The Bharat Aluminium Case: The Indian Supreme Court Ushers In a New Era

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On 6 September 2012, the Indian Supreme Court delivered its much-awaited judgment in *Bharat Aluminium Co v. Kaiser Aluminium Technical Services* ('BALCO'). For the reasons discussed in detail below, the 190-page long *BALCO* decision is likely to go down in the annals of arbitration reports as the watershed decision that heralded a new dawn for Indian arbitration.

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 New York Convention and UNCITRAL Model law, exhort Indian courts to become more arbitration-friendly and thereby less prone to intervene in the arbitral process. To this end, *BALCO* certainly lives up to the buzz and hype created in the international arbitration community after news broke out earlier this year that the Indian Supreme Court was hearing a case that sought a reconsideration of its earlier decisions in *Bhatia International v. Bulk Trading SA*[fn](2002) 4 SCC 105.[/fn] ('Bhatia') and *Venture Global Engineering v. Satyam Computer Services Ltd*[fn](2008) 4 SCC 190.[/fn] ('Venture Global').

Overruling the Bhatia and Venture Global decisions

Readers are likely to be familiar with the problems caused by the much-criticised *Bhatia* and *Venture Global* decisions. Although the Indian Arbitration and

Conciliation Act, 1996 ('the 1996 Act') is based on the UNCITRAL Model Law, on a clearly erroneous statutory construction of the 1996 Act, the Indian Supreme Court in these decisions assumed that, unless the parties expressly or implied agreed to the contrary, the Indian courts had jurisdiction with respect to foreign-seated arbitration akin to their curial jurisdiction with respect to arbitrations seated within India under Part I of the 1996 Act. Based on this flawed analysis of the 1996 Act, Indian courts had hitherto asserted their jurisdiction to grant interim measures in aid of foreign-seated arbitrations (*Bhatia*) and even set-aside awards made pursuant to foreign-seated arbitrations (*Venture Global*).

The Indian Supreme Court in *BALCO* has now unequivocally overruled *Bhatia* and *Venture Global* on the basis that Part I of the 1996 Act does not apply to foreign-seated arbitrations. This conclusion principally stems from two fundamental propositions that the court underscored in its judgment *viz.* (i) the application of the UNCITRAL Model Law was intended to be limited to the territorial jurisdiction of the seat of arbitration i.e. the territoriality principle and (ii) the seat of the arbitration is the 'centre of gravity' of the arbitration and therefore a choice of a foreign-seated arbitration by the parties ordinarily meant that the parties also agreed to the application of the curial law of that foreign country.

The court considered that an acceptance of the statutory construction of the 1996 Act espoused in the *Bhatia* and *Venture Global* decisions was tantamount to giving extra-territorial application to the 1996 Act, which was not the intention of the Indian Parliament when it enacted this law.

The legal consequences of overruling Bhatia and Venture Global

From a doctrinal perspective, there are several consequences that flow by dint of the *Bhatia* and *Venture Global* decisions being discredited by the Indian Supreme Court in the *BALCO* decision.

(1) First, it is now plain that Indian courts should not assert jurisdiction in matters concerned with, in particular, (i) the grant of interim remedies in aid of foreign-seated arbitrations purportedly pursuant to section 9 of the 1996 Act; (ii) the making of default appointment of arbitrators in foreign-seated arbitrations purportedly pursuant to section 11 of the 1996 Act; and (iii) applications to set aside foreign awards purportedly pursuant to section 34 of the 1996 Act.

(2) Secondly, insofar as the Indian court's jurisdiction will no longer depend on its

attempt to divine the express or implied intentions of the parties, it will accordingly not be necessary for parties to expressly exclude the application of Part I of the 1996 Act in arbitration agreements that provide for foreign-seated arbitration on or after 6 September 2012. Following the *Bhatia* and *Venture Global* decisions, this had become a standard drafting practice for parties who wanted minimal intervention from the Indian courts with respect to their contracts that involved at least one Indian party and contained a foreign-seated arbitration clause.

(3) Thirdly, it has been made abundantly clear in *BALCO* that the Indian courts will also not have jurisdiction to entertain an ordinary civil suit filed under the Code of Civil Procedure for the purpose of seeking interim relief in aid of foreign-seated arbitrations. This is because such interim relief is not a substantive cause of action so as to warrant the institution of a civil suit under Indian law. Interestingly, the position under Indian law now appears to the same as it was under English law (see *Siskina (Cargo Owners) v. Distos Compania Naviera SA*[[[1979]] AC 210.]) and Singapore law (see *Swift-Fortune Ltd v. Magnifica Marine SA*[[[2007]] 1 SLR 629.]) prior to supervening legislation being enacted in those two countries to specifically redress this issue.

(4) Finally, Part I of the 1996 Act will continue to apply to all arbitrations (i.e. domestic and international) seated in India. In arbitrations seated in India, the Indian courts, in their capacity as the supervisory courts at the seat of arbitration, will have broad jurisdiction under Part I of the 1996 Act to supervise and support the arbitral process (including the power to set aside an award made pursuant to such arbitration).

BALCO represents a paradigm shift away from the pre-1996 arbitral jurisprudence

Quite apart from the legal consequences discussed above, there is another important aspect of the *BALCO* decision that needs to be underscored. This is the refreshing manner by which the Indian Supreme Court has embarked on a direct inquiry as to the intention and purpose behind the relevant provisions of the UNCITRAL Model Law and the New York Convention, as discernible from the *travaux préparatoires*, in addition to appreciating how those operative provisions are understood in several other jurisdictions.

This is an important development because it represents a paradigm shift away

from its previous case-law and practice. The apex court's willingness to do so, in fact, resoundingly conveys the message that Indian courts will no longer hesitate to be directly guided by the terms of the relevant international conventions, as they are understood internationally, and, if the need arises, construe Indian legislation in conformity with the same. This is all the more significant in view of the fact that, even now, one of the major hurdles that arbitration users face in India is the Indian courts' difficulty in being able to adapt and transition to arbitrations governed by a law based on the UNCITRAL Model Law, despite it being enacted in 1996.

For over five decades prior to 1996, Indian arbitration was governed by the Arbitration Act of 1940 ('the 1940 Act') which was based on even older English statutes of Victorian vintage. The dilatory and inefficient conduct of arbitrations under the 1940 Act laced together with the excessive intervention of the courts made an Indian Supreme Court judge famously remark once that:

> *'[The 1940 Act] has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the [1940] Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary.'[fn]See Guru Nanak Foundation v. Rattan Singh & Sons (1981) 4 SCC 634 per DA Desai J.[/fn] (emphasis supplied)*

That the arbitration culture and mindset prevalent under the pre-1996 arbitration regime has permeated and coloured the working of the 1996 Act is itself evident from the flawed analysis set out in the *Bhatia* and *Venture Global* decisions, as I explain below.

Prior to the enactment of the 1996 Act, the Indian Supreme Court decided in *National Thermal Power v. Singer Company*[fn](1992) 3 SCC 551.[/fn] ('Singer') that a foreign award could be set aside by the Indian courts in the event that the arbitration agreement between the parties was governed by Indian law. Although this decision could have been narrowly based on a statutory carve-out under the pre-1996 arbitration regime (which has been expressly omitted in the 1996 Act), the court in *Singer* went much further.

It reasoned that though the contract, in that case, provided for ICC arbitration in London, the governing law of the contract was Indian law and therefore, in the

absence of an unmistakable intention to the contrary, the law applicable to the arbitration agreement was Indian law as well. *Ex hypothesi*, the court considered that although the parties could in theory, either expressly or impliedly, make a choice as to the curial law, the jurisdiction of the Indian courts was concurrent with the jurisdiction of the English courts with respect to curial matters (including the determination of an application to set aside the ICC award made in London). This was on the mistaken basis that since the law applicable to the arbitration agreement was Indian law, it necessarily followed that Indian courts had 'jurisdiction over all matters concerning arbitration.'

Instead of clearly departing from the erroneous analysis set out in *Singer* after the commencement of the 1996 Act, the *Bhatia* and *Venture Global* decisions took it to one step further by asserting that Indian courts had jurisdiction with respect to foreign-seated arbitrations involving an Indian party under Part I of the 1996 Act, regardless of the governing law of the contract. To the extent that these decisions are now overruled, the *BALCO* decision has definitively broken the shackles of the arbitration culture and mindset prevalent under the pre-1996 arbitration regime.

Post-BALCO landscape: The challenges that lie ahead

Whilst the *BALCO* decision provides the necessary impetus to enable the Indian courts to make a fresh start, there are several serious issues that will need to be dealt with by the Indian courts in the aftermath of that decision.

The foremost concern arises from the fact that the *BALCO* decision will apply prospectively i.e. only to arbitration agreements which are concluded on or after 6 September 2012. This effectively means that Part I of the 1996 Act will continue to apply to foreign-seated arbitrations with respect to arbitration agreements concluded prior to that date, unless the parties have either expressly or impliedly agreed otherwise.

The doctrine of prospective overruling is a tool that has been applied on several occasions in the past by the Indian Supreme Court. The classic cases, which ordinarily warrant its application, are cases where the court has decided to invalidate a constitutional amendment[fn]See, for example, *Golak Nath v. State of Punjab AIR* 1967 S.C 1643.[/fn] or a statutory enactment[fn]See, for example, *Orissa Cement Ltd. v. State of Orissa* (1991) Supp (1) SCC 430.[/fn] but considers that gravely unfair or disruptive consequences would follow from such invalidity if

past transactions were not immune from judicial scrutiny.

Even if one were to gloss over the fact that the Indian Supreme Court has not invalidated a constitutional amendment or statutory enactment in the *BALCO* decision (but rather its own previous rulings), the question still arises which particular past transactions need judicial immunity so that gravely unfair or disruptive consequences would not follow from the overruling of the *Bhatia* or *Venture Global* decisions.

As explained above, the *Bhatia* or *Venture Global* decisions enabled Indian courts to assert jurisdiction with respect to foreign-seated arbitrations involving an Indian party, unless the parties had expressly or impliedly agreed to the contrary. Seen in that light, it is important to note that these decisions did not affect the validity of foreign-seated arbitration clauses involving an Indian party. With respect, it is thus a *non-sequitur* to argue that by overruling these decisions, such foreign-seated arbitration clauses would be somehow susceptible to being invalidated as well. On the contrary, the only past transactions that were susceptible to being invalidated in the wake of the *BALCO* decision were court proceedings (either pending or those having attained finality) commenced in India on the basis of the *Bhatia* or *Venture Global* decisions. Accordingly, the *BALCO* decision should have been applied prospectively to the commencement of any proceedings in India rather than the execution of any new arbitration agreements.

This is, in fact, likely to become a contentious issue in the future. Given the significant delays in court proceedings in India and the fact that it is not uncommon to obtain a final decision only after litigating there for at least 7 to 10 years, the *BALCO* decision effectively means that despite *Bhatia* and *Venture Global* being expressly overruled, those precedents will ironically continue to guide the Indian courts for another decade or so with respect to arbitration agreements entered into prior to 6 September 2012. Unless the Indian Supreme Court subsequently backpedals on this issue, to the extent I discussed above, there is likely to be a lot of confusion created in any attempt made by the Indian courts to maintain two parallel regimes for the next decade or so.

Another major issue arises from the fact that, besides the *Bhatia* and *Venture Global* decisions, there are still several other previous decisions of the Indian Supreme Court that remain good law and which can potentially create problems in international arbitrations involving Indian parties.

For example, the *BALCO* decision did not have occasion to consider the broad 'public policy' doctrine enunciated in *ONGC v. Saw Pipes*[fn](2003) 5 SCC 705.[/fn] and its applicability as a standard to challenge the enforcement of foreign awards in India. Significantly, the Indian Supreme Court recently applied this standard whilst deciding a case concerning the enforcement of a Russian Chamber of Commerce and Industry award made in Moscow.[fn]See *Phulchand Exports Ltd v. OOO Patriot* (2011) 10 SCC 300.[/fn] Although the challenge did not succeed on the merits of the case, this ruling does create a disconcerting precedent.

The *BALCO* decision also does not affect the judicial rule, endorsed by the Indian Supreme Court, to refuse to refer a matter to arbitration where either a serious allegation of fraud has been made or there are complicated questions of fact or law that require extensive oral or documentary evidence.[fn]See *N Radhakrishnan v. Maestro Engineers* (2010) 1 SCC 72; followed recently in *Bharat Rasiklal Ashra v. Gautam Rasiklal Ashra* (2012) 2 SCC 144.[/fn] The Indian courts consider that, in such circumstances, it is inapposite to refer the disputes to arbitration and will accordingly retain jurisdiction to decide such cases. Although, there are no known reported cases where an Indian court has refused to refer matters to international arbitration on the basis of such a rule, nothing prevents a court from refusing to do so in the future unless this rule is overruled or deemed to be not applicable to international arbitration.

Finally, even after the *BALCO* decision, it remains arguable on the basis of the decision of the Indian Supreme Court in *TDM Infrastructure Private Limited v. UE Development India Private Limited* [fn](2008) 14 SCC 271.[/fn] that it is inconsistent with Indian public policy for an Indian incorporated entity to contract out of the application of Indian substantive law in a contract that it enters into with another Indian incorporated entity. This is despite the fact that such a contract may contain a foreign-seated arbitration clause. Accordingly, in the event that two Indian incorporated entities wish to enter into a contract that provides for a foreign-seated arbitration, it still remains prudent to stipulate Indian law as the governing law of such a contract.

Conclusion

These aforesaid decisions make it plain that the *BALCO* decision is not the panacea for all the ills associated with arbitration in India but certainly a good starting point by the Indian Supreme Court in the right direction. Whilst there will be, no doubt, a

long and arduous path ahead, fraught with difficult legal and policy challenges, before India can truly be considered an arbitration friendly jurisdiction, the *BALCO* decision inspires hope that a new and promising era has begun for arbitration in India.

(The views expressed in this article are those of the author alone and do not necessarily reflect the views of his law firm).