

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

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# Main Issue

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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

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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*

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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, eg. interim relief, to take evidence

# Root Cause of the problem

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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

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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

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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

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Made a non-derogable provisions of Part I, subject to choice of parties- something which was not meant to be

# Bhatia International

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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

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Express mention of exclusion of  
Part I

## Task for Courts

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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

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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

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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

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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

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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

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## A Paradigm Shift

The BALCO challenges

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**BALCO- Prospective effect:**

**Bhatia rule to be applicable in  
agreements signed before  
September 6, 2012**

**Pre-Balco and Post-Balco regimes**

## Courts' responses

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

If clear mention of seat, one has to conclude

# Persisting Challenge- Calling for attention

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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

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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}