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INDIAN COURT EXPANDS ITS JURISDICTION OVER FOREIGN ARBITRAL PANELS

By
Dru Miller*

I. INTRODUCTION

The question of whether Indian courts have jurisdiction to set aside foreign arbitral awards has the potential to affect the international arbitration community as well as international business in India. This question implicates the Indian Arbitration Act of 1996¹ (“the Act”), which governs all issues of the law “relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. . . .”² Indian courts have used parts of the Act to disregard conflicting contractual provisions and assess their own jurisdiction in order to apply interim measures and set aside arbitral awards.

Three major cases came to conflicting positions regarding Indian courts’ jurisdiction in relation to international arbitrations. *Bhatia International v. Bulk Trading S.A. and Anr.*³ (“Bhatia International”) was a high profile decision that grants Indian courts the authority to set aside contractual language that stated the contract was to be governed by foreign law.⁴ Ten years later, the court in *Bharat Aluminum Company v. Kaiser Aluminum Technical Services Inc.*⁵ (“BALCO”) overruled *Bhatia International* and held that Part I of the Act (“Part I”) could not be used to grant jurisdiction to Indian courts over international arbitrations.⁶ *BALCO* was supposed to bring clarity on the issue, but the *BALCO* court limited their decision to all arbitration agreements entered into after September 6, 2012.⁷ The court reviewed *BALCO* in its latest decision in *Union of India vs. Reliance Industries Ltd & Anr.*⁸ (“Reliance Industries”), which revitalized the *Bhatia International* decision with respect to arbitration agreements entered before September 6, 2012. Accordingly, *Reliance Industries* and *BALCO* created two conflicting rules, which

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¹ The Arbitration and Conciliation Act, No.26 of 1996, INDIA CODE (1996), available at <http://keralamediation.gov.in/AC%20Act.pdf>.

² See *id.*

³ *Bhatia International v. Bulk Trading*, (2002) 4 S.C.C. 105 (India).

⁴ See *id.*

⁵ *Bharat Aluminum v. Kaiser Aluminum*, (2012) 9 S.C.C. 552 (India).

⁶ See *id.* at ¶¶ 198-99.

⁷ See *id.* at ¶ 201.

⁸ *Union of India v. Reliance Industries*, (2013) O.M.P. No. 46 (India).

are applied based solely on the date that the parties agreed to the applicable arbitral clauses: 1) an expansive application of Part I for arbitral agreements entered prior to September 6, 2012; and 2) a more limited application of Part I for agreements entered into after September 6, 2012.⁹

This article seeks to discuss the lack of clarity emanating from the Indian courts on the issue of whether Indian courts have jurisdiction over contracts that grant jurisdiction to a different country and how that affects international arbitration. India has recently produced a line of pro-arbitration jurisprudence that supports arbitration agreements granting jurisdiction to a different country.¹⁰ Decisions like *Bhatia International* and *Reliance Industries* defy that reputation, however, and endanger the international arbitration community in India with the possibility of having unenforceable arbitration agreements. After the court's decision in *BALCO*, the international arbitration community was optimistic that they would no longer have to worry about Indian courts claiming jurisdiction over their disputes meant to be governed by foreign law. However, the limited applicability of the *BALCO* decision left open the possibility that *Bhatia International* could reemerge.¹¹

II. EXPANSION OF JURISDICTION OVER FOREIGN ARBITRAL PANELS

Bhatia International is the foundation for case law supporting the Indian courts' expansion of jurisdiction over foreign arbitral panels. The *Bhatia International* court found that Part I applied to international arbitrations, despite the fact that it seemed to apply only to domestic arbitrations.¹² Nevertheless, the *Bhatia International* court held that Part I applied to international arbitrations unless the parties expressly or impliedly excluded the provision.¹³ *Bhatia International* "gave the Indian courts an opportunity to

⁹ See *id.* at 6-7; see also *id.* at 58-59.

¹⁰ *Delhi High Court Reaffirms Application of Venture Global to Pre-BALCO Agreements and Expands Scope of Interference in Foreign Seated Arbitrations*, INTERNATIONAL ARBITRATION E-BULLETIN (Sept. 3, 2013), <http://sites.herbertsmithfreehills.vuturvevx.com/181/5707/landing-pages/delhi-high-court-reaffirms-application-of-venture-global-to-pre-balco-agreements-and-expands-scope-of-interference-in-foreign-seated-arbitrations.asp?sid=d9beff98-8ca0-40c2-83ae-102978114b63>.

¹¹ See *Bharat Aluminum*, 9 S.C.C. 552, at ¶ 201.

¹² Sherina Petit & Joseph Tirado, *Landmark Judgment Delivered from the Indian Supreme Court in Bharat Aluminum Co v. Kaiser Aluminum Technical Services, Inc.*, NORTON ROSE FULBRIGHT (Sept. 2012), <http://www.nortonrosefulbright.com/knowledge/publications/70563/landmark-judgment-delivered-from-the-indian-supreme-court-in-bharat-aluminium-co-v-kaiser-aluminium-technical-services-inc>.

¹³ See *Bhatia International*, 4 S.C.C. 105, at ¶ 32; see also The Arbitration and Conciliation Act, No.26 of 1996, (Aug. 16, 1996), available at <http://keralamediation.gov.in/AC%20Act.pdf>.

(Part 1- Arbitration- Chapter 1: 2. Definitions. - (1) In this Part, unless the context otherwise requires, . . . f) "International commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is- (i) An individual who is a national of, or habitually resident in, any country other than India; or (ii) A body corporate which is incorporated in any country other than India; or

intervene in a foreign award as if it were an Indian award.”¹⁴ Essentially, *Bhatia International* granted courts the authority to claim jurisdiction over international arbitration agreements and set aside arbitral awards from foreign-seated panels when such a dispute involved an Indian party.

This power was illustrated in subsequent cases, like *Venture Global Engineering v. Satyam Computer Systems Ltd.* (“Venture Global”).¹⁵ Venture Global and Satyam Computer had a Shareholder Agreement, which contained an arbitration agreement.¹⁶ Satyam Computer filed for arbitration in the London Court of International Arbitration alleging that it was entitled to shares in a company that the parties owned jointly because of an alleged default by Venture Global.¹⁷ The arbitrator ruled in favor of Satyam Computer, and Satyam sought enforcement in United States District Court for the Eastern District of Michigan.¹⁸ Meanwhile Venture Global filed for an injunction and to have the award set aside in Indian court.¹⁹ The court in *Venture Global* used Part I to determine that it had jurisdiction over the agreement in question.²⁰ The *Venture Global* court stated that it was able to exercise jurisdiction because the parties’ agreement violated numerous Indian statutory provisions and was contrary to Indian public policy.²¹ Additionally, the

(iii) A company or an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv). The Government of a foreign country . . . Scope (2) This Part shall apply where the place of arbitration is in India. (3) This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration. (4) 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. (5) 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. Construction of references (6) Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorize any person including an institution, to determine that issue. (7) An arbitral award made under this Part shall be considered as a domestic award.); *but see Id.* (Part 2- Enforcement of Certain Foreign Awards-Chapter 1: 44. Definition.- In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960.).

¹⁴ Shaun Lee, *Case Update: Bharat Aluminum Co v Kaiser Aluminum Technical Services Inc.*, Olswang (Sept. 19, 2012), <http://www.olswang.com/articles/2012/09/case-update-bharat-aluminium/>.

¹⁵ *Venture Global Engineering v. Satyam Computer Systems*, (2008) 4 SCC 190 (India).

¹⁶ *See id.* at ¶ 3.

¹⁷ *See id.*

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ Petit, *supra* note 12.

²¹ *See id.*

court noted that the non obstante clause²² of the agreement overrides “the entirety of the agreement,” including the arbitration agreement that specified foreign law was to govern.²³ The court elaborated that the non obstante clause, which stipulates that the parties would not violate Indian law, was evidence of their intention to have Indian law govern their agreement.²⁴ As a result, the court gave the non obstante clause more weight than the provisions of the contract that specifically detailed what law the parties’ agreed to have govern their contract.²⁵

Venture Global created the impression that Indian courts can use a non obstante clause in arbitration agreements to seize cases that have been decided unfavorably for Indian parties in foreign jurisdictions. The *Venture Global* court reasoned that if it did not follow *Bhatia International* and found that Part I or II did not apply to international commercial arbitrations that occurred outside of India, then no law in India would govern those disputes, which could prevent some international arbitration parties from seeking relief in India.²⁶ However, by seizing jurisdiction over these cases, Indian courts are not only expanding their jurisdiction, but they are also bailing out the Indian parties who are involved in these disputes. While this might be beneficial for the Indian parties in the short run, it could scare away international businesses in the future due to fear of unwelcomed decisions by the Indian courts.

III. LIMITING INDIAN COURTS’ JURISDICTION

Following the court’s decisions in *Bhatia International* and *Venture Global*, the international arbitration community criticized the growing trend among the Indian judiciary to restrict the applicability of Part I.²⁷ In the years that followed, the court’s decision in *BALCO* was the apex of the Indian courts’ recent string of cases working toward overruling *Bhatia International*. One of the decisions that began to shift the line of thinking toward a more arbitration friendly judiciary was *Videocon Industries Limited v. Union of India & Anr.* (“Videocon”).²⁸

²² BLACK’S LAW DICTIONARY (9th ed. 2009). Non-obstante clause-“‘Notwithstanding.’ Words anciently used in public and private instruments, intended to preclude, in advance, any interpretation contrary to certain declared objects or purposes.”

²³ *Venture Global Engineering v. Satyam Computer Systems*, (2008) 4 SCC 190 (India) ¶¶ 26-27.

²⁴ *See id.*

²⁵ *See id.*

²⁶ *See id.* at ¶ 14.

²⁷ *Petit*, *supra* note 12.

²⁸ *Videocon Industries Limited v. Union of India*, (2011) 6 SCC 161 (India).

The *Videocon* court held that the lower court lacked jurisdiction because the parties had agreed English law would govern any arbitration proceedings.²⁹ The *Videocon* court's decision showed the court was willing to recognize implied exclusions of Part I when the parties agreed to have a non-Indian countries law govern their disputes.³⁰ Basically, *Videocon* illustrated that Indian courts were willing to recognize the conflicting provisions that prohibited them from exercising jurisdictions over international arbitration agreements that did not implement Indian law. Therefore, *Videocon* was a step away from the anti-arbitration decisions of *Bhatia International* and *Venture Global*. Furthermore, *Videocon* set the stage for clarification and expansion on the recognition of implied exclusions of Part I in the subsequent *BALCO* decision.

In *BALCO*, the court once again addressed the question of whether the parties either expressly or impliedly excluded Part I as it relates to the court's jurisdiction over the matter.³¹ The court ultimately held that:

We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996. With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in *Bhatia International* and *Venture Global Engineering*.³²

The court elaborated that Part I, Sections 9 and 34, which had previously been used by courts to establish jurisdiction, could not be connected to either Part I or II to create jurisdiction for the court because Part I is limited to domestic Indian arbitrations.³³ Not only did *BALCO* answer the question about courts exercising jurisdiction over international commercial arbitration, but it also overruled the prior decisions of *Bhatia International* and *Venture Global*.

The *BALCO* court limited its decision to only affect agreements created after the date of the decision, September 6, 2012.³⁴ Consequently, the limitation to agreements

²⁹ See *id.* at 25-26.

³⁰ See *id.*

³¹ Petit, *supra* note 12.

³² See *Bharat Aluminum*, 9 S.C.C. 552, at ¶¶ 198-99.

³³ See *id.* at ¶ 138. See also *id.* at ¶ 199.

³⁴ See *id.* at ¶ 201.

entered into after *BALCO* left the door open to what the stance would be on agreements entered into pre-*BALCO*.

IV. ANALYZING RELIANCE INDUSTRIES

After the *BALCO* decision, it remained unclear what rule would apply to arbitration agreements entered prior to September 6, 2012. This question was addressed in *Union of India v. Reliance Industries*.

The dispute in *Reliance Industries* arose from two Productions Sharing Contracts (“PSCs”) concerning the exploration and production of petroleum from the Tapti and Panna Muleta fields in India.³⁵ The contracts were signed in 1994 and were intended to operate for twenty-five years unless the parties agreed otherwise.³⁶ Reliance filed multiple claims ranging from royalties to cesses and service taxes.³⁷ The Union of India objected on the grounds that the claims were not arbitrable.³⁸ Nevertheless, the arbitral tribunal held that Reliance’s claims were arbitrable.³⁹ As a result, the Union of India filed a claim in the Delhi High Court in an attempt to set aside the arbitral decision under Part I, Section 34.⁴⁰ Reliance objected on the grounds that the arbitration agreement in the PSCs stipulated that English law was to govern and a London-seated arbitration panel was to oversee any disputes.⁴¹

The Union of India argued that the court had jurisdiction because they believed the parties had the unmistakable intent of being governed by Indian law because the PSCs were signed in India, the subject matter of the PSCs was in India, and other stipulations throughout the contract showed the parties’ intent to be governed by the laws of India.⁴² The Union of India also pointed to the non obstante clause of their agreement, which stated that the parties could not violate the laws of India.⁴³ This argument relied on the *Venture Global* decision, because the court in *Venture Global* used the non obstante clause to hold that the Act was impliedly excluded and therefore the *Venture Global* court

³⁵ See *Reliance Industries*, O.M.P. No. 46 at 1.

³⁶ See *id.*

³⁷ BLACK’S LAW DICTIONARY (9th ed. 2009) (Cess-An assessment or tax).

³⁸ See *Reliance Industries*, O.M.P. No. 46 at 1-2.

³⁹ See *id.* at 2.

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *id.* at 3.

⁴³ See *id.* at 6.

had jurisdiction over the case.⁴⁴ The *Reliance Industries* court noted how *Venture Global* used dictum from *Bhatia International* when it used the non obstante clause to hold that Indian law was applicable.⁴⁵ Following the precedent of *Venture Global*, the Union of India also argued that the non obstante clause of their agreement mandated that the parties could not violate the laws of India.⁴⁶

In support of their argument against the Indian court having jurisdiction over this dispute, Reliance pointed to Articles 32 and 33 of the agreement to show that English law governed this dispute.⁴⁷ Additionally, Reliance cited *Videocon* in support of its argument that the foreign law stated in the parties' agreement should govern the arbitration proceedings as well as any following proceedings.⁴⁸

The main issue before the *Reliance Industries* court was whether the parties either expressly or impliedly excluded Part I.⁴⁹ Indian courts, such as the *Venture Global* court, had previously used public policy concerns to justify their jurisdiction rather than find the parties had excluded Part I.⁵⁰ The *Reliance Industries* court also stated that the jurisdiction of the Indian court was connected to the public policy concerns stemming from Indian objects, taxes, and government involved in the PSCs.⁵¹ The *Reliance Industries* court concluded that:

[N]o inference as to exclusion of the jurisdiction of Indian courts can be drawn by this court when there exists a non obstante clause precluding the parties [from] violating Indian laws . . . [t]herefore, the Indian laws are not intended to be excluded by the parties and this court can conveniently exercise its jurisdiction.⁵²

The court further stated that English law would govern all arbitral proceedings, but the law would revert back to Indian law for all other proceedings.⁵³

⁴⁴ See *Reliance Industries*, O.M.P. No. 46 at 7.

⁴⁵ *See id.* at 36.

⁴⁶ *See id.* at 6.

⁴⁷ *See id.* at 14.

⁴⁸ *See Reliance Industries*, O.M.P. No. 46 at 15.

⁴⁹ *See id.* at 17.

⁵⁰ Keen, *supra* note 11.

⁵¹ *See Reliance Industries*, O.M.P. No. 46 at 6.

⁵² *See Reliance Industries*, O.M.P. No. 46 at 6-7.

⁵³ *See id.* at 27.

The *Reliance Industries* decision followed *Venture Global*, rather than *BALCO*, because the holding in *BALCO* only applied to agreements made after the decision was handed down in 2012,⁵⁴ and the agreement between Reliance Industries and the Union of India was entered into in 1994.⁵⁵ Additionally, the *Reliance Industries* court found no inference that the parties excluded Part I when the court applied *Bhatia International* and *Venture Global* to this case. Therefore, the court denied Reliance's objection to the court having jurisdiction over the parties' agreement.⁵⁶

V. IMPLICATIONS OF *RELIANCE INDUSTRIES*

After the Delhi High Court's decision in *Reliance Industries* there appears to be more uncertainty than clarity on whether Indian courts have jurisdiction to mandate interim measures and set aside arbitral awards for international arbitrations. As it stands, Indian courts are allowed to exercise jurisdiction over any agreements entered into prior to September 6, 2012, but they will not be able to exercise jurisdiction over agreements entered into after September 6, 2012, due to the court's decision in *BALCO*. The *Reliance Industries* court did not indicate that its decision would affect post-*BALCO* agreements. Therefore, *BALCO* still governs all agreements entered into after September 6, 2012.⁵⁷ Additionally, the *Reliance Industries* court likely reaffirmed *Bhatia International* and *Venture Global* by focusing their analysis on Part I, Section 34 and the non obstante clause of the parties' agreement.⁵⁸ Section 34 and the non obstante clause were the two key provisions that the *Venture Global* court focused on to determine that they had jurisdiction over the arbitration agreement in dispute. Furthermore, the *Reliance Industries* court noted that the question regarding the court's jurisdiction was connected to a potential violation of public policy.⁵⁹ Once again, this follows *Venture Global* where the court used the issue of public policy as a reason it should exercise jurisdiction.⁶⁰ Following *Reliance Industries*, it appears that *Bhatia International* and *Venture Global* are once again the prevailing jurisprudence for this issue, despite the contradicting decisions in *Videocon* and *BALCO*. Thus, it appears that the anti-arbitration line of thinking on this issue is, once again, the prevailing case law in India.

⁵⁴ *Bharat Aluminum v. Kaiser Aluminum*, (2012) 9 S.C.C. 552 (India).

⁵⁵ *See id.* at 38; *but see id.* at 58.

⁵⁶ *See id.* at 59.

⁵⁷ *Delhi High Court Reaffirms Application of Venture Global to Pre-BALCO Agreements and Expands Scope of Interference in Foreign Seated Arbitrations*, *supra* note 10.

⁵⁸ *See Reliance Industries*, O.M.P. No. 46 at 7. *See also id.* at 36.

⁵⁹ *See id.* at 6.

⁶⁰ *See id.* at 38.

Following *Reliance Industries*, Indian courts may use the non obstante clause of agreements to seize cases that have been decided unfavorably for Indian parties in foreign jurisdictions. *Reliance Industries* continues a string of anti-arbitration jurisprudence stemming back to *Bhatia International* and *Venture Global*. In *Reliance*, Indian courts ran the risk of scaring off international businesses who could potentially contract with Indian companies. With Indian courts bailing out Indian parties from unfavorable foreign arbitral decisions, parties only other recourse for pre-September 6, 2012 agreements is to renegotiate terms today or be left with their arbitration agreements that are essentially worthless if they win in arbitration.

VI. CONCLUSION

Reliance Industries expanded Indian courts' ability to exercise jurisdiction over international commercial arbitrations by adopting the reasoning from *Venture Global*.⁶¹ *Reliance Industries* also reverted back to this old line of thinking despite *BALCO* overruling both *Bhatia International* and *Venture Global* by holding that Indian courts could no longer exercise jurisdiction over international arbitration agreements that were created after September 6, 2012.⁶² Thus, after the court's decision in *Reliance Industries*, Indian courts are, once again, free to exercise jurisdiction over internal commercial arbitrations that elected to have foreign law govern their disputes.

As of April 22, 2014, *Reliance Industries* was awaiting appeal on this matter as there are several other matters in dispute between the parties. The outcome of that appeal could significantly alter the Indian court's stance on this issue.⁶³ Pending the outcome of the appeal, Indian courts are currently free to exercise jurisdiction over commercial arbitration agreements entered into prior to September 6, 2012, by relying on *Bhatia International*, *Venture Global*, and *Reliance Industries*. Additionally, Indian courts are prohibited from exercising jurisdiction over any agreement entered into after September 6, 2012, under *BALCO*.⁶⁴ These two conflicting methodologies defy one another and should not continue to coexist. The uncertainty surrounding the issue of Indian courts having jurisdiction over international arbitrations will continue until the judiciary firmly overrules either *BALCO* or *Bhatia International* and *Reliance Industries*.

⁶¹ See *Reliance Industries*, O.M.P. No. 46 at 38.

⁶² See *Bharat Aluminum*, 9 S.C.C. 552 ¶¶ 198-201.

⁶³ *Delhi High Court Reaffirms Application of Venture Global to Pre-BALCO Agreements and Expands Scope of Interference in Foreign Seated Arbitrations*, *supra* note 10.

⁶⁴ See *Bharat Aluminum*, 9 S.C.C. 552 ¶ 201.