VOLUME 2 | ISSUE 3

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

JUDICIAL INTERVENTION IN THE ARBITRAL PROCESS

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ABSTRACT

In 2012, we saw a momentous decision by the Supreme Court of India; a five- Judge bench overruled the former disputatious judgment pronounced in the Bhatia International vs. Bulk Trading SA[2] in the verdict Bharat Aluminium Co. vs. Kaiser technical Services[3]. The present paper deals with the analysis of the Judicial intervention in the Arbitral process after the Bharat Aluminium (BALCO hereinafter) vs. Kaiser Technical service judgment. In the ruling, the bench restricted the scope of the Court's intervention in the process of Arbitration, which led outside the jurisdictional limits, by leaving the applicability of Part I of the Act, 1996[4](from now on, Act 1996). In the Bhatia International Judgement, the Supreme Court reasoned that it could request episodic measures from an Indian court in the International Chamber of Commerce (ICC) Arbitration, which has its seat in Paris (outside the Indian Territory). The matter soon came up to the doors of the Apex Court. It was also held that the provisions of Part I of the Act are equally applicable in the processes of ICC arbitrations held outside India unless there is any such provision excluded by the contractual agreement between the parties, which is stated, either expressly or impliedly.

Key Words: - Judicial Intervention, Arbitral Process, Foreign Award, Interim Relief, International Chamber of Commerce (ICC) Arbitration, Domestic Arbitration.

1. Introduction: -

Arbitration has slowly gained popularity as the most preferred mode of dispute resolution with a high focus on speedy dispute resolution, preference for party autonomy, and minimal Court intervention. Although the Law allied to domestic Arbitration is very clear as to which courts would have jurisdiction to supervise the matters, there is still some ambiguity as far as

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[2] (2002) 4 SCC 105.
[3] Civ App 3678 of 2007 (6 September 2012).
[4] THE ARBITRATION AND CONCILIATION ACT, 1996 ACT No. 26 OF 1996.

International Commercial arbitration5 is concerned. To the extent that the procedural Law of Arbitration is concerned, Parties to the agreement make their Law owing to party autonomy preference. However, this does not mean that International Commercial arbitration occurs in a vacuum. Even rules decided by Parties need the sanction of Law if they are to be enforceable. In this context, it is quintessential to comprehend that the relevant Law which governs the procedural and curial aspects of Arbitration is known as the Law of the seat or place of Arbitration and is called the "lex arbitri."

Background

The Arbitration and Conciliation Act, 1996 provides arbitrations primarily in the following two parts – Part I of the Act concerns the initiation and conduct of Arbitration and enforcement, challenges of any arbitral award; Part II deals with enforcement of arbitral awards delivered in foreign seats (outside the Indian jurisdiction) arbitrations under either the New York Convention6 or Geneva Convention, 19277

In Bhatia International vs. Bulk Trading SA 8, the apex court ruled that "Part I of the Act 1996 applies even to the arbitrations seated outside the Indian Jurisdiction until or unless the party had expressly or impliedly agreed to exclude the same." The rationale was that the Act is based on the Model Law. The provision9 analogous to s.2(2) of the Act contains the word 'only.' It was held that the omission of 'only from s.2(2) of the Act was evidence of the intent of the Indian legislature to permit Part I of the Act to apply to arbitrations that take place outside. This decision was a well-intentioned attempt to tackle a comprehended lacuna in power for courts to order "interim relief" in the encouragement of arbitration proceedings, which is found in part I of the Act.10 The concern was that, If Part-I applied only to seats inside India, one consequence would be that there was no power for the Courts to grant "interim relief" in foreign Arbitration. This produced the noteworthy consequence that even concerning foreign arbitrations, where Part I of the Act was not exempted, the Indian courts could, inter-alia:

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[5] *Section 2(f) of the Arbitration and Conciliation Act, 1996 (the Act)* defines *"International commercial arbitration" as "an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is- (i) An individual who is a national of, or habitually resident in, any country other than India; or (ii) A body corporate which is in corporate in any country other than India; or (iii) An association or a body of individuals whose central management and control is exercised in any country other than India; or (iv). The Government of a foreign country;"*

[6] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

[7] Geneva Convention on the Execution of Foreign Arbitral Awards, 1927.

[8] Supra note 1.

[9] Art. 1 (2) UNCITRAL Model Law 1985.

[10] S. 9: "A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced. . apply to a court for an interim measure of protection…"

- Can give award interim relief in support of the Arbitration;
- Appoint arbitrators in appropriate circumstances;
- Moreover, Set aside arbitral awards.

As a consequence of the decision in Bhatiya Judgement, Venture Global Engineering v. Satyam Computers Services11 intervened in Arbitration that had a foreign seat in the wake of the Bhatia case's conclusion. The matter dealt with the London Court of International Arbitration award, holding its seat in England. The apex court ruled that Part I of the Act applied to such a foreign award. Moreover, the courts in India have competent jurisdiction to set aside the award with the applicability of Part I. Accordingly, in Intel Technical Service Pvt. Ltd. v. W.S Atkins Plc12, the Apex Court acquired the power to appoint arbitrators in arbitral proceedings in which the seats are awarded outside India, conformable to Section 11 of the Act. In a bid to restore the autonomous stature of a party, the Court wanted to restrict the strict applicability of Part I of the Act in arbitrations with a foreign seat. The Court demonstrated the effort to infer only implied exclusions of Part I where the parties had chosen a foreign seat outside of India, and the jurisdiction is of foreign Law to govern the Arbitration. In the case of Videocon Industries Ltd. v. UOI13, the Indian Court ruled that, since the parties agreed to an arbitration clause governed by the English Law, even though the Indian Law managed the main contractual agreement, part I of the Act was impliedly excluded.

The international arbitration community has been a long sufferer of this raucous situation that prevailed in India, and this happened to blur the country's stance on restoring party autonomy. In Yograj Infrastructure Ltd v. SSang Yong Engineering and Construction Co Ltd,[14] the Supreme Court held that the nomination of a foreign seat of Arbitration is sufficient to result in the exclusion of supervisory Jurisdiction of the Indian Courts over the arbitral proceedings. This was a position that was not the intention of the Indian Parliament when enacting this Act. Therefore, in the light of the same, the BALCO judgment settled this orientation which was prevailing concerning the arbitral proceedings that had a seat outside India and where Indian parties wanted the Indian Courts to intervene in setting aside foreign awards, thus making it non-enforceable in India, which makes the entire arbitral proceedings fruitless.

[11] [2008] 4 SCC 190
[12] [2008] 10 SCC 308
[13] [2011] 6 SCC 161
[14] Yograj Infrastructure Ltd v. SSang Yong Engineering and Construction Co Ltd [2011] 9 SCC 735

1. *BALCO Judgement: An Analysis*

The Supreme Court in Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc[15](BALCO) decided, in part, I and II of the 1996 Act[16] are mutually exclusive. It was comprehended that the 1996 Act is territorial, and Sections 9 and 34[17] will apply only in the Arbitration seat in India. It was held that the seat is the *"center of gravity"* of Arbitration, and even where two foreign parties arbitrate in India, Part I would apply, and, by Section 2(7), the award would be a "domestic award." The Supreme Court recognized the "seat" of Arbitration to be the juridical seat; however, in line with international practice, it was observed that the arbitral hearings might take place at a location other than the seat of Arbitration. Therefore, the distinction between "seat" and "venue" was recognized. In such a scenario, Part I would be applicable only if the seat is determined to be in India. If the seat is foreign, Part I would be inapplicable. Even if part I were expressly included, "it would only mean that the parties have contractually imported from the 1996 Act those provisions which are involved with the internal conduct of their arbitration and which are not capricious with the mandatory provisions of the [foreign] Procedural Law/Curial Law". The same cannot be used to confer jurisdiction on an Indian court.

1.1.Categorical Changes Post BALCO Judgement

"The Supreme Court of India initiated a direct inquiry on the rationality behind the applicable provisions of the NY(New York) Convention and the UNCITRAL Model Law. This was a significant development as it represented a paradigm shift from its previous practice.18"The Apex Court's willingness to do so rang the message that Indian courts will no longer be hesitant to be guided by applicable international conventions and construe the Indian legislation in conformity. This has proved influential because arbitration practitioners face a significant hurdle in India: the courts' difficulty adapting to arbitration processes regulated by a law based on the UNCITRAL Model Law.

In the recent case Law BGS SGS Soma JV v. NHPC Ltd[19], On the question of "seat" of Arbitration, the Hon'ble Supreme Court made it clear that its earlier decisions did not correctly distinguish between "seat" and "venue" of arbitral proceedings. This question was addressed

[15] Supra note 1.
[16] Supra note 3.
[17] "Application for setting aside arbitral award…"
[18] Ashish Chugh, The Bharat Aluminium Case: The Indian Supreme Court Ushers In a New Era, September 26th, 2012) Available at: http://arbitrationblog.kluwerarbitration.com/2012/09/26/the-bharat-aluminium-case-the-indian-supreme-court-ushers-in-a-new-era/?doing_wp_cron=1596539681.5677900314331054687500
[19] CIVIL APPEAL NO. 9307 OF 2019.

earlier by the five-judge bench in Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc [BALCO].

The Supreme Court in BALCO held that where parties have selected the seat of Arbitration in their agreement, such selection would amount to an exclusive jurisdiction clause. The BALCO judgment also accepts the position in English Law, as laid down in Roger Shashoua v. Mukesh Sharma,[20] [Roger Shashoua], that the Court at the seat of Arbitration will have exclusive jurisdiction.

In a nutshell, the Supreme Court of India mainly provided the following points, changing the scenario.

- Section 2(2) of the Act, applicability of Part-I and exclusion of "only."[21]
- No jurisdiction to grant "interim measures."[22]
- The seat of Arbitration vis-à-vis the Doctrine of Territoriality[23] , "This is the governing principle of the Act, and accordingly, the seat of arbitration determines the jurisdiction of the Court."[24]

2. Challenges Post-BALCO: Uprise or downfall?

The much-glorified BALCO judgment, interestingly, also has several downsides to it. The Court discovers that the party contrary to whom the arbitral award is made is rendered essentially remediless if such party has its assets in India. In addition to it, the benefit of this judgment can be availed only prospectively, i.e., it excludes retrospective application.

2.1. No Interim Reliefs available to the Parties

However, the decision in BALCO was expressly given prospective effect and applied to arbitration agreements executed after the date of the judgment. "While the decision in BALCO is a step towards the right direction and would radically reduce intervention by the Judiciary in foreign arbitrations, the Law Commission[25] felt that there were still some areas that are prone to

[20] [2009] EWHC 957 (Comm); This position was reiterated in *Roger Shashoua & Ors. v. Mukesh Sharma & Ors.*, (2017) 14 SCC 722.

[21] Bharat Aluminium Co. vs. Kaiser technical Services, Civ App 3678 of 2007 (6 September 2012).at [63] and [68]

[22] Supra note 25, at [para 85]

[23] Supra note 25, at [para 167].

[24] Prof J. Martin Hunter and Ranamit Banerjee, "Bhatia, Balco And Beyond: One Step Forward, Two Steps Back?"(2013) Vol. 24(2)

[25] LAW COMMISSION OF INDIA. "246th report on Amendments to the Arbitration and Conciliation Act 1996"(August, 2014).

be problematic."[26] For example, "interim orders" would not be qualified to considered as a "judgment" or "decree" for Sections 13[27] and 44-A[28] CPC 1908 (which provides a mechanism for enforcing foreign judgments). Indeed, few issues have now been tackled by amendments to Sections 2(2), 2(2A), 20, 28, and 31.[29] Regarding foreign seated arbitrations, where the subject matter of the dispute is situated in India, no party can now pursue any interim relief under the Act. in addition to which, the Court held that a separate *inter-parte* suit solely for interim relief in an arbitration pending outside India would be non-maintainable as discussed above the provision of the Code of Civil Procedure; in the scarcity of a provision which could cater to such a situation. Further, the Court also disregarded the contention that parties would be rendered remedied in such a situation while opining that parties were free to seek appropriate remedies in their chosen jurisdiction.

2.2. Law of the 'Seat' (lex arbitri)

The juridical seat of the Arbitration is appointed by the parties, or an arbitral institution[30], the arbitrators themselves.[31] The seat must be differentiated from the physical venue of the hearings. The physical venue rarely has any practical effect on the conduct or outcome of the Arbitration. However, in theory, Arbitration is 'governed by the law of its' seat,' which is sometimes the Law of the Jurisdiction its hearings occur.

2.3. Can two Indian parties choose a Foreign Seat for Arbitration?

These questions were raised many times in the Court of Law. Initially, The Bombay High Court in M/s Addhar Mercantile Private Limited vs. Shree Jagdamba Agrico Exports Pvt Ltd32 in section 11 under the Act had addressed the given question. The Bombay High Court relying upon the judgment passed by the apex court in TDM Infrastructure Pvt. Ltd. v UE Development India Pvt. Ltd.33, ruled that the intention of the legislature would be clear that Indian parties and Companies established in India should not be permitted to derogate public policy of India and hence cannot choose a foreign seat of Arbitration. On the other hand, Reliance Industries

[26] Avtar Singh, Law of Arbitration and Conciliation 18(Eastern Book Company, lucknow,11 edn., 1 January 2020.).
[27] THE CODE OF CIVIL PROCEDURE, 1908 ACT NO. 5 OF 1908,s.13: "When foreign judgment not conclusive".
[28] THE CODE OF CIVIL PROCEDURE, 1908 ACT NO. 5 OF 1908,s.44-A :"Execution of decrees passed by Courts in reciprocating territory".
[29] Arbitration and Conciliation Act, 1996 [Act No. 26 of 1996]. [As amended by Arbitration and Conciliation (Amendment) Act, 2015.]
[30] Art. 18, UNCITRAL Arbitration Rules (as revised in 2010).
[31] Section 3, Arbitration and Conciliation Act, 1996 [Act No. 26 of 1996].
[32] Arbitration Application No. 197/2014 along with Arbitration Petition No. 910/2013.
[33] 2008 (14) SCC 271

Limited & Anr v Union of India34 talks about two Indian parties having a foreign Seated Arbitration. Recently, in April 2021, a three-judge bench in PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited35 (PASL Wind Solutions), **The Supreme court made it clear that two parties, if want, could choose an arbitration seat outside India, Indian Contract Act, 1882 does not bar them from doing so.**

3. **Conclusion: -**

These decisions in BALCO are not the panacea for all the ills associated with the Arbitration in India but became a good starting point by the Supreme Court of India in the Apex court towards the right direction. While there is a long and arduous path ahead, fraught with complex legal and policy challenges, before India can be considered an arbitration-friendly jurisdiction, the BALCO decision inspired hope that a new and promising era has begun for Arbitration in India. To conclude, it may be said that different courts play different roles in Foreign Seated arbitration. Firstly, it needs to be determined which is the seat of Arbitration, after which the closest and most real connection needs to be analyzed. After that, for different remedies, different Courts can be approached. Given the above, India has become and continuously grows towards Arbitration and foreign investor-friendly countries. Moreover, the 2015 amendment has given Indian courts an Arbitration center; the courts have gone about to provide impetus in the enforcement of awards.

[34] (2014) 7 SCC 603

[35] Civil Appeal No. 1647 of 2021 arising out of SLP (Civil) No. 3936 of 2021.