

Subject : Arbitration**Title : Supreme Court Decisions Under The Arbitration And Conciliation Act 1996 From Bhatia International To Venture Global Engineering - Are These In The Right Direction?****Author : Mr. Manendra Singh****Manendra Singh*****1. Introduction**

The topic deals with the Supreme Court's Decision in Bhatia International v. Bulk Trading S.A.,¹ (hereinafter referred as "Bhatia International") and Venture Global Engineering Company U.S.A. v. Satyam Computer Services,² (hereinafter referred as "Venture Global Engineering"). Broadly it aims at understanding, firstly, the ramifications of Bhatia International and Venture Global Engineering on the arbitration regime in India vis-à-vis Arbitration and Conciliation Act, 1996 (hereinafter referred as "ABC") with its overall impact on international commercial arbitration; secondly, with India's role in world arena as a subject of Convention on the Recognition and Enforcement of Foreign Arbitral Awards,³ (hereinafter referred as "New York Convention") vis-à-vis international law with a considerable focus on 'developing v developed spectrum'; and last but not the least, how effectively can a decision be not criticized though it has its binding authority by virtue of Article 141,⁴ of the Constitution of India with the possible solutions to the controversy.

2. What is ABC?

ABC tracks its enactment with the failure of Arbitration Act, 1940⁵ (hereinafter referred as "1940 Act") in dealing with international commercial disputes. The 1940 Act only governed domestic arbitration, limiting its applicability in dealing with the increasing international litigation. The expansion of economy in 1991 and the continuing trend of globalization, increasing technological advances, availability of information and transportation, increased the amount of domestic and international commerce activities and so the need of a statute to make the dispute resolution process commercially viable and reliable. Thus, with a view to ensure that the flow of foreign investment is not impaired, especially when domestic and foreign parties claimed that the delays and expenses incurred in adjudicatory proceedings were key barriers for parties to enter into contractual obligations in India,⁶ the Parliament, realised the importance of creating an arbitration system that would increase efficiency and attract foreign investors, and accordingly repealed the 1940 Act and brought ABC on statute book, aiming to provide a uniform regime for both domestic and international arbitration. It aimed to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, by taking into account the Model Law and Rules adopted by United Nations Commission on International Trade Law (hereinafter referred as "UNCITRAL") in 1985.⁷ The main objective of ABC was to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration and to minimise the supervisory role of courts in the arbitral process and to permit an arbitral Tribunal to use mediation, conciliation or other procedures during the arbitral proceedings in settlement of disputes, etc.⁸

A. Scheme of ABC

ABC IS divided into 3 parts:

- a. Part I of ABC governs both domestic and international commercial arbitration,⁹ and is applicable to arbitral proceedings and arbitral awards rendered in such proceedings where the place of arbitration is in India;
- b. Part II of ABC governs foreign arbitration agreements where the place of arbitration is outside India and also applies to the enforcement in India of New York Convention awards;
- c. The last part of ABC lists out provisions related to conciliation in India.

Thus ABC deals with the rules relating to both domestic and international arbitration. Domestic arbitration can be done for any type of dispute that is arbitrable under Indian law; whereas an international arbitration must satisfy the additional requirement of being a dispute arising out of a legal relationship defined as 'commercial' within Indian law.¹⁰ The Supreme Court has adopted the UNCITRAL interpretation,¹¹ of the term 'commercial'.¹² The Apex Court has reasoned that the purpose of ABC is to facilitate trade and provide a quick resolution and this requires a liberal construction of the term.¹³

• Duty Imposed upon Courts

One of the objectives of ABC was to minimise the supervisory role of courts in the arbitral process.¹⁴ It would not be a far-fetched conclusion to state that Parliament was conscious of the Court's capacity to intervene in the arbitral process, and that it accordingly restricted the power of the judiciary and allowed it to interfere only when provided in order to see that the power of judicial review is not abused.¹⁵ Keeping the same in mind, Section 5 of ABC provides the extent of judicial intervention in the following words :

"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."

ABC specifically provide for limited instances in domestic arbitration when a court can intervene prior to the making of an award by the arbitral tribunal. The Court can intervene only in the following ways: to stay legal proceedings and refer parties to arbitration,¹⁶ to grant interim measures,¹⁷ to appoint arbitrators in cases of conflict,¹⁸ to terminate the mandate of arbitrators in a limited set of circumstances and assist in taking evidence,¹⁹ and to have limited powers of staying a proceeding.²⁰ Part II of ABC contains similar provisions to limit judicial intervention in international arbitration. It expressly states that the court must refer the parties to arbitration upon the request of one of the parties unless the court finds the agreement is null and void, inoperable, or incapable of being performed.²¹

• Enforcement proceedings & power to set Aside Awards

Section 34 of ABC specifically deals with the power of Court to set aside an award on meeting certain grounds. The options available to challenge an award under ABC are much more limited than under the 1940 Act.²² It has been held by Supreme Court in *Bhatia International* that unlike the prior act which required the arbitral tribunal to file the award in court, ABC provide for legal finality of an award instantaneously unless a party challenges it under Section 34. However, it's a different case altogether that even after Parliament has made its intention clear, the Judiciary has not been reluctant to interfere when it deems so, be it a much criticised judgment of Apex Court in *Oil and Natural Gas Corporation Limited v SAW Pipes Limited*,²³ (hereinafter referred as "SAW Pipes") where it ruled that any domestic arbitral award found to contravene Indian statutory provisions could be set aside by Indian Courts for violating "public policy" ground provided under Section 34 of ABC.

3. What Does *Bhatia International* and *Venture Global Engineering* Say?

The Judgment of Apex Court in both *Bhatia International* and *Venture Global Engineering* revolves around

the issue of *lex loci arbitri* i.e. seat of arbitration.²⁴ Usually the law that governs arbitration and its procedure is known as *lex loci arbitri* or curial law. In international arbitration law, *lex loci arbitri* is the law of seat of the arbitration. It is a well accepted principle of law that the country of the seat of arbitration alone has jurisdiction to set aside an award. Thus, the *lex loci arbitri* Court would have the primary jurisdiction to set aside an arbitral award whereas any other non-seat court would only have secondary jurisdiction to only refuse the enforcement of award. This principle derives its validity from the well established doctrine of sovereignty in international law which says that authorities of one State can only give non-recognition to acts of other State's authorities and not deny the validity of their act.²⁵

However, at the same time a contradictory position also holds with respect to choice of parties to select an arbitral law of procedure other than the *lex loci arbitri*, i.e. there is some doubt as to whether they may exclude the mandatory procedural law of the forum. Article 1(2) of the UNCITRAL Rules states :

"These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail."

It has been argued that this section does not conclusively support the view that mandatory *lex loci arbitri* is binding upon international arbitrations. According to Shindler, there is nothing in the UNCITRAL Rules which indicates how the "applicable law" is to be determined.²⁶ Arguably, the Rules could have specified that the "law of the place of arbitration from which the parties cannot derogate" would prevail. Thus it could be well argued that UNCITRAL Rules which have been relied upon by ABC are ambiguous in nature as far as the status of mandatory *lex loci arbitri* is concerned.

In light of these principles, let us see what Supreme Court has said.

A. Bhatia International

Bhatia International decision was in the context of the power of Indian courts to grant interim reliefs (e.g. injunctions) in foreign arbitrations. The Supreme Court was to answer if Part I of ABC applies to arbitrations whether held in India or not. The Court held that provisions of Part I-stated to cover only domestic arbitrations would apply to all arbitrations and would apply equally to foreign arbitrations. It also held that where such arbitration is held in India the provisions of Part I would compulsorily apply and parties shall be free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitration held out of India, the provisions of Part I would apply unless the Parties by the agreement, express or implied, excluded all or any of its provisions. In that case, the laws or rules chosen by the Parties would prevail. Any provision of Part I contrary to or excluded by that law or rules will not apply. And thus it accordingly held that Section 9 of Part I did apply to foreign arbitral proceedings.²⁷

B. Venture Global Engineering

In Venture Global Engineering, the Supreme Court was stuck with the issue if a foreign award can be set aside by Indian courts under Section 34 of ABC. The Court answered the question in affirmative and relied heavily on Bhatia International. The Court was to answer whether the general provisions of Part I (usually relief provided under Section 9²⁸ or Section 34²⁹) would not apply when Part II contained specific provisions in respect of the same subject matter,³⁰ or whether Part I was applicable to Part II in all circumstances. The Court held that Part I would apply to all arbitrations including international commercial arbitrations. However, by way of an express or implied agreement, parties can exclude the applicability of Part I. It went on further to hold that where it is open to the parties to exclude the application of the provisions of Part I by express or implied agreement, it would mean that otherwise the whole of Part I would apply. In any event, to apply Section 34 to foreign international awards would not be inconsistent with Section 48 of ABC, or any other provision of Part II as a situation may arise.

4. Did the Supreme Court Fail to understand the 'abc' of ABC

A lot of hue and cry has been raised with surrounded criticisms by national as well as international jurists, media and commentators about the judgments in Bhatia International and Venture Global Engineering. No matter if both the judgments are right or wrong; as long as they stand as law under Article 141 of the Constitution of India, legal firms and lawyers need to draft the arbitration agreements carefully by closely examining the will and capacity of the parties.

An analysis of these judgments would surely raise a question, if the Court has met the aim of providing alternate mode of dispute resolution or if it has ended only in alternate modes of interpretations. It has to be understood as to how did, the Court find the scope to interpret ABC in such a way that, it has now limitless power of judicial review, even when the aim of ABC was to minimise judicial intervention. Section 2(2) of ABC specifically limits the application of Part I to arbitrations where place of arbitration is in India, then how did the Court come to conclusion that it can extend the applicability of Part I to arbitration even if place of arbitration is not in India. A reason to this could be non-availability of similar provisions in Part I and Part II. But can that be quoted as an excuse to overcome the will of legislators? The answer to that is a definite 'No' unless Court would have found some other approach to deal with the situation.

Let us try to analyse the judgments in light of certain principles as mentioned below to find an answer if the Court went wrong.

A. New york convention vis-à-vis the delocalisation theory: Defence by supreme court?

New York Convention was a guiding factor for the Parliament during the time of enactment of ABC and Section 44 of ABC incorporated the New York Convention into its scheme and stated how awards made pursuant to it would be treated as foreign award for the purpose of enforcement. It has been the usual practice for enforcing courts to refuse recognition of awards set aside in the place of arbitration, but the question that simulate fear for arbitration is if New York Convention allow its subjects,³¹ to do otherwise i.e. enforcing Court to set aside an award instead of refusing recognition (only in appropriate cases) when it is not the lex arbitri court?

Article V (1) of the New York Convention deals with provision which provides that enforcement of an award may be denied on five grounds. The first four grounds are limited to: the incapacity of the parties or invalidity of the arbitration agreement under the applicable law; failure to give proper notice or allow a party to present its case; an award on matters falling outside the jurisdiction of the arbitrator; or where the tribunal or arbitral procedure was not in accordance with the agreed law or the law of the place of arbitration. The fifth and most controversial ground of refusal is paragraph (e), where an award may be refused recognition if it is not yet binding on the parties or has been set aside or suspended by the country in which, or under the law of which, the award is made. Thus paragraph (e) recognises the setting aside of an award by the Courts of the country where it was made or under the law of which it was made. As far as situs of arbitration is concerned Supreme Court might have erred but it would not be wrong if the Court has focussed its decision based on the involvement of India's law in the contract and not the procedural law.³² Although it is the predominant view that the New York Convention permits only one court in any given case, the language of Article V(1) (e) suggests the possibility, that more than one country may be eligible for primary jurisdiction.³³

This leads us to the Delocalisation theory, which might also suggest that the Supreme Court would be correct in its approach. The Delocalisation theory consists in the belief that international arbitration should not be restricted by the mandatory procedural law of the forum, and should theoretically be able to float, detached from the country of origin.³⁴ Delocalization of an award entails removing (or limiting) the power of local courts to make a globally effective declaration of the award's nullity,³⁵ and would rather liberalize the notion that it is the prerogative of only lex loci arbitri court to set aside an award. This would involve freeing

international arbitrations from the mandatory *lex loci arbitri*.

However, this approach would does not seem practically possible, since this way every court would have the power to set aside an award and the problem would arise when other courts would not recognise such a decision and would continue to deal with the enforceability and the validity of arbitral award. Thus, where, New York Convention and the law of treaties intend to develop uniform rules of 'conflict of laws', such practice would inevitably result in 'conflict between nations' and would run counter to the aim for finality in international commercial arbitration.

5. Are Decisions, Part of 'developing v/s developed' Spectrum?

It is now a known fact that India is acting as a super power in the world's economic, social and political arena, although being a developing country. However, it cannot be denied that the role of developing countries have always been questioned in the arbitration regime.³⁶ The growth of international commercial arbitration is largely a post-World War II phenomenon, fuelled by the explosive growth of international trade and commerce and foreign investment in both developing and developed countries. Parties from developed countries are traditionally uncomfortable holding arbitrations at the domicile of their contract partners in developing countries; by the same token, the developing country partners are suspicious of arbitration in a more developed country.³⁷ Third World scholars have always advanced the modes of arbitrations as the most flagrant proof of bias in international commercial arbitration.³⁸

Thus, Supreme Court has to see that it does not widen the gap between north and south and that it does not heighten the insecurities and polarise international arbitration into first and third world approaches.

6. Conclusion

Supreme Court's decision in *Bhatia International and Venture Global Engineering* has settled the position in India that Indian courts have power to set aside foreign awards at the enforcement stage. However, it has to see that India being a growing economic power does not act as an obstacle for international trade. The judgments have, no doubt, got the potential to cripple the potentials of arbitration as a feasible and approachable method of dispute resolution amongst international community especially for transactions involving Indian parties but the issue could be resolved by either formulating uniform rules by making proper amendments in ABC or by revision of judgments by a larger bench.³⁹ The concerns have also been raised about fulfilling the need of an 'international court of arbitral awards.' Formation of such court seems to be the best possible solution in order to invoke a uniformity among all nations, since it would then be the sole forum to determine the integrity of an award, removing the need for separate analysis by municipal courts at the place of arbitration, and then at the place/s of enforcement (though, the implementation of the idea seems difficult). Another way to shut the controversy is careful drafting of arbitration clauses so that the role of Courts could be minimised in arbitration processes.

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1. AIR 2002 SC 1432

2. AIR 2008 SC 1061

3. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 UNTS 38

4. Article 141 states that the law declared by the Supreme Court shall be binding on all courts within India

5. The Arbitration Act, No. 10 of 1940, § 8, India Code (2000)
6. Justice D. K. Jain, Arbitration: As a concept and as a process, Indian Council of Arb. Q., Jan.-Mar. 2007, at 1, available at www.ficci.com/icanet
7. Refer Statement of Objects and Reasons, ABC
8. Bharat Seva Sansthan v Uttar Pradesh Electronics Corporation Limited, AIR 2007 SC 2961
9. Section 2 (f) of ABC defines "international commercial arbitration" as an arbitration relating to disputes arising out of legal relationships, considered as commercial under the law in force in India and where at least one of the parties is: (1) an individual who is a national of a country other than India, (2) a corporate body incorporated in any country other than India, or (3) a company or association of individuals whose central management and control is exercised in any country other than India
10. Dominant Offset Pvt. Ltd. v Adamovske Strojirny A. S., 1997 (2) Arb LR 335
11. The UNCITRAL Model Law defines commercial arbitration as covering all matters arising from all relationships of a commercial nature, whether contractual or not. UNCITRAL Model Law states that relationships of a commercial nature include, but are not limited to the following transactions: any trade transaction for the for the supply or exchange of goods and services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; construction; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail, or road
12. Promod Nair, Surveying a Decade of the New Law of Arbitration in India, 23 Arb. Int'l., at 706 (2007)
13. Justice A K Sikri, Judge, High Court of Delhi, Recognition and Enforcement of Awards in India, Address before the Indian Arbitration Bar & Singapore International Arbitration Centre (Jun. 22, 2008)
14. Supra Note 7
15. It cannot be always stated that Judiciary is the only player to keep check on other parts of Government, Parliament too can keep a check over misuse of powers by other parts of Government.
16. Section 8, ABC
17. Section 9, ABC
18. Section 11, ABC
19. Section 14 (2), ABC
20. Secur Industries Ltd. v Godrej & Boyce Mfg. Co. Ltd., (2004) 2 SCR 705
21. Also refer Shin-Etsu Chemical Co. Ltd. v M/s Akash Optifibrea Ltd., (2005) 7 SCC 426
22. Ashok H. Desai, Challenges to An Award Use and Abuse, Indian Council of Arb, Q., Jul.-Sep. 2006, at 3, available at www.ficci.com/icanet
23. AIR 2003 SC 2629

24. Especially in the light of Section 2(2) of ABC which reads as: "This Part shall apply where the place of arbitration is in India"
25. F.A. Mann, *Lex Facit Arbitrum*, in *International Arbitration: Liber Amicorum for Martin Domke* 157 (Pieter Sanders ed. 1967); Albert Jan Van Den Berg, *The New York Convention of 1958* at 28-51 (1981); William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 *I.C.L.Q.* 2 (1983); F.A. Mann, *England Rejects 'Delocalised' Contracts and Arbitration*, 33 *I.C.L.Q.* 193 (1984)
26. A. Shindler, *Arbitration Still Bound*, 102 *L. Q. REV.* 500 (1986) at 502
27. The judgment has been upheld in *Indtel Services v WT Atkins Rail* (2008) 10 SCC 308
28. Interim measures, etc. by Court
29. Application for setting aside arbitral award
30. Section 48 of ABC which deals with conditions for enforcement of foreign awards
31. India being a signatory to the New York Convention, its commitment could be questioned under Vienna Convention on the Law of Treaties, if it does not comply with it in good faith as required under Article 26 of the Vienna Convention i.e. *pacta sunt servanda*.
32. It was argued in *International Standard Electric v Bidas Sociedad Anonima Petrolera* [745 F. Supp. 172 (S.D.N.Y. 1990)], that since the New York Convention contains no provision enumerating grounds for setting aside an arbitral award, as per Article (V) (1) (e), the law under which the award was made referred not to the law governing the arbitral procedure (curial law) but to the law governing the substance. Therefore the New York Convention pre-supposed that an award could be set aside in the country whose law had been applied to the substance of the dispute.
33. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 308 (5th Cir. 2004); James Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 *Am. Rev. Int'l Arb.* 9, 66 (2004)
34. Jan Paulsson, *Arbitration Unbound: An Award Detached from the Law of the Country of Origin*, 30 *ICLQ* 358 (1981)
35. Okenzie Chukwumerije, *Choice of Law in International Commercial Arbitration*, 77 (1994) at 89
36. Keba Mbaye, *Commentary, The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective*, in *60 Years of ICC Arbitration: A Look at the Future*, 293, 293-95 (1984)
37. W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 *Tex. Int'l L.J.* 1 (1995) at 155
38. M. Somarajah, *The Climate of International Commercial Arbitration*, 8 *J. Int'l Arb.* June 1991, at 47, 61; Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (1995)
39. As Indian courts are precedent bound under Article 141 of the Constitution of India.

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