International Commercial Arbitration: Role of Courts in Post-BALCO Regime
Main Issue

Extra Territorial Applicability of Law of Arbitration of a country

Applicability of Indian Law in foreign seated arbitration

To what extent courts in India have jurisdiction to decide matters relating to arbitration which is conducted outside India
Applicability of domestic laws of a country- An Old Issue which has refused to be settled

Model Law and the 1996 Act- An Attempt to address the above issue, with incorporation of the principle of territoriality
Model Law embodies this awareness that while there is a need to restrict jurisdiction of courts, complete exclusion is neither desirable nor possible. Model law gave jurisdiction to domestic courts even in foreign seated arbitration, e.g., interim relief, to take evidence.
Root Cause of the problem

A small mistake/omission/oversight/poor drafting in the 1996 Act

Section 2 (2):

Omission of the word- ‘Only’ and the exceptions relating to section 9, which was mentioned even in Model Law
Above Omissions

Resulted in Bhatia International in 2002, which involved challenge to jurisdiction of Indian courts for grant of interim relief in a foreign seated arbitration.

And few years later in *Venture Global*

Jurisdiction of Indian courts to grant interim relief could be exercised only by reversing the territorial principle.
The above requirement resulted in emergence of legal principle:

*Part I is applicable to foreign seated arbitration unless excluded expressly or impliedly*
Consequences of Bhatia International

Made a non-derogable provisions of Part I, subject to choice of parties- something which was not meant to be
Choice of Seat- not to be taken as exclusive jurisdiction clause

Choice of seat not to be taken as choice to restrict jurisdiction of Indian courts
A New Requirement for Arbitration clauses

Express mention of exclusion of Part I
Task for Courts

Generated a task for the courts- to interpret arbitration clauses to decipher whether it contains express and implied exclusion of jurisdiction of Indian courts
Implied Exclusion

Required something more than choice of seat

Started a trend of courts interpreting arbitration clauses to conclude whether Indian courts have jurisdiction or not
Implied Exclusion- Judicial Interpretation

A situation where implied exclusion ranged from mere choice of seat to the requirement where choice of seat needed to be accompanied with a choice of foreign law to govern arbitration agreement, or substantive law of contract to be foreign law
BALCO

BALCO five judges’ bench addressed the issue in 2012- overruled Bhatia, restored principle of territoriality
Choice of Seat as exclusive jurisdiction clause
However, came with its own challenges
Post-BALCO Challenges

Did not relieve the Courts of its “implied exclusion” task

Completely excluded jurisdiction of Indian courts (even in matters relating to interim relief), situation taken care of (only to some extent) through the 2015 Amendment Act

Overruled *NTPC v Singer, 1998 SC*
Overruling NTPC

A Paradigm Shift
The BALCO challenges

BALCO- Prospective effect:
Bhatia rule to be applicable in agreements signed before September 6, 2012

Pre-Balco and Post-Balco regimes
Courts’ responses

Attempt to conclusively define “Implied Exclusion”- Reliance Industries, Harmony Innovation:

If clear mention of seat, one has to conclude
Persisting Challenge- Calling for attention

Complete exclusion of jurisdiction of Indian courts-

Should section 9 Interim relief be subject to choice of parties

Should we do away with the idea of concurrent jurisdiction for the purpose of annulment of awards
Persisting Challenge

Complete exclusion resulting in a new set of litigation and uncertainty:

A new tool: Seat-Venue distinction- interpretation of arbitration clauses or challenge to arbitration clauses to contest foreign seat of arbitration (taking advantage of use of the terms-venue, place, seat)

Eg.: {Dredging Corporation of India v Mercator Ltd. (DHC, Oct 10, 2018), UOI v Hardy Exploration and Production, Sept 25, 2018 SC}