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The Changing Contours of Indian Arbitration Law – A Sign of Times to Come?

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The Indian arbitration regime has seen a sea change in the last couple of years. Before the decision of the Indian Supreme Court (“SC”) in *BALCO v. Kaiser Aluminium* [Civ. App. No. 7019 of 2005] in 2012, the Indian judiciary was considered highly interventionist in its approach to arbitration. The reason for this was a series of decisions starting from *Bhatia International v. Bulk Trading* [(2002) 4 SCC 105] and culminating with the decision of the SC in *Venture Global v. Satyam Computers* [(2008) 4 SCC 190].

In *Bhatia International v. Bulk Trading*, the SC held that Indian courts would have jurisdiction over foreign international commercial arbitrations unless there was an express or implied exclusion of Indian law. Although *Bhatia* dealt with interim measures under Section 9 of the Indian Arbitration and Conciliation Act, 1996 [“the Act”], subsequent decisions used its reasoning to expand the jurisdiction of Indian courts with respect to foreign seated arbitrations. The approach adopted by the SC in *Bhatia* was taken to its conclusion in *Venture Global v. Satyam Computers*, wherein it set aside a foreign seated arbitration on the basis of Indian law.

The SC in 2012 overruled the decision in *BALCO v. Kaiser Aluminium* and held that Indian law would not apply to foreign arbitrations unless chosen as applicable law by the parties. This was the first of a series of highly progressive decisions by the SC. In 2013 in *Shri Lal Mahal v. Progetto Grano SpA* [Civ. App. No. 5085 of 2013], the SC held that the public policy applicable in case of international commercial arbitration, would be considerably different than that applicable to domestic arbitrations. Further, the court in this decision also held that courts do not act in appeal over international arbitrations and enforcement of an award could only be refused on very limited grounds. The court held that foreign arbitration could be refused enforcement only if it is contrary to fundamental policy of India, the interests of India or contrary to justice or morality. Thus the SC reiterated its respect for arbitration and the change in its stance after the *BALCO v. Kaiser Aluminium* decision.

The change in the SC’s attitude was also visible in its decision of *Enercon (India) Ltd. v. Enercon GmbH and Anr* [Civ. App. No. 2087 of 2014]. In this case, the SC had the opportunity to examine an arbitration clause with certain flaws. Although the court retained jurisdiction over the case, determining the seat to be India, despite the inclusion of London as the venue in the arbitration clause, this determination was influenced by the fact that all other applicable laws were chosen to be Indian by the parties to the arbitration agreement. The SC in this case held that certain errors in the arbitration clause would not prevent parties from arbitrating unless the clause was incapable of

being performed. Through this decision the SC also ensured that Indian courts would not unduly interfere in international commercial arbitrations. The court in the case of *World Sport Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte Ltd*. [Civ. App. No. 895 of 2014] reinforced its pro-arbitration approach in international commercial arbitration disputes. The issue before the court in this case was whether the arbitration could proceed despite allegations of fraud raised by the parties.

The issue was highly contentious as in *N. Radhakrishnan v. Maestro Engineers* [Civ. App. No. 7019 of 2009], the SC had held that questions of fraud would not be arbitrable in India. However, the SC in *World Sport Group v. MSM Satellite* held that in case of foreign seated arbitrations, as per the provisions of section 45 of the Act, arbitration could be stayed only if the arbitration agreement was void or inoperable or incapable of being performed. The SC held that mere allegations of fraud could not prevent international commercial arbitrations from proceeding [for an analysis of the arbitrability of fraud in India, refer to this [article](#)]. Courts could not therefore interfere in foreign seated arbitrations where allegations of fraud had been raised. The court held that its previous decision in *N. Radhakrishnan v. Maestro Engineers* was limited to domestic arbitrations and the court could reference to arbitration only if the conditions in Section 45 of the Act were fulfilled.

This decision, in addition to the other decisions referred to above indicates that the Indian judiciary is taking a pro-arbitration approach in its decision. Moreover, these recent developments have led to calls for changing rule to permit foreign lawyers to participate in arbitration in India [*Plea to Change Arbitration Rules, April 28, 2014, Telegraph*]. Currently, foreign lawyers cannot participate in Indian proceedings. This change, if effected, would be highly desirable and would improve the competition in the field in India. Policy changes with respect to arbitration are also expected as the new government led by the Bharatiya Janata Party [“BJP”] in India has also promised changes in arbitration in order to make India a global hub for the same [The BJP Manifesto can be accessed [here](#)].

It becomes clear that international commercial arbitration in India has undergone a sea change in the last few years and will continue to do so. However, it remains to be seen how Indian arbitration develops in the coming years. This positive trend would need to continue in order to ensure that India becomes a global hub for arbitration.

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