

Dispute Resolution Hotline

February 12, 2016

WHAT FINALLY HAPPENED IN BHARAT ALUMINIUM CO. ["BALCO"] V. KAISER TECHNICAL SERVICES?

- The *BALCO* saga has finally ended with a Supreme Court judgment addressing the subject matter of the dispute.
- In light of the prospective applicability as provided in the 2012 landmark judgment in the same case, the Supreme Court made its decision in line with the pre-*BALCO* arbitration regime.
- The Supreme Court clarified that a reference to a seat or a specified law governing the arbitration is enough to impliedly exclude part I of the Arbitration and Conciliation Act, 1996.

Much has been said about the Supreme Court of India ["SCI"] judgment in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service*¹ which has perceptibly changed the arbitration regime in India. However, one may recall that the judgment made no reference to the facts of the appeal and sought only to resolve the legal questions that arose during arguments. Recently in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services*² ["JUDGMENT/BALCO II"], the SCI addressed the subject matter of the appeal.

The SCI in *BALCO I* had held that the judgment would apply only prospectively and therefore the present dispute had to be resolved as per the law as laid down in the *Bhatia International v. Bulk Trading*³ ["*Bhatia*"] judgment. Under the *Bhatia* regime, all the provisions of Part I of the Indian Arbitration & Conciliation Act, 1996 ["*Act*"] were to be applicable to all arbitration whether domestic or foreign-seated unless the parties by agreement, express or implied, had excluded wholly or partly, the provisions of Part I of the Act.

FACTS

The parties had entered into an agreement in relation to the supply of equipment, modernization and upgradation of production facilities. Certain disputes arose and were referred to arbitration seated in England and awards were made in favour of the Respondent. The Appellant had filed applications to set aside the award before the Chhattisgarh High Court under Section 34 of the Act (which falls under Part I).

RELEVANT CLAUSES OF THE AGREEMENT

Article 17 - Arbitration

17.1 Any dispute or claim arising out of relating to this agreement shall be in the first instance endeavor to be settled amicably by negotiation between the parties hereto and failing which the same will be settled by arbitration pursuant to the English Arbitration Law and subsequent amendment thereto.

17.2 The arbitration proceedings shall be carried by two arbitrators, one appointed by the Petitioner and one by the Respondent chosen freely and without any bias. The Court of arbitration shall be wholly in London, England and shall use the English language in the proceedings. The finding and award of the Court of Arbitration shall be final and binding.

17.3 Before entering upon the arbitration, the two Arbitrators shall appoint an Umpire. If the two arbitrators are not able to reach an agreement on the selection of an Umpire, the Umpire shall be nominated by the International Chamber of Paris.

Article 22 - Governing Law

This agreement will be governed by the prevailing law of India and in case of Arbitration, the English Law shall apply.

JUDGMENT [BALCO II]

The court held that Article 22 is clear in providing that the proper law of the contract is Indian law. They further held that Article 17.1 provided for English law to be the law applicable to the arbitration agreement and therefore it would be impracticable and inconvenient to interpret Article 22 to mean that Indian law would be the substantive law governing the contract but in case of an arbitration, English law would govern. Therefore, the court found that English law was the law applicable to the arbitration agreement. In light of the same, the court upheld the decision of the High Court dismissing the Section 34 applications.

ANALYSIS

The court read the arbitration clause in light of "party autonomy" being the "grundnorm" of international commercial arbitration and stated that when interpreting such an agreement, it must be kept in mind that parties would have intended to avoid impracticable and inconvenient processes and procedures. The court therefore found that the

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proper law of contract was clearly Indian law while English law was only the law governing the arbitration agreement.

This judgment is also significant in light of interpreting arbitration clauses in contracts entered into before 6th September 2012 i.e., those governed by the *Bhatia* regime. The question therefore was whether Part I of the Act had been impliedly excluded. The court cited *Union of India v. Reliance Industries*⁴ where the Supreme Court of India held that Part I of the Act would be considered impliedly excluded when the juridical seat is outside India or where a foreign law is chosen as the law governing the arbitration agreement. So saying the court dismissed the Section 34 applications filed at the High Court to set aside the arbitral awards.

– **Niyati Gandhi & Vyapak Desai**
You can direct your queries or comments to the authors

¹ Bharat Aluminium v. Kaiser Technical Services, Civ App 3678 of 2007 (6 September 2012)
² Bharat Aluminium v. Kaiser Technical Services, Civ App 3678 of 2007 (28 January 2016).
³ Bhatia International v. Bulk Trading, (2002) 4 SCC 105.
⁴ Union of India v Reliance Industries, 2015 (10) SCALE 149.

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