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MONTHLY NEWSLETTER

FEBRUARY 2022

Applicability of BALCO to the Bhatia regime of arbitration agreements: A Critical Analysis

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INTRODUCTION

Prior to the 2015 amendment to the Arbitration and Conciliation Act, 1996 ("**Act**"), the scope and application of Part I of the Act was subject to several conflicting interpretations, especially in respect to foreign seated arbitrations.

The meaning of the words "*where the place of arbitration is in India*" [1] under Section 2 of the Act, resulted in questions regarding the applicability of Part I to foreign seated arbitrations. This issue was initially decided by the Supreme Court of India ("**Supreme Court**") in *Bhatia International v. Bulk Trading* [2] ("***Bhatia International***"), wherein it was held that Part I of the Act could be applied to arbitral disputes with a foreign seat "*unless the parties by agreement express or implied exclude all or any of its provisions*".

The decision in *Bhatia International*, was based on an erroneous interpretation of the Act. This resulted in the Supreme Court reconsidering its decision. Thereafter, a five-judge bench of the Supreme Court in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.* [3] ("***BALCO***") overruled its earlier decision in *Bhatia International* and excluded the applicability of Part I of the Act to foreign seated international commercial arbitrations ("**ICA**").

However, the Supreme Court in *BALCO*, limited the application of the judgement only to arbitrations agreements signed on or after September 6, 2012, *i.e.*, on or after the date of the *BALCO* judgement. Therefore, the law as laid down in *Bhatia International*, continues to be applicable till this date for all disputes arising out of an arbitration agreement entered into before September 6, 2012. This paper seeks to analyse the recent trend of courts placing reliance on the principles laid down by the Supreme Court in *BALCO* for arbitration agreements entered into by parties during the pre-*BALCO* era, and effectively analyse the basis in law for the same.

ABOUT THE FIRM

AKS Partners (formerly known as A.K. Singh & Co) is a law firm based in New Delhi (India) that provides a comprehensive range of legal services and solutions to domestic and international clients. The Firm offers a unique blend of the local knowledge to apply the regulatory, economic, political and cultural context to legal issues and develop case strategies.

We regularly handle technically challenging and complex multi-jurisdictional matters. Our team is spearheaded by one of the highly recognised lawyers with extensive experience in international dispute resolution and strong government and diplomatic backgrounds. This experience gives us the deepest understanding of the key decision points that are critical in navigating complex & complicated matters and managing government regulations.

LAW LAID DOWN IN *BHATIA INTERNATIONAL* AND *BALCO*

The applicability of Part I of the Act to foreign seated ICA was governed by the law set out in *Bhatia International*. This case specifically dealt with the issue of whether an application for interim reliefs can be sought before Indian courts when the arbitration was to be held in Paris, France, as per the rules of the International Chamber of Commerce ("**ICC**"). The Supreme Court in *Bhatia International*, held that the "*provisions of Part I of the Act would also apply to international commercial arbitrations seated outside India, unless the parties had expressly or impliedly agreed to exclude its application.*" The Supreme Court reasoned that an interpretation to the contrary would disclose a lacuna under the Act since neither Part I or Part II would apply to arbitrations held in non-signatory nations of the New York Convention or the Geneva Convention. The Supreme Court further observed that the interpretation propounded in *Bhatia International* would resolve the conflict between Sections 2(2) of the Act which states that Part I of the Act shall apply "*where the place of arbitration is in India*", and Sections 2(4) and 2(5) of that Act which state that Part I of the Act applies to every arbitration and all proceedings relating to such arbitration.

The Supreme Court was also of the opinion that a party would be left remediless in a foreign seated ICA, especially if a party intends to seek interim reliefs in India, and in situations where the assets of the other party to the arbitration are located in India.

While the intent of the Supreme Court in pronouncing its judgement in *Bhatia International* was to ensure that a party is not left remediless in a foreign seated ICA, the judgment soon resulted in increased interference by Indian courts in arbitral awards passed in foreign seated arbitrations. Several decisions also appeared to be in conflict, owing to the issue of when an arbitration agreement could be interpreted to infer an implied exclusion of the application of Part I of the Act.

The chaos resulted in a two-judge bench of the Supreme Court to express its reservations regarding the correctness of the decision and the interpretation of the Supreme Court[4] in *Bhatia International*. The decision was thereafter referred to a three-judge bench of the Supreme Court, which directed the matter to be placed before a Constitution Bench.[5] The five-judge bench of the Supreme Court in *BALCO*, accepted the "territoriality principle" as per the UNCITRAL Model Law [6] and held that Part I of the Act would only apply to domestic arbitrations. The Supreme Court further held that ICAs that have their seat within the territory of India would still be amenable to Part I of the Act.

The Supreme Court further held that Part I of the Act would have no application to ICAs seated outside India. The main consequence of this judgment was the insulation of arbitrations seated outside India from unwarranted interference by Indian courts.[7]

Interestingly, the Supreme Court overruled the application of *Bhatia International* prospectively to all arbitration agreements executed after September 6, 2012. This was to ensure that the decision does not affect the reliance placed on *Bhatia International* by the High Courts and their subordinate courts in older matters. Further, the Supreme Court did not want the reopening of endless cases that had been settled under the old regime as per the law laid down in *Bhatia International*,

which had been the law of the land for over ten (10) years.

THE RECENT TREND OF THE LAW LAID DOWN BY THE SUPREME COURT IN PRE-BALCO ARBITRATIONS

While things stood thus, recent trends of the Supreme Court indicate a shift in the treatment of arbitration agreements entered into by and between parties in the pre-*BALCO* era.

The Supreme Court in *IMAX Corporation v. E-City Entertainment (India) Pvt. Ltd.* [8] ("***IMAX Corporation***"), dealt with the issue of "implied" exclusion of the provisions of Part I of the Act. The case dealt with a dispute concerning an agreement for supply of large format projections systems for cinema theatres. The arbitration agreement provided for the settlement of disputes as per the rules of the ICC. The arbitral tribunal so appointed chose London as the seat of arbitration. Despite the award being passed in the pre-*BALCO* era, the Supreme Court held that since the parties had chosen the ICC Rules to govern their arbitration and London as the seat, Part I of the Act had no application. The Supreme Court was of the opinion that the parties had agreed to the arbitration being conducted outside India and by implied consent accepted that Part I of the Act would not be applicable.

A similar issue was raised before the Supreme Court in *Government of India v. Vedanta Ltd*. [9] ("***Vedanta***"). In this case, a party to a foreign seated ICA sought to challenge the award passed in an ICA during enforcement proceedings. The Supreme Court in this case held that since the seat of arbitration was Kuala Lumpur and the law governing the arbitration agreement was English Law, the Malaysian Law would be the curial law and the courts in Malaysia would govern any challenge to the arbitral award.
The Supreme Court refused to interfere with the decision of the arbitral award, despite the arbitration agreement having been entered pre-*BALCO*. However, it is pertinent to note that neither of the parties sought to argue for the application of Part I of the Act in this case, and the challenge on the grounds of public policy was raised pursuant to such a ground being available under Section 48 of the Act under Part II of the Act at the stage of enforcement.

This issue was in fact discussed at length and recently settled by a division bench of the Supreme Court in *Noy Vallesina Engineering SpA v. Jindal Drugs Limited & Ors.* [10] ("***Noy Vallesina***"). The Supreme Court was required to consider the applicability of *Bhatia International* to the impugned arbitral award, since the award was passed in the pre-*BALCO* era. The appellants in this case contended that the law as laid down in *Bhatia International* was applicable. The Supreme Court, upon considering the decisions in *IMAX Corporation* and *Vedanta*, held that the challenge to a pre-*BALCO* foreign award is not maintainable under Section 34 of the Act and that Part I of the Act is not applicable even to pre-*BALCO* awards, if the seat of arbitration is outside India. The Supreme Court discussed the jurisprudence regarding the applicability of *Bhatia International* in pre-*BALCO* arbitral agreements and held that the scope of application was very limited in situations where it could not be ascertained in an ICA that seat of arbitration is outside India. This decision finally laid to rest the scope of application of *Bhatia International* to pre-*BALCO* arbitral agreements and awards.

ANALYSIS ON THE APPLICATION OF *BHATIA INTERNATIONAL* TO PRE-*BALCO* DISPUTES

The confusion in the application of *Bhatia International* to pre-*BALCO* disputes remains a curious one. The Supreme Court in *Noy Vallesina* sought to narrow the applicability of *Bhatia International* in pre-arbitral disputes and held that its application would only be required in those cases in which the agreements stipulate the seat of arbitration in India, or in situations where a judgement cannot be reached that the seat of arbitration is outside India. This position had earlier already been clarified by the Supreme Court in *Union of India* v. *Reliance Industries* [11] ("***Reliance Industries***"), in respect of the application of *Bhatia International* to pre-*BALCO* awards in foreign seated ICAs. The Supreme Court held that in situations where either (a) the juridical seat is outside India; or (b) the law governing the arbitration agreement is not Indian law, Part I of the Act would stand excluded by necessary implication.

In this manner, the Supreme Court has sought to interpret paragraph 32 of the *Bhatia International* case which states that Part I of the Act can be excluded expressly or by necessary implication. The Supreme Court has interpreted this phrase to ensure that the arbitral regime pre-*BALCO* is interpreted in a manner consistent with the Act. Since the decision in *BALCO* was curative, it is therefore clear that the law could not stand different pre and post *BALCO*, especially in the absence of any amendment to the law.

Therefore, the Supreme Court has sought to address this issue to ensure a common understanding of the law pre and post *BALCO* by interpreting necessary implication as used in *Bhatia International*.

CONCLUSION

The application of the law laid in *Bhatia International* is only in remote situations where the seat of arbitration is not discernible in an ICA. The courts have unanimously recognised the application of the law as laid down in *BALCO* even in arbitration agreements entered into during the pre-*BALCO* period by cleverly interpreting the term "*necessary implication*" as provided in *Bhatia International*.

The judgements have now ensured the uniformity in the application of *BALCO* to foreign seated ICAs that were entered into prior to the 2015 amendment.

While it is clear that the 2015 amendment to the Act has ushered a new era where parties can approach Indian courts in certain situations, the non-application of the remedy to set aside foreign arbitral awards under Part I of the Act by Indian courts, continues to be the law of the land till date.

REFERENCES

[1] The Arbitration and Conciliation Act, 1996, Section 2(2).

[2] (2002) 4 SCC 105.

[3] (2012) 9 SCC 552.

[4] *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 649.

[5] *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 648.

[6] Model Law on International Commercial Arbitration 1985 (United Nations Commission on

[7] International Trade Law [UNCITRAL]) UN Doc A/40/17, Annex I.

[8] Prof J. Martin Hunter & Ranamit Banerjee, *BHATIA, BALCO AND BEYOND: ONE STEP FORWARD, TWO STEPS BACK?,* 24 Nat'l L. Sch. of India Rev. (2013).

[9] (2017) 5 SCC 331.

[10] 2020 SCC Online (SC) 749.

[11] (2021) 1 SCC 382.

[12] *Union of India* v. *Reliance Industries*, (2015) 10 SCC 213.

DOMESTIC ARBITRATION

AN ARBITRAL AWARD IS PATENTLY ILLEGAL WHERE THE ARBITRAL TRIBUNAL FAILS TO ACT IN TERMS OF THE CONTRACT

The Supreme Court in the case of *Indian Oil Corporation Ltd. v Shree Ganesh Petroleum Rajgurunagar* observed that an arbitral award can be said to be patently illegal where the Arbitral Tribunal has failed to act in terms of the contract or has ignored the specific terms of a contract. The Supreme Court reiterated that the arbitral tribunal is a creature of contract, is bound to act in terms of the contract under which it is constituted, and if the arbitrator travels beyond the contract he has acted without jurisdiction.

STATUTORY REMEDY AGAINST THE APPOINTMENT OF ARBITRATOR WOULD LIE UNDER THE ARBITRATION AND CONCILIATION ACT, 1996 AND NOT THROUGH INVOKING ART. 226 AND 227 OF THE CONSTITUTION

The Gujarat High Court in the case of *Sandeepbhai Ashokbhai Parmar v. The Arbitrator, Kumari Neetaben Vitthabhai Patel* held that if the Arbitration and Conciliation Act, 1996 provides for a mechanism to address certain grievances and the Petitioner is ignorant of such statutory mechanism or chooses not to avail the same and straightaway invokes the High Court's extraordinary jurisdiction then such invocation shall be improper. The Gujarat High Court observed that when a process has been set in motion, judicial interference beyond the procedure should not be exercised.

OBJECTIONS AGAINST ENFORCEMENT OF FOREIGN ARBITRAL AWARDS CAN'T BE FILED IN A PIECEMEAL MANNER

The Delhi High Court in the case of *TAQA India Power Ventures Private Limited and Ors. v NCC Infrastructure Holdings Limited* observed that a Judgment Debtor cannot be permitted under Section 48 of the Arbitration and Conciliation Act, 1996, to file its objections against enforcement of an arbitral award in a piecemeal manner.

RECENT UPDATE

Our Managing Partner, Mr. Sonal Kumar Singh along with Mr. Anshuman Gupta (Principal Associate) and Ms. Sukanya Lal (Senior Associate) have published an article on Mondaq titled as "*Can Additional Grounds Of Appeal Be Raised In An Appeal Filed Under Section 37 Of The Arbitration And Conciliation Act, 1996?*". Please click here to read.

It also observed that the court is expected to consider both the aspects of maintainability and enforceability of the arbitral award simultaneously.

INTERNATIONAL ARBITRATION

SUPREME COURT OF SINGAPORE SETS ASIDE ARBITRAL AWARD FOR BREACH OF NATURAL JUSTICE AND EXCESS OF JURISDICTION FOR ALLOWING UNPLEADED DEFENSE

The Supreme Court of Singapore ("SGCA") in the case of *CAJ and Anr. v CAI and Anr*, set aside an arbitral award on the ground that the arbitral award had been passed in breach of natural justice and in excess of jurisdiction. In this case, the Respondent raised the defense regarding extension of time for the first time before the arbitral tribunal in its written closing submissions. The SGCA looked into the issue of whether the arbitral tribunal could rule on an unpleaded defence. The SGCA held that allowing the respondent's defense would amount to breach of natural justice as the defense was factually and conceptually different from the other defenses taken by the respondent. The claimant did not get an opportunity to respond to this defense which amounted to a breach of natural justice. Further, the extension of time defense was not raised in the pleadings, list of issues or terms of reference it could not be said to be within the scope of the arbitration and the arbitral award was in excess of jurisdiction. The SGCA observed that the correct mechanism in this case would have been to let the respondent apply for making amendments to its pleadings and decide on the same first.

INSOLVENCY AND BANKRUPTCY CODE

OPERATIONAL CREDITORS INCLUDE ALL THOSE WHO PROVIDE OR RECEIVE OPERATIONAL SERVICES FROM THE CORPORATE DEBTOR

The Supreme Court in the case of *Consolidated Construction Consortium Limited v Hitro Energy Solutions Pvt. Ltd.* held that the operational creditor includes all those who provide or receive operational services from the corporate debtor, which ultimately leads to an operational debt. A debt that arises out of advance payment made to a corporate debtor for supply of goods or services would be considered an operational debt. The Supreme Court further observed that the Insolvency & Bankruptcy Code ("**Code**") defines 'debt' as the non-payment of the debt by the corporate debtor when it has become due. Therefore, limitation does not commence when the debt becomes due but only when a default occurs.

IBBI NOTIFIES IBBI (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) (AMENDMENT) REGULATIONS, 2022

The IBBI *vide* notification dated February 9, 2022 notified the aforestated Regulations to amend the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The Regulations sought to amend Regulation 18 pertaining to the 'Meeting of the Committee' wherein, the Resolution Professional may place a proposal received from the members of the Committee in a meeting, if he considers it necessary. The Resolution Professional is required to place the proposal, if the same has been made by the members of the Committee representing at least 30% of the voting rights. Additionally, the amendments were also made in Regulation 39A pertaining to 'Preservation of Records' whereby the Resolution Professional or Interim Resolution Professional shall preserve the record to give a complete account of CIRP.

DEFICIT OF STAMP DUTY PAYABLE ON INSTRUMENT NOT RELEVANT IN PROCEEDINGS INITIATED UNDER S. 7 OF THE CODE

The NCLT, Mumbai Bench in the case of *Vistra ITCL India Ltd. v Satra Properties (India) Ltd.* held that insufficiency of stamp duty payable on the debt instrument is not to be looked at in an application under Section 7 of the Code, more so when 'debt' and 'default' are proved otherwise than by looking into these documents. The NCLT, Mumbai Bench further held that the instrument shall be impounded for payment of deficit stamp duty.

MEDIATION ORDER AND DISHONOUR OF CHEQUE WOULD NOT LEAD TO EXTENSION OF LIMITATION FOR AN APPLICATION UNDER SECTION 9 OF CODE

The NCLAT in the case of *Ravi Iron Ltd v Jia Lal Kishori & Ors.* held that an order of mediation and dishonor of cheques would not lead to extension of limitation for filing an application under Section 9 of the Code. The NCLAT further held that the fact that the cheques were dishonored may give any right to the Appellant to initiate appropriate proceedings under law but that shall not lead to extension of the limitation for filing an application under Section 9 of the Code.

CO-OPERATIVE SOCIETY NOT A 'CORPORATE PERSON' UNDER THE CODE

The NCLT, Mumbai Bench in the case of *The Solapur Dist. Central Co – Operative Bank Limited v. Sangola Taluka Sahakari Sakhar Karkhana Limited* dismissed an application under Section 7 of the Code against the Respondent which was a Co-operative Society. The NCLT, Mumbai Bench held that the 'Co-operative Society' cannot be deemed to be a 'Corporate Person' to whom the Code applies. The NCLT, Mumbai Bench replied on NCLAT judgment in *Asset Reconstruction Company India Ltd v Mohammadiya Educational Society*. The NCLT, Mumbai Bench also noted that while the Central Government has issued notifications with respect to CIRP against a Corporate Debtor and also Personal Guarantor to Corporate Debtor, no such notification has been issued with respect to a Co-operative Society.

CORPORATE UPDATES

SEBI ISSUES CIRCULAR REGARDING AUDIT COMMITTEE OF ASSET MANAGEMENT COMPANIES (AMCS)

The SEBI *vide* circular dated February 09, 2022 issued guidelines regarding the Audit Committees to be set up for Asset Management Companies ("AMCs"). AMCs of mutual funds shall be required to constitute an Audit Committee. The role, responsibility, membership, and other features of the Audit Committee of AMC are detailed in the circular. The Audit Committee of the AMC shall be responsible for oversight of the financial reporting process, audit process, etc. This circular shall come into force from August 01, 2022.

SEBI ISSUES CLARIFICATIONS REGARDING TIMING OF SUBMISSION OF NOC FOR SCHEMES OF ARRANGEMENT BY LISTED ENTITIES

The SEBI *vide* circular dated February 03, 2022 has issued clarifications regarding the NOC which is to be obtained by a listed entity undergoing a scheme of arrangement from the lending scheduled commercial banks/ financial institutions/ debenture trustees, from not less than 75% of the secured creditors in value. It is clarified that the NOC shall be submitted before the receipt of the No objection letter from the stock exchange in terms of Regulation 37(1) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

OTHER UPDATES

SECTION 69(2) OF THE PARTNERSHIP ACT IS NO BAR TO A SUIT FILED BY AN UNREGISTERED FIRM

The Supreme Court of India in the case of *Shiv Developers Through Its Partner Sunilbhai Ajmeri v Aksharay Developers* held that Section 69(2) of the Indian Partnership Act, 1932 is not attracted to any and every contract and Section 69(2) is not a bar to a suit filed by an unregistered firm if the same is for enforcement of a statutory right or a common-law right. To attract the bar of the said provision the contract in question must be the one entered into by a partnership firm with the third-party defendant during their business dealings.

THE AUTHOR OF THE TENDER IS THE BEST PERSON TO INTERPRET THE DOCUMENTS

The Supreme Court in the case of *Agmatel India Pvt. Ltd. v Resoursys Telecom* reiterated the principle that the author of the tender will be the best person to interpret its documents and requirements. The SC further observed that the courts would interfere only when the questioned decision suffers from illegality, irrationality, mala fide, perversity, or procedural impropriety.

LIMITATION PERIOD FOR ISSUANCE OF NOTICE TO EXCLUDE THE DAY ON WHICH INTIMATION IS RECEIVED

The High Court of Delhi in *M/S Rayapati Power Generation Pvt. Ltd. v Indian Renewable Energy Agency Ltd.* observed that while computing the limitation period of 30 days prescribed under Section 138(b) of Negotiable Instruments Act, 1881 i.e. relating to the issuance of legal notice, the day on which intimation is received from the bank for status of the cheque being returned unpaid is to be excluded from such limitation period.

ISSUE OF LIMITATION CAN ONLY BE DECIDED AS PRELIMINARY ISSUE UNDER ORDER XIV RULE 2 OF THE CODE OF CIVIL PROCEDURE ("CPC"), IF IT IS PURE QUESTION OF LAW

The Supreme Court in the case of *Mongia Realty and Buildwell Pvt. Ltd. vs. Manik Sethi*, observed that Order XIV Rule 2(2) of CPC provides that if issues pertaining to both questions of law and fact arises in the same case, the court may dispose of an issue or any part of the issue thereof pertaining to question of law first. However, the issue of law must relate to the jurisdiction of the court or a bar to the suit created by any law in force in the country.

ORDER II RULE 3 CPC PERMITS A PLAINTIFF TO JOIN CAUSES OF ACTION BUT IT DOES NOT COMPEL THEM TO JOIN TWO OR MORE CAUSES OF ACTION IN A SINGLE SUIT

The Supreme Court in the case of *Prakash Corporates vs. Dee Vee Projects Limited* has held that in the ordinary circumstances, the mandates of Rule 1(1) of Order V, Rule 1 of Order VIII as also Rule 10 of Order VIII, as applicable to the commercial dispute of a specified value, do operate in the manner that after expiry of 120th day from the date of service of summons, the defendant forfeits the right to submit his written statement and the court cannot allow the same to be taken on record but, these provisions are intended to provide the consequences in relation to a defendant who omits to perform his part in progress of the suit as envisaged by the rules of procedure and are not intended to override all other provisions of CPC such as under Section 10.

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