

Dispute Resolution Hotline

April 17, 2015

HAVE YOU AMENDED YOUR ARBITRATION AGREEMENT POST BALCO?

- Supreme Court clarifies the operation of a pre BALCO agreement, when the same was amended by an Addendum, post the decision rendered in BALCO – however the arbitration clause in the Agreement was not amended by the Addendum.
- Supreme Court indicates that unless an amendment has been executed post BALCO suggesting specific changes to the arbitration clause, the principles laid down in Bhatia International would continue to govern the arbitration agreement.
- Supreme Court has re-clarified that the BALCO has only prospectively overruled Bhatia International.

Recently, a two judge bench of the Supreme Court of India (“**Supreme Court**”) in Harmony Innovation Shipping Ltd (“**Appellant**”) v. Gupta Coal India Ltd. (“**First Respondent**”) & Anr¹ ([click here](#)), has clarified the scope of an arbitration agreement entered before the decision in Bharat Aluminum co. v. Kaiser Aluminum Technical Services Inc² (“**BALCO**”). The Supreme Court has held that pre-Balco arbitration agreements must be considered based on the principles laid down in Bhatia International v. Bulk Trading S.A. (“**Bhatia International**”).³

BRIEF FACTS

On October 20, 2010, an agreement was entered between the Appellant and the First Respondent in respect to Appellant’s 24 coal voyages from Indonesia to India (“**Agreement**”).⁴ Thereafter, the First Respondent undertook only 15 coal voyages and that resulted in a dispute, which ultimately was referred to arbitration. Consequently, an addendum to Agreement was executed on April 3, 2013 as regards the remaining voyages (“**Addendum**”). The Addendum did not make any changes to the arbitration clause in the Agreement.

A dispute arose, arbitration proceedings were initiated and eventually an award was passed. The arbitration was held in London.

The Appellant subsequently filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 (“**Act**”) before Learned Additional District Judge, Ernakulam (“**ADJ**”).⁵ seeking security from the First Respondent.

The ADJ directed the First Respondent to furnish security for US\$ 11,15,400 and as an interim measure conditionally attached the cargo belonging to the First Respondent.

HIGH COURT

Aggrieved by the Order of the ADJ, the First Respondent preferred a writ petition before the Kerala High Court (“**High Court**”) contending that the order of the ADJ was without jurisdiction and hence unsustainable in law.

The High Court held that the law laid down in BALCO is declaratory in nature and therefore it cannot be said that it has only prospective effect. Accordingly, the High Court reversed the decision of the ADJ stating that Section 9 of the Act has limited application to arbitration taking place in India and cannot be applied to international commercial arbitrations as held in BALCO.

ISSUES

The Supreme Court had to consider that in a scenario where:

- a. The Agreement has been executed pre BALCO;
- b. The Addendum has been executed post BALCO;
- c. The Addendum amends only certain clauses of the Agreement, not the arbitration clause contained in the Agreement;

Whether the arbitration clause in the Agreement should be interpreted in accordance with the principles laid down in Bhatia International or BALCO.

After determination of the above issue, another aspect which required determination by Supreme Court was whether the jurisdiction of the Indian Courts would be ousted applying the principles of Bhatia International or BALCO, as the case may be.

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First, the Appellant relied on Bhatia International and Citation Infowares Ltd v. Equinox Corp⁶, referred to the arbitration clause in the Agreement, and submitted that there was no express exclusion, and therefore the jurisdiction of Indian Courts cannot be ousted and hence the learned ADJ had not faulted in exercise of jurisdiction.

RESPONDENTS

The Respondents referred to the Agreement and contended that as the juridical seat is in London, Part I of the Act would not be applicable. Further, reliance was placed on Reliance Industries Limited and Anr. v. Union of India⁷ and it was submitted that after the Agreement, the Addendum was executed (which was in fact after pronouncement of the decision in BALCO) and, therefore, the principles laid down in Bhatia International would not be applicable and on the contrary the instant case should be governed by the seat centric approach evolved in BALCO.

JUDGMENT

Supreme Court observed that BALCO was decided on September 6, 2012 and in BALCO, Bhatia International and Venture Global Engg. v. Satyam Computer Services Ltd⁸ was overruled only prospectively. However, in the present case the Agreement was executed before the decision in BALCO and only the Addendum came into existence afterwards. Supreme Court held that as there is nothing in the Addendum to suggest any amendment to the arbitration clause, and hence the same would continue to be controlled and governed by the conditions of the Agreement, and therefore the principles laid down in BALCO would not be applicable in the instant case.

However, the Supreme Court, after analyzing various decisions on applicability of the Act to arbitrations seated outside India and relying on the 'presumed intention' test concluded that in the instant case, the parties intended to keep the juridical seat of arbitration as London on the basis of various phrases occurring in the arbitration clauses including the following:

- a. *"arbitration in London to apply"*
- b. Arbitrators are to be the members of *"London Arbitration Association"*
- c. Contract *"to be governed and construed according to English Law"*

The Supreme Court further went on to hold that the implied exclusion principle as stated in Bhatia International would be applicable i.e. (i) the parties intention to have London as the juridical seat of arbitration (ii) arbitrators being members of London Arbitration Association and (iii) the contract being governed by English Law, evidenced the parties intention to exclude the applicability of Part 1 of the Act.

Thus, the ultimate finding of the Supreme Court was that though the High Court erred in applying BALCO to the facts of the instant case, it's conclusion that ADJ had no jurisdiction, was correct.

ANALYSIS

This judgment serves as well written all-in-one compendium of the land mark rulings of pre BALCO on *"what would constitute 'implied' and 'express' exclusion"*.

Notably, in an earlier judgment of the Bombay High Court in Konkola Copper Mines (PLC) v. Stewarts and Lloyds of India Ltd⁹, it was held that the question whether or not Part I of the Act would apply to an arbitration agreement entered into prior to September 6, 2012, would be decided in accordance with the principles laid down in the Bhatia International. However, having once decided that Part I applies, the question as to which court – within India would have jurisdiction to entertain applications under Section 9 or Section 34 etc. would be decided in accordance with the principles provided in the BALCO judgment which set out that "seat" of arbitration is the center of gravity while determining which Court would have jurisdiction.

The take away from the judgment would be that in case of a pre BALCO agreement, even if the said agreement was amended post the decision rendered in BALCO, unless the amendment specifies anything on the arbitration clause, the said clause would continue to be governed by the decision of Bhatia International. This is particularly important for the pre BALCO agreements which would want to fall under the seat centric approach adopted by the Supreme Court in BALCO.

— **Alipak Banerjee, Moazzam Khan & Vyapak Desai**
You can direct your queries or comments to the authors

¹ 2015 (3) SCALE 295

² 2012 9 SCC 552; In BALCO, Supreme Court held that Part I of the Act would apply if the seat of arbitration is in India. BALCO overruled Bhatia International and make Indian arbitration law seat centric.

³ 2002 4 SCC 105; In Bhatia International, the Supreme Court held that in cases of international commercial arbitrations held out of India, provisions of Part I of the Act would apply unless the parties by agreement, express or implied, exclude all or any of its provisions.

⁴ Clause 5 of the Agreement: If any dispute or difference should arise under this charter, general average/arbitration in London to apply, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision or that of any two of them, shall be final and binding, and this agreement may, for enforcing the same, be made a rule of Court. Said three parties to be commercial men who are the members of the London Arbitrators Association. This contract is to be governed and construed according to English Law. For disputes where total amount claim by either party does not exceed USD 50,000 the arbitration should be conducted in accordance with small claims procedure of the London Maritime Arbitration Association.

⁵ An application under Section 9 of the Act can be filed for interim measures before, during or any time after the existence of an arbitral award but before enforcement.

⁶ 2009 7 SCC 220

⁷ (2014) 7 SCC 603

⁸ (2008) 4 SCC 190

⁹ 2013 (4) ARBLR 19 (Bom)

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