JUDICIAL IMPORT OF THE MODEL LAW: HOW FAR IS TOO FAR?

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Abstract

The Indian Arbitration and Conciliation Act, 1996 ("Act") is widely understood to have been modelled or based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 ("Model Law"). However, the practical impact of this construct is two-fold – whether the Model Law can be relied upon by Indian courts while interpreting the provisions of the Act, and if so, the manner or extent to which such reliance should be placed. Judicial pronouncements and research papers involving the Act more-often-than-not rely upon the Model Law and its associated literature, yet surprisingly there is a dearth of jurisprudence on the exact role of the Model Law while interpreting the Act. The issue throws up nuanced questions involving, amongst others, international comity, legislative sovereignty and principles of statutory interpretation. This paper is limited to examining this issue through the narrow prism of how Indian courts have addressed this construct so far, with special focus on the judgment of the Delhi High Court in Union of India v. East Coast Boat Builders and the judgments of the Supreme Court of India in Bhatia International v. Bulk Trading and Bharat Aluminium v. Kaiser Aluminium. The paper briefly touches upon the far-reaching consequences of allowing the Model Law to permeate into the Act. The paper concludes with the author's personal views on the issue. This article is an extension of an 'Arbiter Dictum' blog post titled "Importing the Model Law: How far is too far?" published in March 2014.

1. Introduction

> "… *The present bill seeks 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, taking into account the said UNCITRAL Model Law and Rules*"[1]
>
> (emphasis added by author)

> "… *AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules*"[2]
>
> (emphasis added by author)

The 176th Report[3] of the Law Commission of India describes India's arbitration law, i.e., the Arbitration and Conciliation Act, 1996 ("Act"), as being "based" on the UNCITRAL Model Law on International Commercial Arbitration, 1985[4] and its Rules ("Model Law"). This view is supported by the Consultation Paper of the Ministry of Law and Justice,[5] Government of India the 246th Report of the Law Commission of India[6] and general academic discourse on the Act,[7] all of which characterize the Act as being either 'modelled' or 'based' on the Model Law.

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[1] The Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE (1996), Statement of Objects and Reasons. [hereinafter *The Arbitration and Conciliation Act*].

[2] *Id.*

[3] Law Commission of India, *The 176th Report on the Arbitration and Conciliation (Amendment) Bill, 2001*, at 5 ¶1.1, *available at* http://lawcommissionofindia.nic.in/arb.pdf.

[4] Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985) [hereinafter UNCITRAL Model Law] *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

[5] Ministry of Law and Justice, Government of India, *Consultation Paper on the Proposed Amendments to the Arbitration and Conciliation Act, 1996*, at 1 ¶ 1, *available at* http://lawmin.nic.in/la/consultationpaper.pdf.

[6] Law Commission of India, *The 246th Report on the Amendments to the Arbitration and Conciliation Act, 1996*, at 3 ¶ 8, *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf.

By way of background, the Model Law is a legal framework which was drafted by a working group of the United Nations, and subsequently adopted by the United Nations Commission on International Trade Law[8] in June 1985, to act as a vehicle for harmonization and improvement of national arbitration laws.[9] Pertinently, the Model Law is not a treaty[10]; nevertheless various countries which have reviewed their arbitration laws since 1985 have based their national laws, to varying extents, on the Model Law.[11]

This general sense of deference to the Model Law may be attributed to a resolution adopted by the General Assembly of the United Nations in December 1985 recommending that all countries give "due consideration" to the Model Law while enacting their national laws.[12] In the context of India, the "due consideration" of the Model Law is specifically reflected in the Statement of Objects and Reasons[13] and the Preamble[14] to the Act, stating in no uncertain terms that the Act was enacted after "taking into account" the Model Law.

This paper aims at analysing the narrow question of whether the "taking into account" of the Model Law is a justification for importing the provisions of the Model Law while interpreting the Act, and more specifically, critiquing the manner in which Indian courts have addressed this issue. The paper shall also endeavour to establish that the extent to which the Model Law can be relied upon by Indian courts while interpreting the Act is not merely an academic question, rather it has far-reaching consequences which have deeply influenced Indian arbitration jurisprudence. The paper concludes with the author's personal views on the issue.

2. Indian courts and the Model Law

Indian courts have referred to and even relied upon the Model Law in numerous judgments,[15] however only a handful of judgments have directly addressed the extent to which the Model Law

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[7] *See generally* Sumeet Kachwaha, *The Arbitration Law of India: A Critical Analysis*, 1.2 ASIA INT'L. ARB. J. 105, 105-126, *available at* http://www.kaplegal.com/upload/pdf/arbitration-law-india-critical-analysis.pdf; Aishwarya Padmanabhan, *Analysis of Section 34 of the Arbitration and Conciliation Act – Setting Aside of Arbitral of Arbitral Award and Courts' Interference: An Evaluation with Case Laws*, *available at* http://manupatra.com/roundup/326/Articles/Arbitration.pdf.

[8] UNCITRAL is a subsidiary body of the General Assembly of the United Nations. It plays an important role in improving the legal framework for international trade by preparing international legislative texts for use by States in modernizing the law of international trade and non-legislative texts for use by commercial parties in negotiating transactions. *See generally*, United Nations, *A Guide to UNCITRAL: Brief facts about the United Nations Commission on International Trade Law*, *available at* http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf.

[9] UNCITRAL Secretariat, *Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration*, at ¶2-3, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

[10] *Supra* note 3, at 6 ¶ 1.2.

[11] *See,* the Report of the Departmental Advisory Committee (DAC), which was the basis of the English Arbitration Act, 1996, *available at* http://uk.practicallaw.com/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1247974981876&ssbinary=true; *See generally, supra* note 3, at 6 ¶1.2.

[12] G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf. The General Assembly of the United Nations has vide Resolution No. 61/33 adopted on 4 December, 2006 recalled Resolution No. 40/72 and recommended that all countries give "favourable consideration" to the Model Law while enacting their national laws.

[13] *Supra* note 1.

[14] *Id.*

[15] *See generally,* Sundaram Finance v. NEPC, A.I.R. 1999 S.C. 565 (India); Olympus Superstructures v. Meena Vijay Khetan, A.I.R. 1999 S.C. 2102 (India); Milkfood v. GMC Ice Cream, (2004) 7 S.C.C. 288 (India); Great Offshore v. Iranian Offshore Engineering and Construction Company, (2008) 14 S.C.C. 240 (India); P. Manohar Reddy

should play a role in interpreting the Act. The answer turns on how the phrase "taking into account" is construed, an erudite analysis of which is found in the judgment of the Delhi High Court in *Union of India & Anr.* v. *East Coast Boat Builders & Engineers Ltd*[16] ("*East Coast Boat Builders*").

(A) Judgment of the Delhi High Court: *East Coast Boat Builders*

In 1998, the Delhi High Court was posed with the question of whether an order passed by an arbitral tribunal under Section 16 of the Act, that a particular dispute is arbitrable, could be treated as an interim award, such that the order could be challenged and set aside under Section 34 of the Act. It was argued before the Delhi High Court that since the Act had been enacted after 'taking into account' the Model Law, Article 16(3) of the Model Law should come into play while interpreting the nature of an order under Section 16 of the Act.

Speaking through Justice A.K. Srivastava, the Delhi High Court rejected the contention that Article 16(3) of the Model Law could be relied upon while determining the nature of an order under Section 16 of the Act, stating:

"… *it cannot be said that each and every provision of the said Model Law and Rules forms part of the Act. Those Model Law and Rules were in fact taken into account while drafting and enacting the Act but whatever has been enacted is the law on arbitration enforceable in India*."[17]

However, the Court sought to distinguish between situations where the provisions of the Act were clear as opposed to situations where the provisions were ambiguous, by observing:

"… *had there been a lacunae in the provisions of the Indian Arbitration Act on the point at issue or if it contained such provisions which is capable of two or more different interpretations then of course internal aid of the preamble to the Act could be taken for interpreting such provision and then the relevant provisions of the said Model Law and Rules could be read so as to interpret that provision because while enacting the Indian Act, said Model Law and Rules were taken into account*."[18]

Therefore, the Delhi High Court held that if a literal reading of a provision of the Act is unambiguous and leads to a certain conclusion, the Court is required to give effect to that conclusion. The reasoning given in *East Coast Boat Builders* on this point is a reiteration of the foremost principle of statutory interpretation, i.e., the literal rule of interpretation (if the literal meaning of a provision is clear and unambiguous, then the provision must be given effect to in accordance with the language used therein).

However, as stated earlier, courts in India have on countless occasions resorted to the Model Law for interpreting the Act,[19] amongst whom the one having the most far-reaching consequences is the judgment of the Supreme Court of India in *Bhatia International* v. *Bulk Trading S.A. & Anr.*[20] ("*Bhatia*").

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v. Maharashtra Krishna Valley Dev. Corp. A.I.R. 2009 S.C. 1776 (India); Sime Darby Engineering v. Engineers India, A.I.R. 2009 S.C. 3158 (India).

[16] Union of India v. East Coast Boat Builders & Engineers Ltd., A.I.R. 1999 Delhi 44 (India).

[17] *Id.*, at ¶ 17.

[18] *Id.*

[19] *Supra* note 15.

[20] Bhatia International v. Bulk Trading S.A. & Anr., A.I.R. 2002 S.C. 1432 (India) [hereinafter *Bhatia*].

(B) Judgment of the Supreme Court: *Bhatia International*

In *Bhatia,* a 3-Judge Bench of the Supreme Court of India was required to interpret, *inter alia*, Section 2(2) of the Act to determine whether Part I of the Act applies to arbitrations taking place outside India. Section 2(2) states that, "*This Part shall apply where the place of arbitration is in India*" From a plain reading of Section 2(2), it is clear and unambiguous that Part I will not apply to arbitrations taking place outside India. Going by the rationale put forth in *East Coast Boat Builders*, giving effect to the literal meaning of Section 2(2) would have put the scope of applicability of Part I to rest.

However, the Supreme Court created an ambiguity for itself while interpreting Section 2(2) by referring to its equivalent provision in the Model Law, i.e., Article 1(2) of the Model Law. Article 1(2) states that, "*The provisions of this Law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.*" The Supreme Court noted that the word "only" appearing in Article 1(2) was absent in Section 2(2). According to the Supreme Court, this omission of the word "only" in Section 2(2) was "significant"[21] and changed "the whole complexion"[22]of the provision, thereby reflecting the intention of the Legislature that Part I of the Act would apply to arbitrations seated in India as well as outside India. While other concerns were raised to support the purposive construction of Section 2(2), these were *negative consequences* of following the literal meaning of Section 2(2) rather than *positive reasons* for adopting a purposive construction of the provision.[23] The author submits that the overarching positive reason in *Bhatia* for adopting a purposive construction of Section 2(2) was the reference to the Model Law, specifically the word "only" in Article 1(2) of the Model Law and its absence in Section 2(2). Therefore, it is debatable whether *Bhatia* would have arrived at the same conclusion had the Supreme Court's scope of analysis been limited to Section 2(2) without any reference to Article 1(2) of the Model Law.

While the subsequent judgment of a 5-Judge Bench of the Supreme Court in *Bharat Aluminium Company & Ors.* v. *Kaiser Aluminium Technical Service Inc. & Ors.*[24] ("*BALCO*") has overruled the ratio of *Bhatia* by limiting the applicability of Part I of the Act to arbitrations seated in India, a less highlighted facet of *BALCO* is its take on the extent of permeability of the Model Law while interpreting the Act.

(C) Judgment of the Supreme Court: *BALCO*

In *BALCO*, the Supreme Court undertook an elaborate study of the objects and reasons of the Act and duly noted that the Act had been enacted after "taking into account" the Model Law. During the course of this extensive analysis, the Supreme Court at one point states:

> "*The aim and the objective of the Arbitration Act, 1996 is to give effect to the UNCITRAL Model Law.*"[25]
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> (emphasis added by author)

The difference between "taking into account" the Model Law and "give effect to" the Model Law is not mere semantics; rather it transposes the role of the Model Law from that of a base

[21] *Id.* at ¶ 21.
[22] *Id.* at ¶ 27.
[23] *See generally, Id.* at ¶ 14.
[24] Bharat Aluminium Company & Ors. v. Kaiser Aluminium Technical Service Inc. & Ors., (2012) 9 S.C.C. 552 (India) [hereinafter *BALCO*].
[25] *Id.* at ¶ 45.

document which was referred to while drafting the Act to that of a legal framework which is being implemented in India through the Act.

Whether this statement in *BALCO* is merely an *obiter* or an authoritative finding is hard to discern owing to the absence of reasoning. To further complicate matters, the specific question of the extent to which the Model Law plays a role in interpreting the Act was briefly discussed in the judgment. The appellants in *BALCO* had referred to certain observations of the Supreme Court in *Konkan Railway Corporation Ltd & Anr* v. *Rani Construction Pvt Ltd.*[26] *("Konkan Railway")* where the Apex Court had stated:

> "… *the Model Law was only taken into account in the drafting of the said Act is, therefore, patent. The Arbitration Act, 1996 and the Model Law are not identically drafted… The Model Law and judgments and literature thereon are, therefore, not a guide to the interpretation of the Act.*"[27]

It was also argued by the Appellants in *BALCO* that the judgment of the Supreme Court in *S.B.P. & Co.* v. *Patel Engineering Ltd & Anr.*[28] *("S.B.P.")*, which had overruled *Konkan Railway* on the point of the nature of the Chief Justice's function under Section 11 of the Act, had not overruled *Konkan Railway* on the point of the applicability (or more aptly, the non-applicability) of the Model Law while interpreting the Act. However, the Supreme Court in *BALCO* chose not to delve deeper into the issue and the judgment expresses no opinion on whether it agreed with *Konkan Railway* on this point or whether *S.B.P.* had impliedly overruled[29] even this aspect of *Konkan Railway*.

From an overall reading of *BALCO*, it is evident that the Supreme Court extensively referred to the provisions of the Model Law and its conclusions in the judgment were influenced by the Model Law. This, along with the "give effect to" reference in the judgment, has perhaps laid the foundation for the Model Law to be used as a ready reckoner for interpreting the Act in future cases.[30]

3. Critical Analysis: Playing the Devil's Advocate

Arbitration *aficionados* may contend that there is nothing wrong in referring to or relying upon the provisions of the Model Law and its associated literature while interpreting the Act, since it ensures that Indian arbitration jurisprudence as reflected through judicial pronouncements, is in sync with the global trends of international commercial arbitration. While no exception can be taken to India's gradual transformation towards becoming a pro-arbitration jurisdiction, such paradigm shifts are typically policy decisions best left to the realm of the policy-makers and the legislature.[31]

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[26] Konkan Railway Corporation Ltd & Anr. v. Rani Construction Pvt. Ltd., (2002) 2 S.C.C. 388 (India).
[27] *Id.* at ¶ 9.
[28] S.B.P. & Co. v. Patel Engineering Ltd & Anr., (2005) 8 S.C.C. 618 (India) [hereinafter *S.B.P.*].
[29] *Id.* at ¶ 12; For example, the Supreme Court states in *S.B.P.* that, "It is common ground that the Act has adopted the UNCITRAL Model Law on International Commercial Arbitration, but at the same time, it has made some departures from the Model Law".
[30] A passing reference to the Arbitration and Conciliation Act "giving effect to" the Model Law was also made in the judgment of the Supreme Court in TDM Infrastructure v. UE Development India, (2008) 14 S.C.C. 271 (India), a judgment pronounced much prior to *BALCO*.
[31] *See generally, supra* note 6; *See generally*, *Union Cabinet approves ordinance on arbitration*, THE ECONOMIC TIMES (Dec. 30, 2014), *available at* http://articles.economictimes.indiatimes.com/2014-12-30/news/57528899_1_law-commission-ordinance-indian-law; *Cabinet nod to ordinance tweaking arbitration law*, BUSINESS STANDARD (Dec. 30, 2014), *available at* http://www.business-standard.com/article/economy-policy/cabinet-nod-to-ordinance-tweaking-arbitration-law-

While enacting the Act, the Union Parliament had, in its wisdom, given "due consideration"[32] to the Model Law to "bring it, as much as possible, in harmony with the UNCITRAL Model Law".[33] However, once the Act was enacted, is it the judiciary's role to ensure that India's arbitration framework is in line with international expectations? In fact, *Bhatia* is a ripe example of how an Indian court's attempt at reading the Act along with the Model Law led to an environment which completely isolated India from the international arbitration community.

It may be argued that much of the damage done by *Bhatia* has been undone by *BALCO*. It may also be argued that *BALCO* arrived at its conclusions primarily on the basis of the Territoriality principle[34] which permeates throughout the Model Law. Therefore, India's course-correction towards becoming an arbitration-friendly jurisdiction would not have been possible without reference to the Model Law. As a corollary, it would flow that a nationalistic or narrow view of the Act may run counter to the purpose of enacting this legislation, i.e., bringing India in sync with the Model Law to ensure harmonization and uniformity.[35]

However, such argumentation begs the question as to why, despite an attempt to harmonize arbitration laws, countries across the world have incorporated the provisions of the Model Law to different extents and varying degrees in their domestic legislations.[36] The fundamental principles of international commercial arbitration, such as party-autonomy, *kompetenz-kompetenz*, fairness of proceedings, etc., are widely found in national legislations worldwide, and credit for this may perhaps be attributed to the "due consideration" of the Model Law while enacting these national laws. But to say that India, despite incorporating the Model Law into the Act to the extent its law-makers felt fit,[37] should nevertheless rely on the Model Law while interpreting the Act appears to be a case of putting the cart before the horse.

4. Conclusion

The author is of the opinion that the judgment of the Delhi High Court in *East Coast Boat Builders* had laid down the perfect balance of maintaining the sovereignty of the Act. Unlike the approach taken in *Konkan Railway,* which would have shut out the Model Law completely, *East Coast Boat Builders* had carved out limited circumstances in which the Model Law could be relied upon for interpreting the Act. Such an approach is consistent with the build-up to the enactment of the Act, which was not solely a result of the Model Law, but amongst others, recommendations for reform in India, particularly for speeding up the arbitration process and for reducing intervention by courts.[38] However, the author feels that amidst the general enthusiasm to showcase India as a 'hub'[39] of international arbitration, *BALCO* has set the tone for the Model Law to be viewed as the sole driving force and the over-arching primer to the Act.

114122901209_1.html; *Ordinance route for quick arbitration reforms*, THE HINDU (Dec. 31, 2014), *available at* http://www.thehindu.com/news/national/ordinance-to-amend-law-on-arbitration/article6739783.ece.

[32] *Supra* note 12.

[33] Fuerst Day Lawson Ltd v. Jindal Exports Ltd., A.I.R. 2011 S.C. 2649 at ¶ 72 (India).

[34] Alternately referred to as the Jurisdiction theory, this principle cloaks the national arbitration law of the country within which the seat of the arbitration is located as the law governing the arbitration proceedings.

[35] For a broad overview on literal interpretation vis-à-vis purposive construction of a statute. *See generally*, Girdhari Lal & Sons v. Balbir Nath Mathur & Ors, (1986) 2 S.C.C. 237 at ¶¶ 6-16 (India).

[36] *Supra* note 3, at 6 ¶ 1.2.

[37] *Supra* note 31.

[38] *Supra* note 3, at 7 ¶ 1.2.

[39] *Need to promote institutional arbitration to place India amongst top 50 countries in the World Bank's ease of doing business ranking*, FICCI (Dec. 22, 2014), *available at* http://www.ficci-arbitration.com/htm/news-clipping/news.htm#4; *India plays catch-up game*, BUSINESS STANDARD (Mar. 23, 2014), *available at* http://www.business-standard.com/article/opinion/india-plays-catch-up-game-114032300751_1.html.

The author's position on this issue can be aptly crystallized through a simple analogy, wherein the exercise of interpreting a statute may be visualized as being akin to driving on a highway. In this analogy, the legislature has paved the road for the judiciary to drive on by enacting the Act. The Model Law is at best a road-sign or a map-based 'app',[40] i.e., an aid which is available to the courts if the highway bifurcates or has a crossroads (i.e., if there is an ambiguity in the provisions of the statute). However, the author is apprehensive that in the post-*BALCO* era, Indian courts may be heading towards adopting a practice which is becoming increasingly commonplace in our daily lives – always relying on the app!

[40] Depending on which side of the "*taking into account*" debate the reader is on, the Model Law may be treated either as a road-sign laid by the legislature along the highway (i.e., an internal aid) or a map-based mobile application (i.e., an external aid) for determining which route to take if there are multiple roads ahead. In either case, the Model Law is merely an aid which should come into play only when there is an ambiguity in the provisions of the Act.