim from the appellant (Indian party). So the respondent applied to the District Judge of Indore under Section 9 of the Arbitration Act asking for certain interim measures to be taken so as to secure the property of the Indian party situated in India. The Indian party contended that the application under Section 9, Part I of the Act was not maintainable because Section 2(2) of the Act<sup>5</sup> limits the applicability of the whole of Part I of the Act to only those arbitrations which take place in India.

The issue that then arose before the Court was as to whether Part I of the Act, including Section 9, applied to even those arbitrations which took place outside India or not. The High Court rejected the appellant's contention who then approached the Supreme Court.

**TWO POSSIBLE APPROACHES:** This same issue had previously come for resolution before a number of Indian High Courts and all of them had basically taken two

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<sup>4</sup> *Infra* n. 23.

<sup>5</sup> Section 2(2), Arbitration Act, 1996: "This Part shall apply where the place of arbitration is in India."

widely divergent lines of reasoning. One set of High Courts<sup>6</sup> took the view that the legislative intent was clearly to limit the scope of provisions of Part I to domestic arbitrations only and especially not to extend the operation of Section 9 to arbitrations taking place out of India since the main objective of the whole Act itself was to minimize judicial intervention in arbitration proceedings. According to these Courts, such a conclusion was further supported by the fact that firstly, the Legislature had deliberately departed from the wording of Article 1(2) in the UNCITRAL Model Law<sup>7</sup> despite having incorporated almost all of the rest of the provisions of the Model Law verbatim in the 1996 Act and secondly, because of the language of various provisions of the 1996 Act itself. Section 2(2) provides that Part I shall apply where the place of arbitration is in India which was interpreted by this set of High Courts to imply that Part I does not apply when place of arbitration is not in India. Thus, the High Courts applied the Golden Rule of Interpretation<sup>8</sup> in order to reach its conclusion by adding the word 'only' to the text of Section 2(2).<sup>9</sup> The judgments of these High Courts adopted a narrow interpretation of the Act and even went so far as to say that even if parties suffered hardship and were left remediless because of such a construction being given still it was for the Legislature to amend the Statute and the Court could not do anything because the language of the statute was plain and unambiguous.<sup>10</sup> Such an approach<sup>11</sup> is an exemplification of the classic disciplinarian approach<sup>12</sup> as defined by Jane S Schacter in her famous article titled *Metadecocracy: The Changing Structure of Legitimacy in Statutory Interpretation*.<sup>13</sup>

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6 *Marriott International Inc. v. Ansal Hotels Ltd.*, AIR 2000 Del 377; *East Coast Shipping Ltd v. M.J. Scrap Pvt. Ltd.*, 1997 (3) ICC 429 (Cal); *Keventer Agro Ltd v Seagram Company Ltd.*, Civil Appeals No. 1125 and 1126 in two unreported orders (APO 490 of 1997 and C.S. No. 592/97) dated 27 January 1998 and 23 April 1998, Calcutta High Court.

7 Article 1(2), UNCITRAL Model Law: "The provisions of this Law, except articles 8, 9, 32, and 36, apply only if the place of arbitration is in the territory of this State." where Article 9 of the UNCITRAL Model Law permits a party to request a Court for interim measure even if the arbitration is not in the territory of the State.

8 According to the Golden Rule of Interpretation if the literal or dictionary meaning of the words of a statute leads to an absurdity then the Court can alter the meaning of the provision by adding or removing certain word

9 *Supra* n. 5.

10 *Marriott International Inc. v Ansal Hotels Ltd.*, AIR 2000 Del 377 at p. 390, para 34.

11 It is to be noted by the reader that the Court may be adopting the strict or narrow interpretation of the statute even while using the Golden Rule of Interpretation or the Mischief Rule of Interpretation as long as the final consequence of using either of these rules is to limit the scope of application of these provisions. Similarly, literal rule of interpretation may sometimes be adopted to give an expansive interpretation of the Statute.

12 According to Schacter, disciplinarian approach refers to the attitude of the judiciary to limit itself to strict or narrow interpretation of the statutory text and not read laws in an expansive manner beyond what the bare text of the provision dictates because of its belief, like the essentialist school, that it is the exclusive domain of the Legislature to amend the Statute and no one else.

13 Jane S Schacter, "Metadecocracy: The Changing Structure of Legitimacy in Statutory Interpretation", 108 Harv L. Rev. 593-663 (1995)

But the other set of High Court judgments<sup>14</sup> gave a completely opposite interpretation of the Act. They read Sections 2(2)<sup>15</sup> and 2(5)<sup>16</sup> together and stated that the use of phrases like 'all arbitrations' and 'all proceedings' in the latter indicated Legislature's intention that Part I should extend to all arbitrations even those that were conducted outside India. This set of High Courts went on to conclude that the conflict that ostensibly existed between the two provisions could be resolved by application of the Doctrine of Harmonious Construction<sup>17</sup> according to which Section 2(2) would be interpreted as being inclusive and not exhaustive in nature. Hence, Part I provisions were made applicable even to foreign arbitrations. The approach adopted by these latter set of judgments is illustrative of the complementarian approach<sup>18</sup> under the metademocratic paradigm, which is the theoretical opposite of the disciplinarian approach.<sup>19</sup>

**RATIO DECIDENDI:** The Hon'ble Supreme Court finally settled the debate on the issue by following the latter of the above two approaches. A three judge bench unanimously held that all provisions of Part I, including Section 9, apply to all arbitrations irrespective of whether they took place inside India or outside. The Court further held that while in the case of 'domestic arbitrations',<sup>20</sup> provisions of Part I compulsorily apply; in 'foreign arbitrations',<sup>21</sup> Part I applies only in those cases where the parties have not expressly or impliedly excluded the same.

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14 *Dominant Offset Pvt. Ltd. v. Adamovske Strojiny A.S.*, 1997 (2) Arb. LR 335, *Marnot International v. Ansal Hotels*, 1999 (82) DLT 137 and *Suzuki Motor Corporation v. Union of India*, 1997(2) Arb. L.R. 477 (Del); *Olex Forcas Ltd. vs. Skoda Export Co. Ltd.*, AIR 2000 Delhi 161.

15 *Supra* n. 5.

16 Section 2(5), Arbitration Act, 1996: "Subject to the provisions of sub-section (4), and save in so far as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto."

17 According to the Doctrine of Harmonious Construction, two ostensibly conflicting provisions of the same statute should be interpreted in a manner so as to reconcile their apparent contradiction in accordance with the intention of the Legislature.

18 According to Schacter, under the complementarian approach Courts perceive themselves to be an extension of the Legislature and thus, judges have the legitimate power to interpret provisions in a manner which might not be strictly obvious from the bare text of the statute. This approach accepts the fact that it is impossible for the Legislature to have envisaged every possible situation that might come under the Act and believes it to be acceptable if the judiciary then acts as 'finishers, refiners and polishers of legislation' while giving a decision keeping in mind the peculiar facts and circumstances of the case.

19 *Supra* n. 13.

20 Due to lack of more precise terminology, the phrase 'domestic arbitrations' will be hereinafter used to refer to arbitrations that take place within India irrespective of the nationality of the parties. Note that this term is distinct from 'domestic award' which has been defined by Section 2(7) as an arbitral award made under Part I of the Act.

21 Due to lack of more precise terminology, the phrase 'foreign arbitrations' will be hereinafter used to refer to arbitrations that take place outside India irrespective of the nationality of the parties. This is distinct from foreign award which has been defined under Sections 44 and 53 of the Act.

In order to reach this conclusion, Supreme Court carried out a detailed statutory interpretative analysis and the paramount reason which guided the Court in this exercise was its conviction that certain disastrous consequences would 'inevitably' follow if the former of the above two stated viewpoints were to be accepted. The author has hereinafter discussed these consequences below in order to determine as to whether these 'consequences' would have in fact actually occurred if the Court had adopted the narrow interpretation of the Statute or not.

### III. ALLEGED 'INEVITABLE' CONSEQUENCES.

- a) The Court said that a grave lacuna would be left in the Act as neither Part I nor Part II would apply to arbitrations held in a non-convention country<sup>22</sup> and thus, there would be no law in India governing such arbitrations.<sup>23</sup>

It is true that if Part I is restricted only to domestic arbitrations then there would be no law in India governing arbitrations in non-convention country. But the Court failed to satisfactorily explain its devout belief as to why the Indian Arbitration Act should cover such arbitrations also.<sup>24</sup> The only reason that it gave to support its stance was that Section 2(1)(f) of the Act defines international commercial arbitrations in a very expansive manner as including all the arbitrations taking place outside India. The Court interpreted this as including even those arbitrations which took place in a non-convention country. The Court then went on to state that since the said Act nowhere explicitly states that its provisions do not apply to arbitrations outside India and since Part II was limited to governing arbitrations in convention countries only, therefore Part I must then automatically be assumed to extend to covering arbitrations taking place outside India in a non-convention country.

The Court thus used the literal method of interpretation while interpreting Section 2(1)(f) by restricting itself only to the bare text of the Statute refusing to add or subtract any words or construe any meaning which was not explicitly stated. It was by adopting this technique that the Court reached the conclusion that Part I of the Act was intended to be applied even to foreign arbitrations. By giving such an interpretation the Court has effectively made the Act extraterritorial in operation through judicial lawmaking since henceforth, provisions like appointment of arbitrators, termination of the mandate of the arbitrators, etc., all of which involve some sort of judicial intervention, would be applicable to proceedings that are not

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22 The phrase 'non-convention country' refers to a country which is not a signatory either to the New York Convention or to the Geneva Convention.

23 (2002) 4 SCC 105 at p. 115, para 14.

24 (2002) 4 SCC 105 at p. 115, para 16; The Court stated, "It is not possible to accept the submission that the said Act made no provision for international commercial arbitrations which take place in a non-convention country."

taking place on Indian soil. Even Part II of the 1996 Act does not attempt to control foreign arbitrations and instead is only concerned with recognition and enforcement of foreign awards, delivered in pursuance of foreign arbitrations taking place in convention countries, within the territorial limits of India. Moreover, Parliament could not have intended to apply Part I, as a whole, to foreign arbitrations because as a general rule the Parliament is authorized to make laws to be operational only within the territory of India since the Constitution itself does not have extra-territorial operation.<sup>25</sup>

Thus, it is this author's submission, that application of the Golden Rule of Interpretation would have been much more appropriate because then the Court could have avoided the above mentioned absurd consequences.

- b) It would lead to an anomalous situation since even though Part I would apply to Jammu and Kashmir in all international commercial arbitrations including those taking place outside India but the same won't be applicable in the rest of India if the arbitration takes place out of India.<sup>26</sup>

The Court reached this conclusion by interpreting the Proviso to Section 1(2) of the Act<sup>27</sup> as an exception to the main provision. The Court stated that while according to the main provision, the Act as a whole is applicable throughout the territory of India but the proviso is an exception to this general rule and therefore in the State of Jammu and Kashmir ("J&K"), the Act (including Part I) shall apply to *all* international commercial arbitrations including those happening outside India. The Court justified this interpretation by saying that since the Legislature has not explicitly stated that the international commercial arbitrations in the Proviso refers to only those that take place within the J&K and since it is the normal rule of interpretation that the ouster of jurisdiction must be made explicit and cannot implied; therefore Part I of the Act will apply to all international commercial arbitration whether they are happening inside or outside India. The Court further extended this line of logic by stating that if the narrow interpretation of Section 2(2)<sup>28</sup> is adopted and applicability of Part I is restricted to only those arbitrations that take place within India then it will result in an anomalous situation with different rules being applicable in the J&K and in the rest of India.<sup>29</sup> In order to avoid this so called

25 Article 245(1), Constitution of India. Extent of Laws made by the Parliament and by the Legislature of the States – Subject to the provisions of the Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State."

26 (2002) 4 SCC 105 at p. 115, para 14.

27 Section 1(2), Arbitration Act, 1996: "It extends to the whole of India.

*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."*

28 *Supra* n. 5.

29 (2002) 4 SCC 105 at p. 115, para 17.

'anomalous situation' the Court said that the provisions should be harmoniously construed. Hence, Section 2(2) were read by the Court as being merely inclusive and clarificatory in nature and not exclusionary as the narrow approach suggested.

This is an illustration of application of the Mischief Rule of Interpretation<sup>30</sup> where the Court is reading the provisions in accordance with what it perceives to be the object of the Act. But, it is humbly submitted that the Court has adopted a circular reasoning which is faulty because the Court itself construed the Proviso as being an exception to the general norm so obviously, no anomalous situation occurs if in the rest of India the general rule, of Part I being limited only to domestic arbitrations, is followed. Moreover, the Court has misunderstood the entire purpose behind the Proviso to Section 1(2) which is evident if one looks at the legal situation prevalent in the J&K which prompted the Legislature to include the proviso in the enactment in the first place as well as the clear text of the proviso. The true purpose behind the Proviso was not to extend Part I provisions to international commercial arbitration taking place outside India, as the Court wrongly assumes the provision does, but in fact to limit the application of Part I in J&K to only international commercial arbitrations and exclude the applicability of the same to domestic arbitrations. This is crystal clear from the fact that the Legislature has used the phrase 'only in so far' which the Court has conveniently ignored. The text becomes clear if it is read in the following manner: "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"

The phrase 'only in so far' qualifies international commercial arbitrations and is evidently restrictive in import and nature instead of being expansive. This alternative interpretation is also supported by the *raison d'être* behind having the provision in the first place. J&K has a special position under the Indian Constitution. Article 370 of the Constitution requires consultation with the State Government before certain laws are made applicable to the State of J&K. Prior to enactment of the 1996 Act, the 1940 Act governed domestic arbitration the whole of India, except in J&K which was governed by the Jammu and Kashmir Arbitration Act, 1946. But, with respect to foreign awards, The Foreign Awards (Recognition and Enforcement) Act, 1961 was made applicable to the whole of India, including J&K. Thus the law governing domestic arbitration in J&K was the Jammu and Kashmir Arbitration Act, while the law governing international commercial arbitration in that State was the 1961 Act. Parliament, by enacting the 1996 Act repealed the 1940 Act and the Foreign Awards (Recognition and Enforcement) Act, 1961 but not the Jammu and

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<sup>30</sup> The Mischief Rule of interpretation also known as the Heydon's Rule of Interpretation states that a provision must be interpreted according to the objective of the Statute.

Kashmir Arbitration Act. It could not have legally done so because it did not have legislative competence to do so. The 1996 Act, therefore, did not cover domestic arbitrations for the State of Jammu and Kashmir, but covered international commercial arbitration.<sup>31</sup> Thus, it is this author's opinion that the Supreme Court erroneously relied on Proviso to Section 1(2) for holding that Part I of the 1996 Act applied outside India.

- c) Giving narrow meaning to Section 2(2), will lead to a conflict between Section 2(2) and Section 1. The only way to make harmonious construction is to hold that Part I applies to arbitrations held outside India.<sup>32</sup>

Section 1 states that the Act extends to the whole of India while Section 2(2) states that Part I of the Act shall apply only when the place of arbitration is in India. Thus, the Court interpreted Section 1 as meaning that the Act, including Part I, will apply throughout the territory of India even when place of arbitration is outside India.

It is humbly submitted that the Court in this instance also read an apparent conflict in a place where none existed because Section 1 is in that segment of the Act that bears the title 'Preliminary' and governs all the four Parts of the Act. In other words it is a general provision whereas Section 2(2) is in Part I and is clearly meant to be a specific provision governing Part I exclusively. Thus, the Court reached its erroneous conclusion by ignoring the basic scheme of the Act.

- d) Leave a party remediless in all those cases when arbitration takes place out of India since then the party would not be able to apply for interim relief in India even though the properties and assets are in India.<sup>33</sup>

This last of the four reasons that the Court gave for interpreting the Statute the way it did is in fact the most unassailable of the lot. Interim measures of protection<sup>34</sup> have an extremely important role to play in arbitration proceedings especially in international arbitrations. These interim measures have several positive effects like compelling parties to behave in a manner conducive to the success of the proceedings, preserving the rights of the parties, ensuring effective implementation of the final arbitral award etc. In fact, very often if the appropriate interim measure

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31 OP Malhotra and Indu Malhotra, *THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION*, 2nd ed. 2006, pp 50, 65

32 (2002) 4 SCC 105 at p. 115, para 14

33 *Ibid.*

34 Interim Measures of protection can be defined as any temporary measure ordered by judicial authority pending the issuance of the award by which the dispute is finally decided. Some common types of interim measures of protection ordered by the Courts include attachment, injunction, payment of security for costs, etc.

is not issued then even a favourable final award can become meaningless. For example- without an interim measure of injunction having been issued, a party can remove goods or assets from a jurisdiction, hide or destroy evidence, or sell assets. Thus, failure to protect the property involved in the dispute can prove disastrous for a party such that very often there may not be any money left for the successful party to satisfy his claim with after getting a favourable award.<sup>35</sup> The possibility of a party being unable to take these steps greatly reduces the efficacy of arbitration proceedings. This fact has been recognized by most countries and most international conventions including UNCITRAL Model Law allow extraterritorial operation of domestic arbitration law with respect of interim measures of protection and national legislations have conferred the national Courts with the power to order interim measures of relief even in case of foreign arbitrations.

*Legislative Intention Versus Object of the Act:*

From the above discussion it is clear that though the Court gave four main consequences, to avoid which it rejected the narrow interpretation of Section 2(2), only the last of those four was in fact a realistic concern to be raised. Grave injustice would have been caused to the parties if the Supreme Court had refused to grant interim measures of protection to the parties. In that respect at least, the *Bhatia Case's* judgment was extremely desirable.

But, the fact remains that the decision of the Supreme Court to extend the application of Section 9 to foreign arbitrations was very possibly against the intention of the Legislature. This can be supported by two very important facts – firstly, the Indian Legislature deliberately deviated from the language adopted by the UNCITRAL Model Law which explicitly allows a party to request a Court for interim measure even if the arbitration is not in the territory of the State<sup>36</sup> and secondly, the 176<sup>th</sup> Law Commission of India's Report<sup>37</sup> which was issued an year before the *Bhatia International Case* reviewing the series of contrary High Court decisions and other material available on the issue and stated that,

“Section 2(2) confined Part I (including sections 8, 9, 35 and 36) only to arbitrations where the place of arbitration is in India...this provision has caused serious prejudice to an aggrieved party in as much as these provisions do not apply to international arbitrations where the place of

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35 POSSIBLE FUTURE WORK IN THE AREA OF INTERNATIONAL COMMERCIAL ARBITRATION: NOTE BY SECRETARIAT, UN GAOR UNCITRAL, 32nd Session, para 117, UN Doc. A/ CN.9/469(1999).

36 Article 1(2), UNCITRAL Model Law: “The provisions of this Law, except articles 8, 9, 32, and 36, apply only if the place of arbitration is in the territory of this State.” where Article 9 of the UNCITRAL Model Law permits a party to request a Court for interim measure even if the arbitration is not in the territory of the State.

37 Law Commission of India, THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2001, 176<sup>th</sup> REPORT.

arbitration is outside India, or where the seat of arbitration is not defined in the arbitration agreement.”

The Law Commission then went on to recommend that Section 2(2) should be suitably amended so as to provisions of Sections 9 and 27 to apply to international arbitrations where the place of arbitration is either outside India or is not specified in the agreement. This is a clear indication that as far as the Law Commission of India was concerned the Part I, especially Section 9, was applicable to only those arbitrations that took place in India.<sup>38</sup>

The question that then needs to be answered is as to whether the Court was justified in giving the decision that it gave, no matter how desirable, in light of the fact that it was against the intention of the Legislature.

It is submitted that the Court was right in extending the applicability of Section 9 to foreign arbitrations also because even though the judgment might be against the intention of the Legislature it is actually in consonance with the overarching objective behind the Act which is to provide a fair and just arbitration procedure. While it is true that one of the main objects behind the Act was to minimize judicial intervention but the same cannot be achieved at the cost of justice and fairness. Non-provision of interim measures can often result in making the whole arbitration process meaningless thereby defeating the whole purpose of opting for arbitration in the first place.

As has been mentioned before, certain High Courts were of the view that it was for the Legislature to amend the Act and it was not Court's mandate to go beyond the Legislature's intention as is evidenced by the text of the Statute. But in this author's opinion, the Supreme Court was right to opt for an activist complementarian approach instead of restricting itself to a more conservative disciplinarian approach. If the Court had adopted the latter of the two approaches then the parties would have been left remediless and Court would then have failed in its task of doing justice. Instead the Court rightly decided to interpret the provisions creatively in order to save the whole arbitration process. But, while this author agrees with the Court's decision to extend the applicability of Section 9 to all foreign arbitrations; the Court did not merely limit itself to doing that but instead went much beyond that. It also:

- a) Extended the applicability of all the provisions of Part I of the Act to all arbitrations including those taking place outside India.

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<sup>38</sup> Unfortunately, the author was unable to get access to the Parliamentary Debates on the Act in question since the Act was first passed as an Ordinance and thereafter legislated directly without any intensive deliberations being made in the Parliament on the statutory provisions.

- b) Conferred the status of being a 'domestic award' even on all those awards that had been rendered by arbitrations that had taken place in non-convention countries.

The Court reached these conclusions by carrying out a detailed interpretative analysis of the statutory provisions of the Act and creatively employing the various canons of construction. In the next part of the project the author will attempt to analyze as to whether the provisions were in fact capable of being interpreted in a manner which allowed the Court to justifiably reach the above two stated conclusions or in other words as to how defensible was Court's interpretation of the text of the Statute.

#### **IV. COURT'S INTERPRETATION OF THE TEXT: DEFENSIBLE OR INDEFENSIBLE?**

##### **A. NON-CONVENTION COUNTRY AND DOMESTIC AWARD**

The major reason (which has already been discussed above) that the Court gave for extending Part I to foreign arbitrations was that a grave lacuna would be left in the Act as neither Part I nor Part II would apply to arbitrations held in a non-convention country and thus, there would be no law in India governing such arbitrations. The author has already given her reasons for disagreeing with the Court on this issue. But, the Court gave an additional reason for reaching its conclusion. The Court interpreted Section 2(7)<sup>39</sup> which defines 'domestic award' as an arbitral award made under Part I and said that since any award which is passed in an arbitration happening in India would automatically be a domestic award there was then no need for the Legislature to explicitly define such an award as a 'domestic' award unless its intention was to also include those awards within the scope of the term 'domestic award' which would otherwise not be covered by this definition. The Court then concluded that the phrase 'domestic award' included all awards rendered by an arbitration which took place in a non-convention country since such an award would not otherwise be considered to be a domestic award but for the definition in Section 2(7). As a corollary to this, the Court stated, that it was obvious that all arbitrations that took place in non-convention countries were also covered by Part I.<sup>40</sup>

The Court thus liberally interpreted the provision thereby greatly expanding its scope by including that by implication which was otherwise not explicit in the bare text of the Statute. This approach was in direct contradiction to the one adopted by the Court while interpreting the term 'international commercial arbitration' wherein the Court had interpreted the provision extremely strictly to once again

39 Section 2(7), 1996 Act: "An arbitral award made under this Part shall be considered as a domestic award."

40 (2002) 4 SCC 105 at 115, para 23.

reach the same conclusion that Part I is applicable to all foreign arbitrations.

Moreover, it is this author's submission that in fact the above interpretation of Section 2(7) is actually based on the fundamentally faulty premise of the Court that the Legislature intended to apply Part I to arbitrations which are conducted in a non-convention country and in fact betrays Court's ignorance of the objects and reasons which prompted the Legislature to formulate Part II in the manner that it had. In India only those foreign judgments which are rendered by a Court of a country that reciprocally enforces judgments of Indian Courts based on principles of comity are enforceable.<sup>41</sup> As far as an award rendered in a foreign country is concerned, since such an award does not even have the status of being a judgment of the foreign Court and is merely based on the contract to arbitrate between the parties, it is, as a general rule, *per se* unenforceable and is instead merely treated as evidence in fresh legal proceedings that have to be initiated right from scratch in India.<sup>42</sup> This was problematic because the whole purpose behind opting for arbitration was lost due to the time and money that the winning party was then forced to spend in getting the foreign award enforced. It was to overcome this situation prevailing in almost every country in the world that the New York Convention, 1958 was formulated so that the countries could multilaterally agree to recognize and enforce the awards rendered in the countries that adhered to the Convention thereby bypassing the lengthy enforcement mechanism. India is part to the Convention and Part II of the 1996 Act was formulated in order to comply with India's obligations under the New York Convention. Under Part II all valid<sup>43</sup> arbitral awards that are rendered in a country which is party to the Convention are automatically treated as court decrees or in other words once the Court finds that the arbitral award confirms to the requirements of Section 48 of the Act, the award is then deemed to be a decree of that Court. In light of this background, it is quite evident that Legislature could not have intended to accord the status of 'domestic awards' on those awards which had been rendered in arbitrations conducted in a non-convention country. Because otherwise the benefit of speedier enforcement of an award by treating them as a decree of Indian Court would be extended to all countries indiscriminately making the reciprocity reservation made by India under New York Convention

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41 OP Malhotra and Indu Malhotra, *THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION*, 2nd ed. 2006, pp. 1349-1353; Refer to Sections 13 and 14 of the CPC for more detail

42 Since the award is based on the contract to arbitrate between the parties it could be enforced in India under the Law of Contracts provided that the claimant is able to prove that i) there was an arbitration agreement; ii) the arbitration was conducted in accordance with that agreement; iii) the award was made pursuant to the provisions of the agreement and is valid according to the *lex fori* of the place where the arbitration was conducted and where the award was made; iv) the award is final in the place where the award was given.

43 Validity is a prerequisite for transforming the arbitral award into a court-ordered decree. To be valid, the award must meet the conditions specified in Article V of the New York Convention, which corresponds to Section 48 of the 1996 Act.

ineffective as well as the whole purpose of having a separate Part II enforcing certain specific foreign awards obsolete.

### B. CONFLICT OF SECTION 2(2) WITH SECTIONS 2(4) AND 2(5)

According to the Court, if the narrow interpretation of Section 2(2)<sup>44</sup> was taken then it would conflict with sub-sections (4)<sup>45</sup> and (5)<sup>46</sup> of Section 2. The Court thereafter let the expansive phrases used in Sections 2(4) and 2(5) like 'every arbitration', 'all arbitrations and all proceedings relating thereto' colour the meaning of Section 2(2) to hold that the latter was inclusive and clarificatory in nature.

Appellants had submitted that the phrases necessarily refer to only those arbitrations that take place in India because otherwise Section 2(2) would become redundant and/or otiose and hence by application of Golden Rule of Statutory Interpretation should be read as 'every arbitration that takes place in India' and 'all arbitrations and all proceedings relating thereto in India' but the Court rejected this contention by stating that acceptance of such a contention would necessitate addition of the phrase 'Subject to provisions of sub-section (2)' to Sections 2(4) and 2(5) which the Legislature had purposely not added to the Sections.

Moreover, the Court looked at the text of Section 2(2) which states, "This Part shall apply where the place of arbitration is in India." And said that the Section is not stating that Part I will not apply if place of arbitration is outside India nor is it stating that Part I shall apply 'only' when place of arbitration is in India, as had been provided in Article 1(2) of the UNCITRAL Model Law.<sup>47</sup> (It is interesting to note here that the Court had previously refused to lend much credence to appellant's submission that the fact that Indian Arbitration Act, 1996 had deviated from the language of UNCITRAL Model Law by not including the exclusionary clause and thereby explicitly stating that a party is permitted to request a Court for interim measure even if the arbitration is not in the territory of the State and this denoted the Legislature's intention to not confer the same power on Indian Courts on the ground that the deviation was not determinative of Legislature's intention.) But, now because it suited its purpose the Court is using exactly the same argument, with respect to the same Article but in a slightly different form to determine Legislature's

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44 Section 2(2), 1996 Act: This Part shall apply where the place of arbitration is in India

45 Section 2(4), 1996 Act: This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder.

46 Section 2(5), 1996 Act: Subject to the provisions of sub-section (4), and save in so far as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto.

47 Article 1(2), UNCITRAL Model Law: "The provisions of this Law, except articles 8, 9, 32, and 36, apply only if the place of arbitration is in the territory of this State."

intention.) The Court ultimately concluded that Section 2(2) was incorporated in order to make provisions of Part I compulsorily applicable to all arbitrations that take place in India which basically means that parties to such arbitrations cannot agree to exclude the non-derogable provisions of Part I. But, that does not exclude application of Part I to arbitrations that are held outside India instead parties to such arbitration can agree to exclude application of even non-derogable provisions of India.

The Court reached this conclusion by emphasizing on the use of the phrase 'shall' and giving it its natural dictionary meaning i.e. the literal interpretation of Section 2(2) while simultaneously applying the Mischief's Rule by giving due weightage to the object of the Act i.e. not to leave parties remediless.

In the author's opinion the use of the word 'shall' in Section 2(2) does make the Court's interpretation somewhat feasible. But, such an interpretation fails to interpret the Act as a whole harmoniously concentrating only on the text of Section 2(2). This is evident if one dwells on the consequences of adopting such an interpretation. As a normal rule, in arbitrations parties have the freedom to choose any system of law that they desire and usually, if nothing contrary is said then as a general rule the presumption is that the law of the place of arbitration will be the governing law.<sup>48</sup> But, with this interpretation, in any arbitration where the contract is silent on the aspect of arbitral law, then irrespective of the place or arbitration, Indian Arbitration Act will apply. This not only takes away the choice of the parties to arbitration to decide for themselves as to which system of arbitration law will apply but it also leads to an extraterritorial operation of the law by judicial innovation which could definitely not have been the intention of the Legislature. Moreover, it gives the Act extraterritorial operation and the reasons for such an interpretation being *per se* problematic.

### C. SECTION 9

The Court also interpreted the text of Section 9 in an extremely creative manner. Section 9 states,

"A part may, (i) before or (ii) during arbitral proceedings or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36 apply to a court for interim measures of protection."

In this situation, Section 36 is limited to enforcement of those awards which are rendered in domestic arbitrations only. The Court limited the application of the

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48 *Shreejee Traca (I) (P) Ltd. v. Paperline International Inc.*, (2003) 9 SCC 79.

phrase 'in accordance with Section 36' only to part (iii) and said that the phrase did in no way limit or narrow the scope of parts (i) and (ii) which would continue to include arbitral proceedings that did not render domestic awards i.e. foreign arbitrations.<sup>49</sup>

But, this interpretation has created an absurdity which arises from the fact that according to Court's interpretation under Section 9 in case of foreign arbitrations the Courts can issue interim measures of protection before and during pendency of foreign arbitral proceedings but not once a foreign award has been issued. Such a distinction is incomprehensible because logically the situation should be reversed considering that once the foreign awards has been rendered the respective rights of the party are more or less determined, reducing chances of the Court inadvertently adversely affecting the rights of either parties by granting interim measures of protection.

#### **D. SECTIONS 1(2) AND SECTIONS 2(1)(E)**

The Appellants had contended that the Court's interpretation of Part I applying to even arbitration taking place in non-convention countries was completely against the express provision of Section 1(2) and rendered the same completely redundant.<sup>50</sup> But, Supreme Court countered this by stating that Section 1(2) only states that the Act extends to the whole of India but does not say that it does not extend outside India. The Court applied the same logic to its interpretation of Section 2(1)(e)<sup>51</sup> which defines Court as one having jurisdiction over the subject matter of the arbitration. The Court said that since the Act does not expressly state that Courts in India will not have jurisdiction if an international commercial arbitration that takes place outside India and because ouster of jurisdiction has to be express and not implied therefore, Part I as a whole will apply to international commercial arbitrations being held out of India.<sup>52</sup>

Once again in its haste to make Part I applicable to foreign arbitrations, the Supreme Court ignored the fundamental point that the Constitution of India does not have extra-territorial operation and that it confers jurisdiction on Indian Courts i.e. limited territorially to India.<sup>53</sup> Thus, there was no need for the Legislature to

49 (2002) 4 SCC 105 at para 28.

50 (2002) 4 SCC 105 at para 17.

51 Section 2(1)(e), 1996 Act: "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having, jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

52 (2002) 4 SCC 105 at para 19 and 20.

53 See Articles 1(3), 133 and 136 of the Constitution of India and Section 20 of the Code of Civil Procedure, 1908.

expressly oust the jurisdiction of the Court since it had never been conferred on it in the first place.

#### **E. SECTIONS 28, 45 AND 54**

But, there were certain other reasons which the Court cited which did in fact support the conclusion that the Court came to that Part I provisions do in fact apply to all arbitrations that take place, even those outside India. The strongest amongst them is the text of Section 28 in Part I of the Act which deals with substantive law that is to govern the arbitral dispute and starts with the phrase, "Where the place of arbitration is situate in India...". Such a qualifier is in fact completely unnecessary if the provisions of Part I are in fact not extended to beyond India.<sup>54</sup> On the same lines, the opening words of both Section 45 and 54 which are situated in Part II of the Act are "Notwithstanding anything contained in Part I". Once again inclusion of such a non-obstante clause was completely unnecessary if Part I provisions are applicable to only domestic arbitrations. Hence, these three provisions lend lot of credibility to Supreme Court's interpretation.

Thus, there are arguments that both support and contradict Supreme Court's conclusions. But, by and large the Supreme Court's interpretation of the bare text of the Statute is quite feasible but only if it is looked at divorced from the consequences that do in fact inevitably follow from adopting such an interpretation as is made clear from the case-law discussion in Part V.

#### **V. CONSEQUENCES OF BHATIA INTERNATIONAL CASE**

No critique of any judgment can ever be complete, without including a detailed analysis of how the subsequent Courts have interpreted and applied the *ratio* laid down in the judgment under the scanner.

##### **A. SETTING ASIDE FOREIGN AWARDS**

Under the original scheme of the 1996 Act, there are two fundamental differences between a foreign award and a domestic award. Firstly, a domestic award is automatically conferred with the status of a Court decree unless otherwise challenged unlike a foreign award which requires a separate application for recognition and enforcement to be filed before the domestic Court. Secondly, while a domestic award can be set aside by Indian Courts under Section 34, there is no analogous provision under Part II of the Act to set aside foreign awards. According to the Act, the Courts only have power to either enforce the foreign award or not, but they cannot set it aside. But, this distinction has now been done away by the

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54 (2002) 4 SCC 105 at para 25.

55 AIR 2008 SC 1061.

Supreme Court in its recent decision 2008 decision in *Venture Global Engineering v. Satyam Computer Services*.<sup>55</sup> In this case, the appellant (foreign company) challenged the foreign award which had been rendered in London under the Rules of London Court of International Arbitration in favour of the respondent (Indian company). The respondent had sought to enforce this award in the USA. But, the appellant filed a civil suit in an Indian District Court seeking to set aside the award on the ground of violation of Section 34<sup>56</sup> in Part I of the Act. The contentions that were raised against this were that the application was not maintainable since there is no provision to set aside an award under Part II and that in view of Section 48<sup>57</sup> in Part II of the Act, Section 34 will automatically stand excluded. Secondly, it was contended that foreign award could not be tested on merits on ground of whether it violates the substantive law of India.

The Court relied on *Bhatia* and effectively made explicit what was otherwise implicit in *Bhatia* by holding that even though there was no provision in Part II of the Act providing for challenge to a foreign award, it could not be construed that the Legislature did not intend to provide the same since there was no need for the Legislature to repeat what was already included in the 'general provisions of Part I' unless and until it wanted to include a contrary procedure. Moreover, Section 34 could not be deemed to have been excluded impliedly merely because of presence of Section 48 since the former provides for grounds on which an arbitral award can be set aside whereas the latter provides for conditions that have to be fulfilled before a foreign award can be enforced in India. Going further the Court held that a challenge to a foreign award in India would have to meet the expanded scope of public policy as laid down in the case of *ONGC v. Saw Pipes*<sup>58</sup> i.e. the award can be challenged on merits on ground of being violative of substantive law of India.<sup>59</sup>

- Created a new procedure for enforcement of foreign awards;
- Made Section 48 practically redundant;
- Exposed the foreign awards to a challenge on merits such that now all foreign awards which are to be enforced in India must first satisfy the requirements of Indian substantive law.

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56 Section 34, 1996 Act deals with application for setting aside the arbitral award.

57 Section 48, 1996 Act deals with conditions for enforcement of foreign awards.

58 [2003] 5 SCC 705.

59 It is humbly submitted that the judgment in *Venture Global* is *per incuriam* at least to the extent of testing the foreign awards on ground of being 'patently illegal' on the basis of what was provided in the *Saw Pipes* judgment because the Court ignored the fact that the *Saw Pipes* judgment is expressly limited to only domestic awards. The Court in *Saw Pipes Case* had clearly confined its expanded interpretation of public policy to domestic awards alone, in order to avoid falling foul of the *Renu Sagar Power Co v General Electric Co*, (1994) Supp SCC 644, judgment which had been given by a larger bench and had interpreted the expression 'public policy' to be made applicable to foreign awards narrowly. The Supreme Court in *Venture Global* did not notice this self-created limitation in *Saw Pipes*.

This is completely contrary to the whole object of the Arbitration Act, 1996 of minimizing judicial intervention and has greatly crippled India the potential of arbitration to be a viable method for dispute resolution for transactions involving Indian parties.

## **B. APPOINTMENT OF ARBITRATORS**

In *INDTEL Technical Services v. WS Atkins PLC*,<sup>60</sup> which was decided very recently on 25<sup>th</sup> August, 2008, INDTEL (an Indian Company) had entered into a Memorandum of Understanding with WS Atkins PLC (a foreign company). The MOU expressly designated English law as the substantive law that would govern the performance of the contract providing that "this Agreement, its construction, validity, and performance shall be governed by and constructed in accordance with the laws of England and Wales". A dispute arose between the parties and INDTEL filed an application under Section 11 of the Arbitration Act.<sup>61</sup> The question before the Court was whether this application was maintainable in view of the designation of English law and whether its decision in *Bhatia* could be extended to cover a situation of this sort.

The Supreme Court once again relied on *Bhatia* and categorically extended the same to even Section 11 in Part I of the Act. It is respectfully submitted that this judgment is erroneous in nature because even though it adheres to the *Bhatia* but it failed to take into account the effect of Supreme Court's judgment in *SBP & Co v. Patel Engineering*<sup>62</sup> which had held that the decision of the judge under Section 11 was judicial in nature and not merely administrative and also that the Court must first determine questions of validity of arbitration contract, mandate of the arbitrator, arbitrability of the subject matter of dispute, etc. before appointing an arbitrator. This obviously gave the Court extremely wide powers of intervention and now that the Supreme Court has extending applicability of Section 11 to arbitrations that take place outside India also the Court has in effect put a question mark over the efficacy of all arbitrations taking place outside India which have even a minimal nexus with India and has also assumed jurisdiction extra-territorially.

The Court rejected the respondent's contention that applicability of Section 11 was excluded by the designation of a specific system of law as the applicable law. The Court stated that what was required was not just the designation of a specific system of 'substantive' law, but of 'arbitration law'. In other words, unless the contract

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60 AIR 2009 SC 1132.

61 Section 11, Arbitration Act, 1996 provides for default procedure to be followed in order to appoint an arbitrator and also empowers the Court to appoint the arbitrator in case the parties are unable to decide on one by themselves.

62 (2005) 8 SCC 618

either explicitly excludes the applicability of the Indian Arbitration Act, or specifies that a foreign Arbitration Act as applicable, the Indian Act will be held to apply. But, it must be noted that in the *Bhatia International* case there was actually a specific foreign arbitration law i.e. Rules of ICC that had been made applicable to the arbitration in question but the Supreme Court still had gone into the question of whether Section 9 was in fact excluded by the ICC Rules or not. Thus, the law on the issue of whether all the provisions of Part I of the Indian Arbitration Act would stand excluded automatically if only another system of arbitration law is specified or whether it is also necessary to prove that the specific provision of Part I that the applicant tries to apply is explicitly excluded by a contrary provision in the arbitration system i.e. adopted or by a specific express agreement to the contrary, remains unclear.

But, what is evident is that *Bhatia International Case* and in turn *INDTEL Technical Services Case* have overturned the general presumption that had previously applied internationally in the case of all arbitration proceedings i.e. if no arbitral law is explicitly specified by the parties in the contract, then it will be presumed that the arbitral law of the place where arbitrations are going to be conducted will be made applicable. With the *Bhatia International Judgment* this presumption has been overturned and now if the arbitration contract is silent with respect of which arbitration law to apply automatically the Indian Arbitration will apply. This has greatly limited individual choice which is the touchstone of all arbitration proceedings.

Such absurd/ anomalous consequences which have been caused due to the application of the ratio in *Bhatia International* has forced the author to conclude that the Court through its interpretative gymnastics has stretching the statutory text up to its breaking point, thereby overshadowing even the good aspects of the judgment.

## VI. CONCLUSION

It has been eight years since the Supreme Court gave its decision in the case of *Bhatia International v. Bulk Trading* and despite its many fallacies it continues to remain the law of the land. Even though certain scattered attempts have been made by various judges at different points of time to limit the scope and impact of the judgment, the most notable amongst them being *Shreejee Traco (I) (P) Ltd. v. Paperline International Inc.*, but they still remain the exception with the general trend being to carve out a much wider role for the judiciary in the arbitration proceedings than was ever intended by the Legislature.

It must be noted that the text of the Section 2(2) of the Arbitration Act was very much capable of being interpreted both ways. It was because of this that the intention of the Legislature and object of the Act became all important. Both the

Supreme Court as well as the High Courts used different tools of statutory interpretation to attribute absolutely opposite intention to the Legislature. The Court in the *Bhatia case* took extreme liberties with the text of the Statute which it justified by stating that it was necessary to do so in order to avoid the disastrous consequences that would follow if the same was not done. But, the author has already exemplified as to how most of those 'inevitable' consequences were actually themselves a product of extremely creative reading of the statutory text, by ignoring what was actually stated and emphasizing on what was not.

However, it cannot and in fact must not be ignored that the Supreme Court undertook this basic exercise in the first place because of a very grave lacuna that existed in the Act – an omission so obvious that had the Legislature properly applied its mind while drafting the Statute such a situation need never have arisen before the Court in the first place. But, since the situation did in fact arise the Supreme Court was then left with the unenviable task to make a policy choice of whether it wanted to strictly construe the Statute and leave it to the Legislature to amend the Act or to instead liberally construe the Statute according to its overarching purpose with the ultimate aim to do justice.

The Supreme Court opted for the latter of the two approaches but unfortunately the Supreme Court in its zeal to do justice went completely overboard and ignored certain very fundamental principles which it should have kept in mind while interpreting the statute. In the process, Supreme Court completely overturned the basic fabric of the Arbitration Act and also stretched the language of the Statute up to the breaking point. Consequently, this has raised justified fears in the hearts of practitioners that India is once again retreating to the 'Dark-Age of Arbitration'. These fears have now come true with the Supreme Court's decisions in *Venture Global* and *INDTEL Technical Services* cases in both of which the judiciary has demonstrated its age-old mistrust for the arbitration process.