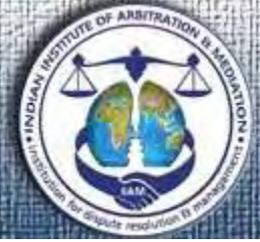


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EDITOR'S NOTE

IIAM has established its Mediator Accreditation System and Qualification Assessment Programs for grading Mediators from Community Mediators to Commercial Mediators. The QAP's are implemented to ensure that the mediators have the mediation knowledge and mediation skills that would be expected of them by the users. These are done in line with the guidelines issued by the International Mediation Institute at the Hague.

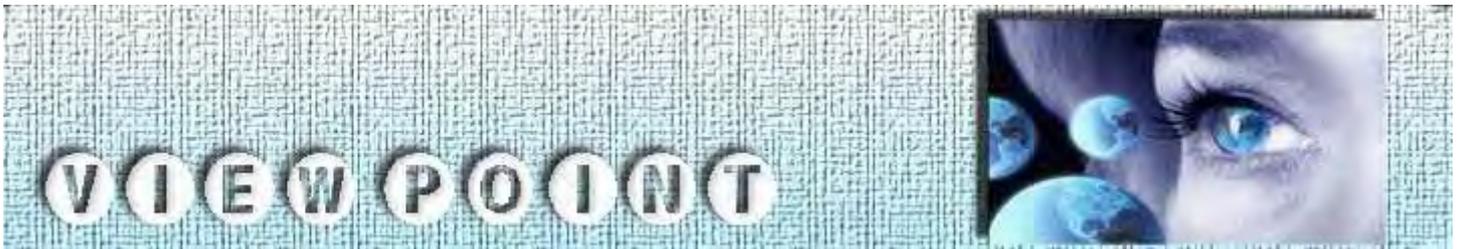
As we had mentioned in our previous issue, we look forward to the support of public spirited people and organizations to partner with us in spreading the message of mediation for a positive social transition and for establishing Community Mediation Clinics.

We look forward to your suggestions and comments in making this magazine more useful.



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A View of Mediation in the Future

(Part 2)

: JAMES MELAMED

A Unique Mediation Quality for the Future: “Scalability”

When I note the “scalability” of mediation, I mean one thing, which is that mediation is the only leading dispute resolution process (consider adjudication, administrative hearing, arbitration, mediation) where “some measure” of assistance can be offered. We can offer you 20 minutes or 2 hours or 2 days of mediation . . . it is “scalable.”

By contrast, if you are a court or agency and need to meet “due process” standards, one cannot offer “some measure of due process.” And in arbitration, with the same adversarial model and disputants waiving their appeal rights, the stakes are often even greater. Severely expedited arbitration hearings are receiving harsh scrutiny in the marketplace these days. In contrast, with mediation, people don’t complain when they come to a voluntary settlement.

In contrast to the process requirements, time demands and stress of due process and arbitration hearings, mediation is rather remarkably flexible. This was brought home to me recently when I taught an advanced mediation course and I had “court facilitators” that mediated with families for about 20 minutes on average; court-connected parenting mediators who mediated for about 2 hours on average; private sector mediators who would deal with all issues in a divorce and meet with couples on average 8-10 hours, and “settlement judges” who would meet with just the attorneys (clients in hall) for 15-30 minutes “mediating” a result in anticipation of a scheduled trial the following week.

In thinking about the future, we would be remiss to not consider the remarkable flexibility of the mediation process and our ability to adapt mediation to new contexts in new and creative ways

This and other experiences have come to make me realize that mediation is the one process where we can offer “some measure” of negotiation assistance – So, a community or court mediator may say: “We’d love to provide 10 to 20 hours of mediation, really whatever it takes for you to reach your best agreement, but, in our program, unfortunately, we can only offer an hour . . . so why don’t we get going and see what the best is that we can do in an hour . . .” In part, this is a reminder of the underfunded nature of court, agency and community

mediation programs. Perhaps even more important for the future, note this remarkable time flexibility (“scalability”) of the mediation process.

The scalability and flexibility of mediation is also important in that assumptions about available mediation resources has a powerful impact on mediator style and strategy. Simply put, the shorter the presumed available time for mediation, the more directive the mediator and mediation program tend to be (to get the job done). If we have more time, or think about mediation time in different ways (for example more capably using the internet), we may also find that we

as mediators can be less directive and more facilitative in helping disputants lead their own problem-solving.

The Adaptability of Mediation Services

In thinking about the future, we would be remiss to not consider the remarkable flexibility of the mediation process and our ability to adapt mediation to new contexts in new and creative ways.

As an illustration, highly effective mass casualty claim mediation programs were developed in a short amount of time in response to hurricanes Katrina, Rita and Ike. This is now a working model and we can expect bigger and better “mass disaster mediation” programs in the future.

Somewhat similarly, with the housing and economic crisis, we have the emergence of “foreclosure mediation” programs. These programs are already established in approximately 20 states and the just completed U.S. Mayors Conference has called for foreclosure mediation in every state!

In these situations, because of the caseloads, cost and delay that would be involved, traditional legal and adversarial processes simply will not work. What is needed is a measure of (sufficient) facilitative help and mediation has provided the answer.

As another example, we see the recent development of “Marital Mediation.” Recognizing that conflict also exists even when couples decide to stay married, there is now a vibrant new service in the marketplace to provide couples with assistance in reaching and memorializing their agreements. And I would guess that mediation for ongoing “non-traditional” relationships can not be far behind. Through commonsense and increasing awareness, mediation is spreading to nearly every nook and cranny of life.

Communication in the Future

Thanks for bearing with me to this point. If you have not jumped out of the boat yet, please do prepare to now get at least a little wet as we plunge over the edge. I try to wrap my head around future communication and mediation issues on a daily basis, yet I consistently fail and underestimate how much things are changing. So, I warn you that there is immediate and meaningful risk that we will now blow some of your mental circuits with the rest of this paper. You are hereby duly warned and advised to not continue.

You renegade! Come brothers and sisters into the future with me. Remarkably and paradoxically, as we now look

back, it was courts and agencies, driven by efficiency and economy concerns, that have driven dispute resolution online. This began with online due process filings, motions and orders. There was the swift move to “the paperless courthouse.” Discovery is now done online except by online judicial order. Hearings are now fast-tracked by asynchronous online video. The reasons for requiring warm bodies to be brought down the courthouse are becoming fewer and fewer. Excess courtrooms are being used for daycare and jail cells.

Mediation has also changed, sometimes overnight. I remember that the way that I mediate divorce changed overnight with the emergence of an online state child support guideline center complete with child support calculator and “what if” abilities participants can easily use. Now, my first mission is to assist clients to find this location and work through their own calculations. And there is now a rather remarkable online parenting plan center, including all of the statutes, regulations, information about developmentally appropriate parenting, model parenting plan provisions (a shared knowledge base of what has worked for others) and more. Overnight, the way that one reasonably and best mediates divorce changed.

Even today, without even thinking much about it, we commonly attach important documents to emails (draft provisions and agreements) for participants and attorney review. Many of us already use the Word feature called “track changes,” which is as effective a “one text document” technology as I can imagine. By using of email, attachments and track changes, we are all “online mediators” as we assist participants and advisers to be actively involved in the drafting process. And with Skype, we can discuss all these documents from the far reaches of the earth, with multiple participants, for free! Today!

There is also increasing recognition of the value of “*asynchronous communication*.” Easier to understand perhaps is “*synchronous communication*,” such as an in-person interview or phone call. Asynchronous communication (think email or leaving a voice message that you can edit) means that the listener or viewer is not present in real time so, bottom line, we don’t have

We have long recognized the benefits of asynchronous communication in mediation. This is perhaps the biggest reason we caucus with participants. While we as mediator are synchronous with the individual party in caucus, the participants themselves are kept asynchronously at a distance.

to necessarily get our communication perfect the first time. We can edit our asynchronous messages until they are as good as they can be. We can re-record our voice message. We can size and crop our photo. We can tweak our texts and instant messages until they are as perfect as we can make them, and then hit the send button when “we are at our best.”

We have long recognized the benefits of asynchronous communication in mediation. This is perhaps the biggest reason we caucus with participants. While we as mediator are synchronous with the individual party in caucus, the participants themselves (and their attorneys) are kept asynchronously at a distance. This allows us to better discuss with each side in private their next contribution to the overall negotiation discussions. Through caucus, we delay each side’s offer or response until that communication is as highly crafted and as likely to succeed as possible. Asynchrony (think email, attachments, voice messages, web sites, texting, instant messaging) is the mediation industry’s new best friend (our best new friend since the word processor). Asynchrony, allows everyone associated with the mediation, the mediator, participants and attorneys, to be at their best, as opposed to at their “first.” Asynchrony allows us all to be more thoughtful, better informed and more effective in conflict resolution.

And Asynchrony and electronic communications may be what allows courts, agencies, private and community mediation to move beyond tense and expensive “single sit” crisis mediation hearings to more capable discussions over time.

For example, many participants in mediation really do not need their attorney there with them for 8 or 10 or 12 hours in a single day. If we can more wisely structure our mediation efforts, integrating both face-to-face dialogue and electronic communications, we can offer far better mediation and dispute resolution services at a far lower cost. My sense is that mediation will in time become as much an asynchronous process as a synchronous process and we will be freed from continuing worship of the single-sit mediation. Our goal should perhaps be to flexibly and capably integrate face-to-face and electronic communications to provide best overall negotiation support.

Also fascinating is how email addresses have become the most ubiquitous way of communicating. A person is far more likely to have an email address than a street address. Just ask any homeless person. Even the poorest of the poor will generally have a free yahoo or hotmail or gmail account. They can use library and other public web access to check their email, complete web information and to even have voice and video

communication with the far reaches of the earth for free. So, in terms of communication with the masses, what used to be “*the digital divide*” has become our “least common denominator” for communicating with adults in our society.

In sum, meditative dispute resolution is about to take off in part because of the costs, delay and stresses of litigation; in part because of the risk and controversy over institutionalized arbitration; in part because of the empowering qualities of mediation (voluntary, complete decision-making, confidential); all supported by such qualities as scalability, adaptability, asynchrony and nearly all of us now being “on the same computer.” These forces may combine to result in an explosion of mediation opportunities and also in the transformation of mediation communication and services.

Mediation In Your Pocket

Unbelievably, all of the communication options we have discussed above are already available to many dispute resolution users, surely “power users” (lawyers, judges, arbitrators, mediators). Even more remarkably, it is all now available in our pockets and purses.

While I don’t want to get behind any particular product, and the marketplace is coming along quickly on new generations of “smartphones,” let’s use the iPhone as an example of how mediation services may come to be delivered in the future. The iPhone. OMG! If someone described the capacities of the iPhone to you 10 years ago, they would have been put away for sure.

So, all of those communication modalities we have talked about so far: text, image, audio, video, are now right in your pocket. Synchronous and asynchronous too. Of course. Phone, email, web, music, camera, photos, weather, calculator, instant message, calendar, notes, maps, timers, compass, skype, video, twitter revolutions and all . . . EVERYTHING and expanding. If all this ever gets scary, just do the “Around Me App” on the iPhone and the phone will tell you what is around you (it can see better than you). And if you lose the phone, you can now go to your “cloud web site” and have the phone tell you exactly where it is.

Further, whereas a phone number used to be to a *physical place*, a phone number is now, most commonly, to a person (more accurately their pocket or purse). This “*personalization of phone numbers*” will surely change how we mediate. It already has. We can now text the client to see if this is a good time to talk. Or we can text and say we have just sent an email with an attachment and links for them to review. And all this is happening 365/24/7 on a global basis.

More of my circuits are blown when we consider that certain disputes will (necessarily) be resolved exclusively online. The largest dispute resolution system in the world is at eBay. eBay has developed a really smart robot that resolves about 85% of their disputes (millions per year). All of the domain disputes have been resolved online. CyberSettle has developed a rather effective blind bidding process that is making them millions. AAA, JAMS, ICC, WIPO . . . you name the international dispute resolution organization . . . they are all now getting into the “online game.” They see the future. They are not dumb.

Richard Susskind, lead technology consultant to the UK Courts, has described a number of the changes that are taking place in his recent book: *The End of Lawyers?: Rethinking the Nature of Legal Services* (2009). A review of Susskind’s book describes:

“a world in which, at least in part, legal services are commoditized, IT renders conventional legal advice redundant, clients and lawyers are collaborators under the one virtual roof, disputes are dominated by technology if not avoided in the first place, and online systems and services compete with lawyers in providing access to the law and to justice.”

So, the first challenge is for face-to-face practitioners and processes to most capably integrate online and other electronic communication technologies. They all fit in your pocket for gosh sakes. There is also a different world when we mediate exclusively online. In some of these circumstances, it even becomes a bit challenging to think in “geographic” terms in terms of jurisdiction, law, even professional licensing. If we are professionals operating online, in one place, but serving people in other states and countries, where are we practicing? We may be moving to new concepts beyond traditional concepts of geographic jurisdiction to a new world of “Trusted Online Communities (TOCs) and “Digital Identities” to create trust and agreed-upon, predictable dispute resolution processes where a part of the ethos of the community may well include accountability for resolving conflicts. For more on this topic, see the excellent paper by Jeff Aresty: “Digital Identity and the Lawyer’s Opportunity for Furthering Trusted Online Communities” at www.internetbar.org.

Again, perhaps most mind-boggling is that all of the technologies described are *already here today*. The only barriers to growth and development are our own creative limitations. While we may look with nostalgia at early romantic notions of face-to-face (synchronous) mediation, there have been some real problems with this model. Let’s start with cost and access. In many cases, the proper comparison for online mediation is

not this romanticized idyllic mediation (as much time as it takes), but, more likely, no available or affordable mediation services at all. The online environment is going to allow us to bring quality mediation assistance to the far reaches of our society and the globe. The online environment can bring mediation to people and situations that have never been able to access or afford any meaningful dispute resolution process.

Additional Likely Trends: Emissary Mediation, Education & Empowerment; Real Time Involvement

As dispute resolution moves more and more online, content submission (be it text, image, audio and/or video) will be more and more user driven (asynchronous, convenient, edited at best, generated without taxi meter running). Missing will be the mediator’s acute ability to note non-verbal indications of acceptability and resistance. The thing that is admittedly hard to do mediating online is what I call “simultaneous problem-solving.” The communication systems just are not responsive and flexible enough for us to intervene effectively in real time. For describing process and sharing information with everyone, synchronous communication is great. But, when it comes to the heavy negotiation lifting, my sense is that mediators will more and more come to serve as “emissaries” of well-considered offers and responses. Think Henry Kissinger and shuttle diplomacy. Their will be less simultaneous problem-solving and more asynchronous problem-solving. I would not be surprised if online mediation increasingly has the mediator more proactively acting as diplomat and emissary.

The online environment also uniquely offers us the ability to educate and empower participants about how to best participate in mediation (everything from technical suggestions to observations about communication options, suggestions for effective negotiation, etc.) In fact, why settle for an ordinary education when the online environment allows us to do things for large numbers at the highest possible level. The online environment also can serve as a base for “emergency” services as well as links to resources and shared situation-solution knowledge bases (what has worked for others in similar situations).

With all of these communication opportunities and mediation as the best concept since sliced bread, how can we not see the future of mediation as bright? Soon we will have world class conflict resolution and mediation education and access to every desktop, laptop and smartphone. The online environment allows us to bring mediation to every pocket and purse. We are all now connected.

With all of these communication opportunities and mediation as the best concept since sliced bread, how can we not see the future of mediation as bright? Soon we will have world class conflict resolution and mediation education and access to every desktop, laptop and smartphone. The online environment allows us to bring mediation to every pocket and purse. We are all now connected.

And just to be sure that all circuits are fully blown, our communication options may get to be so good that mediators will come to be part of live conflict situations . . . so that disputing ex-spouses may come to text a parenting mediator for real time help, or a construction mediator may help a contractor and sub-contractor resolve a matter by taking a shared tour of the construction while looking at and talking into their smartphones. For more on this topic of real time conflict involvement, see “The Future of ODR: One Brief Glimpse” by Sanjana Hattotuwa at www.info-share.org.



Think ...

Many will leave a relationship for the slightest reason. Marriages break up over trivial things. Lifelong friendships are destroyed in a blink. Brothers and sisters won't speak to each other nor children to parents.

Something made them leave. Something broke the relationship. Something caused the split.

What would it take for leaving the relationship? With every relationship that you have, that question looms.

With the increased sensitivities these days, the answers on that list are often long.

When you ask yourself the question, “What would it take to make me leave?” the shorter and more traumatic the list, the more likely the relationship will endure because with all relationships, sooner or later something is likely to happen.

So think about your relationships, and ask yourself the question:
What would it take to make me leave?

....and for the relationships that you really want to last, perhaps you should shorten the list.

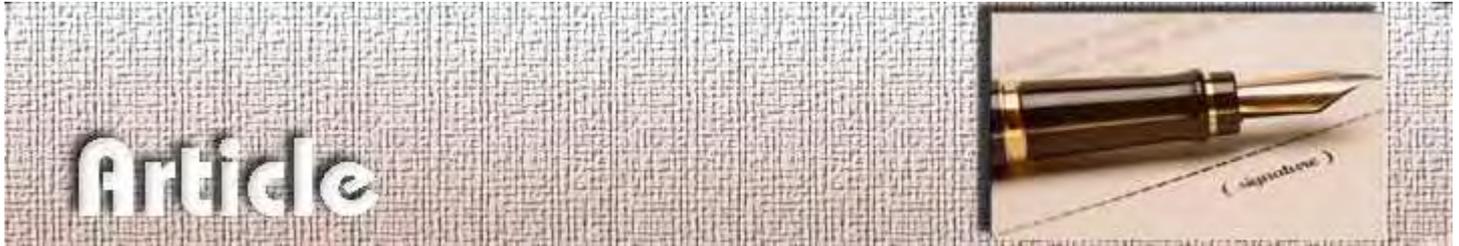
Conclusion

This is only one wild-eyed peek into the future. I hope stimulate a bit of new thinking within each reader and within the global mediation field. While it is of value to consider our roots and our current condition, that is water under the bridge. The real questions are now, knowing all we know, how can we best utilize the mediation model to further improve American and global life.

(Author: Jim Melamed co-founded Resourceful Internet Solutions (RIS) and Mediate.com in 1996. Before this, Jim founded The Mediation Center in Eugene, Oregon in 1983 and served as Executive Director of the national Academy of Family Mediators from 1987 to 1993. Jim is past-Chair of the Oregon Dispute Resolution Commission and a member of the Oregon State Bar. Jim teaches Mediation at the Pepperdine University School of Law's Straus Institute for Dispute Resolution)

God Himself does not propose to judge a man until he is dead.

So why should you?



Harmonising Indian Arbitration Law with International Practice

: SWAPNIL GUPTA

Article focus on the question of applicability of Part-I of the Act to arbitrations which have their seat outside India. Can a party in an arbitration being held outside India be allowed recourse to interim measures of protection from courts in India?

Introduction

India enacted the Arbitration and Conciliation Act, 1996 (herein after 'the Act') to bring the law of arbitration in India in consonance with the international consensus reflected in the UNCITRAL Model Law, 1985 (herein after 'the Model Law'). Since its enactment, the Act has been a subject of significant amount of judicial interpretation.

This Article will focus its attention on the question of applicability of Part-I of the Act to arbitrations which have their seat outside India.¹ S 2 (2) of the Act provides that "this Part [Part-I] shall apply where the place of arbitration is in India". The predominant view amongst the High Courts before the judgment in *Bhatia International*² was that Part-I, by virtue of S.2 (2), would not apply to arbitrations held outside India.³ However, in *Bhatia International* the Supreme Court held that Part-I will apply to arbitrations held outside India unless its application is excluded. The question of applicability of Part-I is crucial since it contains certain important

provisions which must be made available to international arbitrations held outside India for their smooth functioning, such as, the Courts' power to grant interim measures and court assistance in taking evidence. On the other hand, it contains other provisions, for instance, challenge to an arbitral award, which, if applied to arbitrations outside India, will disrupt the effectiveness of the arbitral system.

The Model Law, via Art 1 (2), clearly delineates which of its provisions will apply when the arbitration is held outside the state adopting the Model Law. However, in the Indian Act there is ambiguity on the question of applicability of Part-I to arbitrations held outside India; in the words of the Supreme Court the Act is "not well drafted".⁴ Recently, in *Venture Global*⁵, the Supreme Court has held that a foreign award may be challenged under Part-I of the Act. However, Hon'ble Mr. Justice Katju has expressed his inability to agree with the decision in *Bhatia International* and *Venture Global* in an unreported order of the Supreme Court⁶, and the appeals in that case have been referred to the Hon'ble

(Footnotes)

¹ Arbitrations having seat outside India should not be confused with 'international commercial arbitrations. International commercial arbitration is defined in S. 2 (f) of the Act and may take place either in India or outside India.

² *Bhatia International v. Bulk Trading S.A* AIR 2002 SC 1432.

³ In *Bhatia International* at Para 12 it is pointed out that the Orissa, Bombay, Madras, Delhi and Calcutta High Courts have held that Part I of the Act would not apply to arbitrations which take place outside India. Some of these decision are: *Marriot International Inc. v. Ansal Hotels Ltd.* AIR 2000 Delhi 377; *Biotechnology NV v. Unicorn GmbH Rahn Plastmaschinen* 1998 (47) DRJ 397; *Keventor Agro Ltd. v. Seagram Company Ltd.* 1998 CS No. 592 of 1997 dated 27.01.1998 (Cal).

⁴ *Bhatia International v. Bulk Trading S.A* AIR 2002 SC 1432, Para 35

⁵ *Venture Global Engineering v. Satyam Computer Services Ltd.* AIR 2008 SC 1061

⁶ *Bharat Aluminum & Co. v. Kaiser Aluminum Technical Services Inc.* CA No. 7019 of 2005, dated 16/01/08.

Chief Justice of India to be placed before a larger Bench. In the backdrop of these precedents this article will explore the possible judicial interpretations that can bring the interpretation of the Arbitration and Conciliation Act, 1996 in line with the international consensus as reflected in the Model Law.

Position under the UNCITRAL Model Law and the significance of interim measures

Article 1 (2) of the Model Law provides that reference to arbitration, interim measures of protection, and recognition and enforcement of an award are few matters with respect to which Courts in all jurisdictions can exercise their power to assist arbitration.¹ With respect to all other matters of arbitral assistance and supervision, the Model Law provides a strict territorial criterion². The general principle of the Model Law is that courts of the seat of arbitration alone can perform functions of arbitral supervision including hearing any challenge to the award. The exceptions to this strict territorial principle have been carved out in Art 1(2) because issues regulated in these provisions are linked to the principle of universal recognition of the arbitral process.³ The Model law recommends interim measures of protection from the court in support of arbitration in Article 9.

Giving impetus to international arbitration would certainly mandate allowing interim measures of protection by court(s) that have jurisdiction over the property, which is the subject matter of a dispute,

The general principle of the Model Law is that courts of the seat of arbitration alone can perform functions of arbitral supervision including hearing any challenge to the award.

irrespective of whether the arbitration is being conducted in that jurisdiction. In the absence of such protection a claimant (or a respondent with a counter-claim) could end up with a worthless arbitral award if the losing party manages to liquidate its attachable assets or moves them to a 'safe' jurisdiction⁴. Interim measures by an arbitral tribunal do not always meet the requirement of the situation as often protection is required even before the tribunal is set-up⁵. Moreover, tribunal ordered measures are not enforceable in most jurisdictions⁶.

Bhatia International: The First Chapter of the Story.

Can a party in an arbitration being held outside India be allowed recourse to interim measures of protection from courts in India? This was the question before the Supreme Court in *Bhatia International*.

In the Arbitration and Conciliation Act, 1996, there is no provision akin to Article 1(2) of the Model Law and hence the Act had a structural lacuna as it did not delineate which of its provisions are to apply even when the seat of the arbitration is outside India. The Supreme Court was faced with the unenviable task of interpreting a statute that had

certain structural lacunae. The literal interpretation of S. 2 (2), as given by the High Courts⁷, was resulting in hardship to parties to international arbitrations⁸

The Supreme Court was forced to make up for this lacuna in the Act by placing an interpretation on S. 2(2) that

(Footnotes)

¹ UNCITRAL Second Working Group, 7th Session, 1984 Report, *Model law on International Commercial Arbitration: Territorial Scope of Application and Related Issues*, A/CN.9/WG.II/WP.49, Para 20-22. Retrieved 2nd August, 2009, from http://www.uncitral.org/uncitral/en/mission/working_groups/2Contract_Practices.html

² UNCITRAL, *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session*, 3-21 June 1985, A/40/17. See Para 72-83 on adoption of strict territorial criterion. Retrieved 30th July, 2009, from <http://www.uncitral.org/pdf/english/yearbooks/yb-1985-e/vol16-p3-46-e.pdf>

³ Binder, Peter 2005, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law jurisdictions*, 2nd edn, Thompson Sweet&Maxwell, London, p. 21

⁴ Binder, Peter 2005, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law jurisdictions*, 2nd edn, Thompson Sweet&Maxwell, London, p. 101

⁵ Redfern, D.Alen 1995, 'Arbitration and the Courts: Interim Measures of Protection — Is the Tide About To Turn?', *Texas International Law Journal*, Winter 1995, p. 71

⁶ Art.17 UNCITRAL Model Law, 1985, does not provide for enforceability of interim measures by the tribunal. See Binder, Peter 2005, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law jurisdictions*, 2nd edn, Thompson Sweet&Maxwell, London, p. 394, for jurisdictions where tribunal ordered interim measures are enforceable.

⁷ See note 3 *supra*.

⁸ Mandal, Shiva & Modi, Zia 2001, 'Case Comment *Marriot International Ltd v. Ansal Hotels Ltd.*', *International Arbitration Law Review* 2001. Non-availability of interim measures to parties to an arbitration held outside India is described as a 'critical impediment' to arbitration.

extends the protection of section 9 to arbitrations conducted outside India. The Supreme Court gave the following interpretation to S. 2(2):

“the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions.”

The Supreme Court, therefore, rejected the interpretation of S. 2(2) given by the Delhi High Court in cases like *Marriot*¹ as, in the opinion of the Supreme Court, they resulted in inconsistencies, uncertainty and friction in the system of arbitration.² The result was that parties in an arbitration held outside India would be free to approach the courts to seek interim measures of protection. However, in the process the Court opened up a Pandora's box of interpretative problems, the effect of which is seen in judgments like *Venture Global*³. In *Bhatia International* the question of applicability of Part-I to arbitrations held outside India arose in the context of interim measures of protection, however, the judgment has been subsequently interpreted and followed in various contexts including setting aside of awards⁴ and appointment of arbitrators⁵.

Venture Global Engineering v. Satyam Infoway Ltd.

In *Venture Global* the question raised was whether parties to an arbitration held outside India could approach the courts in India to set aside a foreign award? The dispute resolution clause in the contract provided that the substantive law of the contract will be the Law of Michigan whilst the arbitration will be conducted by LCIA. There was a non-obstante clause in the contract which provided that parties will abide by the Indian Companies Act, 1956.

In *Venture Global* the Supreme Court held that, in light of *Bhatia International*, Part-I is applicable to arbitrations held outside India and, therefore, parties to a foreign award can approach the competent court in India to set-aside the award. The Supreme Court rejected the contention that the decision in *Bhatia International* should not be extended to the applicability of S.34, which relates to setting-aside of awards, to foreign awards. The High Courts in a number of judgments, decided post-*Bhatia International*, had held that since Part-II provided specific provisions with respect to enforcement of foreign awards the provision with respect to the setting aside and enforcement of awards in Part-I should not apply to foreign awards.⁶ The Supreme Court, in *Venture Global*, rejected this interpretation arguing in effect that since Part-II relates only to enforcement of awards it can not exclude the provisions of Part-I relating to the setting aside of awards.⁷ It was, therefore, held that to apply S.34 to foreign awards will not result in any inconsistency with any provision of Part-II including S.48⁸.

The Supreme Court in *Venture Global*, however, failed to consider the ‘friction’ this will cause in the system of arbitration, a concern which weighed heavily with the court in *Bhatia International*. Setting-aside of an award is not the same as its non-enforcement; in case an award is set-aside, its enforcement may be refused in any other New York Convention jurisdiction.⁹ In effect, setting-aside of an award leads to its annulment precluding its enforcement in other jurisdictions.¹⁰ The Supreme Court was aware of this distinction in *Venture Global* and this was the very reason that it held the Indian Courts competent to exercise jurisdiction to set-aside a foreign award in order that it may not be enforced in another country without being subjected to the scrutiny of Indian Courts. However, setting aside due to its ‘extra-territorial’ impact must be in accordance with the international consensus as reflected in the New York Convention.¹¹

(Footnotes)

¹ *Marriot International Inc. v. Ansal Hotels Ltd.* AIR 2000 Delhi 377

² *Bhatia International v. Bulk Trading S.A* AIR 2002 SC 1432, Para 15

³ *Venture Global Engineering v. Satyam Computer Services Ltd.* AIR 2008 SC 1061 has held S.34, relating to setting aside of arbitral awards, applicable to foreign awards.

⁴ *Venture Global Engineering v. Satyam Computer Services Ltd.* AIR 2008 SC 1061

⁵ *Citation Infowares Ltd. V. Equinox Corporation* JT 2009(8)SC 316, *Indetel Technical Services Ltd. v. W.S. Atkin PLC* AIR 2009 SC 1132

⁶ *Inventa Fischer GmbH and Co. v. Polygenta Technologies Ltd.* 2005 (2) ArbLR 125 (Bom), *Jindal Drugs Ltd. v. Noy Vallesina Engineering SPA* 2002 (3) BomCR 554, *Force Shipping Ltd. v. Ashapura Minechem Ltd.* 2003 (3) ArbLR 32 (Bom), *Bulk Trading S.A. v. Dalmia Cement* 2006 1 Arb Lr 38 (del), *J.K Industries v. D.S. Stratgem Trade A.G.* MANU/DE/8771/2007

⁷ *Venture Global Engineering v. Satyam Computer Services Ltd.* AIR 2008 SC 1061, Para 19

⁸ S.48 relates to grounds for refusing enforcement of foreign award.

⁹ Article V 1 (e) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards

¹⁰ Exceptions to this understanding are found in the following cases *Societe Hilmarton v. Societe O.T.V.* XX Y.B. COM. ARB. 663 (1995), *Chromalloy Aeroservices v. Arab Republic* 939 F. Supp. 907 where awards which had been duly set-aside were also enforced.

¹¹ 144 Countries are signatories to the convention. Status retrieved 28th August, 2009, from http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html/

Venture Global runs contrary to the understanding reflected in the New York Convention. Article V 1 (e) of the Convention which provides that the enforcement of an award may be refused in any country if it has been set-aside in the country of its origin or the country under the law of which it had been made. In Article V 1 (e), 'the country under the law of which the award has been made' refers to the country whose law governs the arbitration agreement and not the country whose law governs the contract.¹ This means that, an Indian court can effectively set-aside an award only if it has been made in India or if the arbitration agreement has been subjected to the Indian law.² The Supreme Court in *Venture Global* did not enter any finding that the law of the arbitration agreement is Indian. An order setting aside an award would be effective only if it is recognized by other contracting states as an effective setting aside of the award. Since India is not the country of origin in the case of *Venture Global*, any order setting aside the award would be ineffective as it would not be respected by courts in other states.

A situation similar to *Venture Global* arose in the case of *American Construction Machinery & Equipment Corporation Ltd (ACME)*.³ In this case, there was an arbitration between an American equipment supplier and a Pakistani government-owned corporation. The arbitration was held in Geneva in accordance with the ICC Arbitration Rules and an award was rendered in favour of ACME. The Pakistani corporation had the award set-aside in a Pakistani Court on the ground that it was not in accordance with the law under which it was made (allegedly Pakistani Law was the applicable substantive law). The award was sought to be enforced in US where the District Court held that 'the law under which this award was made' was Swiss law because the award was rendered in Geneva, pursuant to Swiss arbitration law. The District Court, therefore, held that

If Indian courts can interfere in arbitrations to be held outside India what should be the criterion for them to exercise their jurisdiction?

Article V 1 (e) of the NYC could not be invoked in the case and accordingly enforced the award. In *Venture Global* the SC did not set aside the award but, after stating that S. 34 of Part-I would apply to an arbitration held outside India having 'nexus' with India, and remanded the matter to the competent court.¹ Had the award been set aside, it would have perhaps met the same fate as the award in *ACME*. After the Supreme Court's decision in *Venture Global*, while proceedings were pending before the competent court, the award was enforced against the judgment-debtor in the USA.²

The question as to which Court should have jurisdiction to supervise the arbitration has always been a thorny question for international arbitration. If Indian courts can interfere in arbitrations to be held outside India what should be the criterion for them to exercise their jurisdiction? *Venture Global* seems to suggest that if there is an 'intimate nexus' with India a foreign award may be set-aside in India. The contours of this 'intimate nexus' reproduces a field of ambiguity which was sort to be avoided by the Model Law by adopting a strict territorial criterion³ for determining jurisdiction of courts hearing matters relating to arbitration. The *Venture Global* case has brought back to life the controversy surrounding 'nexus' which had been successfully buried by the Model Law.

Conclusion: Exploring Possible Solutions

In *Bhatia International* the concern of the Court was that if Part-I was held not applicable to arbitrations held outside India then this would result in parties to arbitrations held outside India being deprived of the valuable right to get interim measures from the courts. In *Venture Global* the concern of the Court was that the award was not being enforced in India in spite of the 'close and intimate' nexus with India and, therefore,

(Footnotes)

¹ *O.N.G.C v. Western Company of North America* AIR 1987 SC 674. Also, *International Standard Electric Corporation v. Bidas Sociedad Anonima Petrolera, Industrial Y Comercial* 745 F. Supp. 172

² Van Den Berg, Albert Jan, *The New York Convention of 1958: An overview*. Retrieved 30th July, 2009, from http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf/. Mr. Van Den Berg points out that in most the cases it is the seat of arbitration that determines the governing law of arbitration and a case in which seat of arbitration is different from the governing law of the arbitration agreement is nowadays merely 'theoretical'.

³ *American Construction Machinery & Equipment Corporation Ltd. v. Mechanised Construction of Pakistan Ltd.* 659 F. Supp. 426. Affirmed by the Court of Appeal for the Second Circuit in 828 F.2d 117.

⁴ *Venture Global Engineering v. Satyam Computer Services Ltd.* AIR 2008 SC 1061 has been referred to larger bench

⁵ *Satyam Computer Services, Ltd. v. Venture Global Engineering, LLC.* 2009 FED, approved in 0273N (6th Cir.)

⁶ UNCITRAL, *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session*, 3-21 June 1985, A/40/17. See Para 72-83 on adoption of strict territorial criterion. Retrieved 30th July, 2009, from <http://www.uncitral.org/pdf/english/yearbooks/yb-1985-e/vol16-p3-46-e.pdf/>

the judgment debtor was deprived of his remedy under S.48. The Supreme Court was of the opinion that in case a judgment-debtor under an award resides abroad the decree-holder may circumvent enforcement proceedings in India even in respect of properties situate in India by personal compliance extracted on the basis of a threat of contempt.

Completely disregarding the concern of the Court in *Bhatia International* would be to throw the baby out with bath water. It must be recognized that the Arbitration and Conciliation Act, 1996 contains certain lacunae which can be overcome only with 'creative interpretations', bordering on 'judicial legislation'. The interpretation of S. 2(2) given in *Bhatia International* was a valiant attempt to provide for interim measures in cases where the seat of arbitration is not in India. Unfortunately this interpretation does not further the concern of the Court in relation to interim measures since, in cases where there is an express or implied choice of law to govern the arbitration agreement, which often happens in international transactions, interim measures again will not be available¹.

The judgment in *Bhatia International* has created a peculiar paradox. It is indispensable to international arbitration that courts universally provide interim measures of protection irrespective of the seat of arbitration. At the same time, the *Bhatia International* judgment creates more problems than solutions by allowing other provisions of Part-I to apply to arbitrations held outside India.

In order to harmonise the Indian law with international practice there must be an interpretation of S. 2 (2) that permits certain provisions of Part-I to apply and others not to apply. The following interpretation it is suggested will resolve the problem:

It is imperative, if India has to emerge as an arbitration friendly country and as a center for international arbitration that the Indian law on arbitration harmonizes with the position in other jurisdictions

“S 2 (2) does not state that its provisions shall apply only where the place of arbitration is in India. The provisions of Part-I therefore may apply at the discretion of the Court even when the place of arbitration is outside India.”

The circumstances in which provisions of Part-I may apply can be fashioned around S. 2 (4) of the English Arbitration Act². The criterion for applicability of various provisions should be culled out keeping in mind the concern of the Court in *Bhatia International* of supporting the arbitral process. Provisions such as interim measures of protection (S.9) and Court assistance in taking evidence (S.27) may be made readily available to parties to arbitration with seat outside India. Appointment of arbitrators may be granted in those rare cases where the seat of arbitration is not determinable. However, provisions like S.34 relating to setting-aside of the awards may be made available in only those rare cases where a close and intimate nexus with India demands that the award must be enforced in India.³ Such an interpretation can succeed only if the Hon'ble Court proceeds with the same concern for smooth functioning

of the arbitral system as was shown by the Hon'ble Court in *Bhatia International*. The spirit should be to align the Indian law with the position that is ubiquitous internationally.⁴

The advantages of such an interpretation will be:

- ◆ Interim measures of protection and other provisions of arbitral assistance will be made available to arbitrations held outside India
- ◆ There would be flexibility in applicability of provisions of Part-I

(Footnotes)

¹ *Max India Ltd. v. General Binding Corporation* OMP 136/2009 decided on 14.5.2009 by Delhi High Court. In this case, the Hon'ble Court has decided that the choice of English law excludes the provisions of Arbitration and Conciliation Act, 1996 and, therefore, S.9, providing for interim measures, also stands excluded

² The section reads "The court may exercise a power conferred by any provision of this Part ...for the purpose of supporting the arbitral process where -

(a) no seat of the arbitration has been designated or determined, and

(b) by reason of a connection with England and Wales or Northern Ireland the court is satisfied that it is appropriate to do so"

³ In *Venture Global* for eg. the arbitration clause was part of a Share Holders Agreement and the share transfer under the award had to be affected in India.

⁴ *Naval Gent Maritime Ltd. v. Shivnath Rai Harnarain (I) Ltd.* 2000 (54) DRJ 639. Hon'ble Justice Vikramjit Sen has held that interim measures of protection should be provided as that is the position in other jurisdictions.

◆ Challenge to foreign awards which after *Venture Global* are admitted as a matter of course since S.34 has been held applicable to foreign awards will be limited to those rare cases where a close and intimate nexus with India demands that the award must be enforced only in India.

◆ The concerns of the Supreme Court in both *Bhatia International* and *Venture Global* will be addressed.

The law laid down in *Bhatia International* and *Venture Global* may soon be placed before a larger Bench of the Supreme Court for re-consideration as noted above¹ and, therefore, the possible judicial interpretations that can harmonize Indian law with international practice become all the more relevant.

It is imperative, if India has to emerge as an arbitration friendly country and as a center for international arbitration that the Indian law on arbitration harmonizes with the position in other jurisdictions. It is hoped that the necessary corrective steps will be taken soon either by the legislature or by the judiciary.

(Footnotes)

¹ See Note 6, *Supra*

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The Lighter Side



Questions and Answers

A father and son went fishing one day. After a couple hours in the boat, the boy suddenly became curious about the world around him.

He asked his father, "How does this boat float?"

The father thought for a moment, then replied, "Don't rightly know, son."

The boy returned to his contemplation, then turned back to his father, "How do fish breathe underwater?"

Once again, the father replied, "Don't rightly know, son."

A little later, the boy asked his father, "Why is the sky blue?"

Again, the father replied, "Don't rightly know, son."

Worried he was going to annoy his father, he says, "Dad, do you mind me asking you all of these questions?"

"Of course not, son. If you don't ask questions, you'll never learn anything."



Consumer Court will not resolve telephone disputes

If you are a telephone subscriber and have a dispute with the service provider over an inflated bill or disconnection, then you can no longer rush to the neighborhood consumer court for quick and cheap redress of your grievance. The Supreme Court of India ended the jurisdiction of consumer courts to entertain disputes relating to telecom services. It said from now on, these disputes would be resolved through arbitration provided under Section 7B of the Indian Telegraph Act, 1885.

ICC – IBA Event in India

The first ever joint event organized by the ICC International Court of Arbitration and the International Bar Association in India entitled “Arbitration in the 21st Century - Making it Work” will take place in New Delhi on 4-6 December 2009. The conference opened by The Hon Justice K G Balakrishnan, Chief Justice of India, features moderators and speakers selected amongst the most prominent arbitrators and legal practitioners in the field.

Forced mediation for separating couples

Divorcing and separating couples could be compelled to consider mediation before going to court under plans being examined by the Ministry of Justice in the UK. At present, only parties who are funded by legal aid are obliged to consider mediating. Justice Minister informed that strategies are being made to increase public awareness of mediation. ‘Mediation will lead to better outcomes for individuals and for their children, but the challenge is to get the message to people at the earliest possible stage’, she said.

Applications open for 5th International Commercial Mediation Competition

ICC has opened the online application process for another round of its International Commercial Mediation Competition. The renowned moot competition will take place at ICC headquarters from 6 to 10 February 2010.

In matters of style, swim with the current;
in matters of principle, stand like a rock.

~ Thomas Jefferson ~

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