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BALCO: "Deciding the fate of Arbitration for years to come and bringing a new dawn for India."

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Abstract

On 6 Sept, 2012, the Indian Supreme Court delivered its much awaited judgement in Bharat Aluminium & co. v. Kaiser Aluminium Technical Services collectively known as BALCO Judgement. The 190 page BALCO Decision is likely to go down in the annals of arbitration as the watershed decision that heralded the new dawn for Indian arbitration. Since the international consciousness is that, India is arbitration unfriendly Jurisdiction and the main basic reasons being Delays plaguing Indian Court System and poor infrastructures that are demanded to be necessary.[1] The Broad thrust of the BALCO decision is to protect the future from the erroneous and anachronistic decisions of the past and consistent with underlying philosophy and ethos of the NY convention and UNCITRAL Model Law, which is with the purpose of exhorting Indian Courts to became more arbitration friendly and thereby less prone to intervene in the arbitral process. Thus in the introductory part, the paper will discuss the background of the Indian Scenario and advent of arbitration related issues with special reference to Bhatia decision(2002) and the very (in)famous case White Industries case which was heard along with BALCO. And further this paper try to put forth and solve the strings which are attached to the tail of the decision and Also in the light of two papers published recently "three errors" & "half-an error" and English Arbitration Act, 1979. This paper will try to provide suggestions and answers to the question of applicability of BALCO, which is about to bring a new dawn for Indian Scenario in the field of arbitration and will decide the fate of arbitration for the years to come

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1. BACKGROUND OF THE SITUATION IN INDIA

As we all know till the time International consciousness is that India is an arbitration unfriendly jurisdiction and among the few reasons major two reason being, firstly we all are aware of the Delays in the Indian judicial system and secondly , the poor or lack of infrastructure necessary for an arbitration friendly destination. These issues in further became non-issues given the availability of jurisdictions such as Singapore and other places which lend themselves well to parties seeking arbitration.

To this approach of arbitration seating outside India, concerns arose when Indian courts seeks actions for exercising their jurisdiction. Most common requests being actions seeking interim measures from Indian courts in foreign seated arbitrations, and in some instances challenges to awards resulting from these foreign arbitrations.

Foundation with Bhatia (2002) decision :

Interference by Indian courts in arbitral proceedings has specially been striking in the grant of interim measures of protection and interim relief. This is normally in exercise of the power under section 9 of the [Indian] Arbitration and Conciliation Act, 1996. In the specific area of grant of interim measures of protection, of foremost importance is the Bhatia judgement 2002 of Supreme Court which took the view that Part 1 of the 1996 Act applies equally to international commercial arbitrations that are seated outside India.[1]

Argument that succeeded in Bhatia Case, was that section 2(2) of the 1996 Act, didi not use the word "*only*" implying that the legislature had not that Part 1 is not to apply to arbitrations which took place outside India. This surely reflects the lack of judicial interpretation and ambiguousness regarding the interpretation of law till Bhatia Case or may it be the case that there wasn"t any start till then.

Further with relation to the past excluding Part 1, raised several new issues , relating to appointment of arbitrators and setting aside of awards. More precisely saying it created more problems than it solved, consequently in *Indtel Technical Services*,Supreme court appointed arbitrator for outside arbitration under section 1 of the Act.

Also in *Venture Global*, the Supreme court Set Aside an arbitration award made in London, under section 34 of the Act.Thus Leaving foreign arbitration exposed to intervention by Indian courts. In Efforts to make the floodgates close, some Indian Judges took the view that the parties could agree , expressly or impliedly to exclude the application of Part 1 of the Act.[2]

2. <u>BALCO: Welcomed by International Business Community</u>

On 6 Sept, 2012, A five Judge Constitution bench of the Indian Supreme Court handed down 190 pages long BALCO decision, in *BALCO v. Kaiser Aluminium Technical Services Inc.* the BALCO decision came about in the context of several related cases referred to larger bench, from a Two-Judge bench which was unable to agree on the correctness of the Bhatia Decision. A

[1] The decision came about in the context of a request for an interim relief made by a party to an ICC arbitration seated in Paris. The Indian supreme court took the view that unless expressly or impliedly excluded the provisions of Part 1 would also apply to arbitrations seated outside India.

[2] Dozco India Pvt Ltd. V. Doosan Infracore Ltd. (2011) 6SCC 179. And Videocon Industries Ltd. V. UOI (2011) 6 SCC 161.

connected case which also came to be heard by the court along with BALCO and raised the same legal issues in the infamous *White Industries Case.*[3]

In BALCO court took the view that it disagreed with the decision in Bhatia and Global Ventures, and that the power to grant interim measures in respect of the foreing seated arbitrations or to deal with challenges to foreign awards did not flow from the provisions of the 1996 Act. Further took the view that the „broad" interpretation of Bhatia that all of Part1 applied to arbitration seated outside India did not find the proper basis in Arbitration and Conciliation Act, 1996.

Recognising the problems that has arisen, the Supreme Court consolidated no. of cases on this issue and fast-tracked the matter. Further signifying the importance of the matter and intervention heard form interested organizations, Supreme Court concluded;[4]

- Following the Model Law, the Act recognises a "*territoriality principle*" in international arbitration. Supervision of arbitration is for the courts of the jurisdiction where the arbitration is seated.
- Part I and Part II (which incorporates the New York Convention into Indian law) of the Act are mutually exclusive and their provisions cannot be applied interchangeably.
- This means that no section of Part I applies to any arbitration seated outside India. The only powers that an Indian court can exercise in relation to foreign arbitration are set out in Part II of the Act, namely: to give effect in India to an agreement referring disputes to arbitration in another country; and to enforce foreign arbitration awards in India.

3. STRINGS ATTACHED TO THE TAIL OF BALCO:

There are two caveats at the end of BALCO judgement;

Firstly, the Indian Supreme court recognises that in overturning Bhatia International, it was also rejecting the solutions that has been found there for interim measures in aid of foreign arbitration and,

[3] First ever BIT award against in got through this case.
[4] Vivekananda N., Head SIAC "LESSONS FROM THE BALCO DICTAOF THE INDIAN SUPREME COURT" available at www.siac.org.sg.

Secondly, since supreme Court has restricted the application of BALCO to disputes arising from arbitration agreements that are executed after the date of judgement (6 Sept., 2012).[5] The reason provided for this *"is to do complete justice", but, the question arises why should the previous case law, which SC concluded is wrong, continue to apply to agreements which will undoubtly generate arbitrations for years to come?*

To the first caveat, court answered that interim measures can still be obtained from an arbitral tribunal, and possibly from the courts where the arbitration is seated. And for the second caveat, only remedy available to prior 6 sept, 2012 cases is, either to revaluate the existing arbitration agreement, and if possibly re-execute them in order to make BALCO judgement applicable. Since the broad thrust of the BALCO decision is to protect the future from erroneous and anachronistic decisions of the past and consistent with underlying philosophy and ethos of the New York Convention and UNCITRAL Model Law which will exhort Indian courts to became more arbitration friendly and thereby less prone to intervene in the arbitral process.[6]

4. INTERPRETATION OF THE TERM *"COURT"* IN BALCO:

Recently two papers which has been published critically analysing BALCO judgement rendered by Five Judge Bench (three errors & half an error)[7]. According to the interpretation of the term „court" in the Arbitration and Conciliation Act, 1996.

Court is defined in Section 2(1)(e) as below:

"Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of

[5] Ashurst Arbitration Group," The renewal of arbitration in India: Balco-v-Kaiser Aluminium, Sept, 2002.
[6] Ashish Chugh," The Bharat aluminum case: The Indian Supreme Court Ushers in the new era", Sept 26, 2012.
[7] Niranjan & Shantanu Narvane, 'Bhatia International Rightly Overruled: The Consequences of Three Errors in BALCO' (2012) 9 SCC J-26; ("*Three Errors*") & SK Dholakia & Aarthi Rajan, 'Not Three but Half an Error in BALCO: Bhatia International Rightly Overruled'(2013) 1 SCC J-81. ("*Half an Error*")

a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;"[8]

Arguments in the "three error" & "half-an error" paper regarding the interpretation of the term „court";

According to the contentions present in the said paper, court wrongly construed "subject matter of the arbitration" to be different from "subject matter of the suit" which was clearly not the intention. Whereby, the act does not fix jurisdiction but by analogy t the courts that would ordinarily, but for the arbitration, have jurisdiction in a suit, which is definitely an „indirect way of fixing jurisdiction".

Thus, section 2(1)(e) is not consent based jurisdiction but a jurisdiction which is based on statute. Consequently, SC"s view on BALCO would have the following consequences and overall will lead to an erroneous decision of BALCO;[9]

- The court at seat of arbitration which previously never exercised jurisdiction, would not have jurisdiction.
- Certain decisions of the Andhra Pradesh High Court (Paramita Constructions v UE Development India (2008) 3 An LT 440 and Jyothi Turbo Power Services v. Shenzhen Shandong Nuclear Power Corporation AIR 2011 AP 111) held that where parties agree to have their arbitration in a seat, that court alone would have jurisdiction. While the Supreme Court has affirmed in BALCO that the court at seat would have jurisdiction, it does not state that such court alone would have jurisdiction.
- Due to Section 42 (which provides that where any application is made in respect of a Court, that Court alone would have exclusive jurisdiction over all the arbitral proceedings and consequent applications), a court which normally would have jurisdiction under the 1996 Act, would not have jurisdiction, if an application is made to the court at the seat.

[8] Arbitration and Conciliation Act, 1996(Act of 1996).
[9] Practical Academic,"BALCO: Three Errors or Half? Part I", Wed, March 13, 2013.

To the contrary, in the paper "half-an error" on BALCO regarding the issue of interpretation, argues that the court rejected the argument regarding the "subject matter of arbitration". Since, section 2(1)(e) state that the seat of arbitration is the basis of jurisdiction.

Also, the logic of BALCO and its interpretation is based on the principle of territoriality by which the seat would have the „exclusive jurisdiction‟ over the arbitration, which definitely furthers party‟s *autonomy*. Therefore there is no reason why principles of *territoriality and part autonomy* adopted in international commercial arbitration should not be adopted when the seat of arbitration is India.

Concluding that the seat of arbitration are in the best position to supervise arbitration , following are the reasons for the same,[10]

- After BALCO, parties might even choose jurisdictions such as Delhi specifically for the reason that Delhi courts would exercise supervisory jurisdiction over other courts.
- Since court cultures vary as regards speedy disposal of cases, parties must be left with the choice to select the court of their choice.
- Such a choice would foster a culture of arbitration in India.

5. CONCLUDING REMARKS

In the light of the fact that there is proposal to amend the Act and judgements limited applicability, the question whether this judgement would go a long way in affecting international commercial contracts remain to be seen.[11] Also the 190-page long BALCO decision which is

[10] Practical Academic,"BALCO: Three Errors or Half? Part I", Wed, March 13, 2013.
[11] Raj Panchmatia,"The viewpoint- The Jurisdictions of Indian Courts In International Commercial Arbitration", January 3, 2013.

likely to go down in the annals of arbitration and a watershed decision must bring a new dawn for Indian Arbitration.[12]

As a matter of fact, The English Arbitration Act, 1979 which was specifically enacted to make London a better place of arbitration so that the English Courts could Exercise Supervisory jurisdiction in a better manner. London Has became a prominent choice of forum for arbitration due to the supportive role of the English courts. Similarly, If India could find a speedy way of disposing the cases and re-extract a different image with proper with proper infrastructure and supportive personnel"s, with BALCO India could potentially move ahead in bringing the new dawn for Indian Arbitration and will make India an „*arbitration friendly*" destination as contrary to the beliefs of many.

[12] Ashish Chugh," The Bharat aluminum case: The Indian Supreme Court Ushers in the new era", Sept 26, 2012.