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"A case study on Bharat Aluminum Company v. Kaiser Aluminium Technical Services Inc. (2012)"

Stuti Jhunjhunwala
Jindal Global Law School
O.P Jindal Global University

Abstract

The neutrality, efficiency and good enforcement of international commercial arbitration has made it one of the preferred methods for settling cross-border commercial disputes. Before 2012 however, Indian legal landscape on the subject of foreign seated arbitrations was somewhat ambiguous owing to certain judicial precedents which allowed for the Indian courts extensive intervention. The Supreme Court in Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. (BALCO) went on to change this stance by introducing the territorial principle as reflected in the Arbitration and Conciliation Act, 1996 and UNCITRAL Model Law. This paper explores the factual background of the dispute, the legal issues before the Court and the reasoning that informed the Court's decisions that resulted in the overturn of Bhatia International v. Bulk Trading S.A. The paper also elaborately examines the difference between seat and venue of arbitration; applicability of Part I of the Arbitration and Conciliation Act, 1996 and scope of judicial interference in foreign-seated arbitrations. Last but not least, it critically analyses the importance of the BALCO judgment in advancing the arbitration regime in India and the limitations and legislative changes which stemmed from the same.

Keywords: International Commercial Arbitration, BALCO, Arbitration and Conciliation Act, 1996, Foreign-Seated Arbitration, Judicial Intervention, Seat of Arbitration, UNCITRAL Model Law, New York Convention.

Introduction

International commercial arbitration has proven to be an essential forum for the resolution of disputes that arise from international commercial transactions. In today's world of growing trade and investment, arbitration is becoming a preferred forum over litigation, for its neutrality, confidentiality, flexibility in procedure, and relative speed of dispute settlement. In contrast to court proceedings, arbitration is a process which affords the parties the choice of the law that will apply to the proceedings, the place of arbitration and the composition of the arbitral tribunal, which enhances party autonomy and commercial certainty. Arbitration has thus become the choice of international parties to settle international commercial disputes and is recognised in most jurisdictions by national legislation and international conventions like the New York Convention, 1958 and UNCITRAL Model Law on International Commercial Arbitration.

The Arbitration and Conciliation Act, 1996 has been enacted in India with the aim to modernize the Arbitration regime in India to conform to the concept prevalent in foreign jurisdictions. But the meaning of Part I of the Act in the years following its enactment was subject to uncertainty due to judicial interpretation in respect of arbitrations conducted outside India. The judgments in Bhatia International v. Bulk Trading S.A. and Venture Global Engineering v. Satyam Computer Services Ltd. brought a welcome change in the jurisdiction of courts in India by allowing them to exercise jurisdiction in arbitrations held in other countries where the Act did not explicitly or implicitly exclude jurisdiction. This measure had drawn much criticism as it restricted party autonomy, enhanced judicial intrusion and impacted the credibility of India as an arbitration friendly country.

The Constitutional Bench judgment of Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. (BALCO) was an important landmark in Indian arbitration law. The Supreme Court has thus confirmed the position of the territorial principle in the Arbitration and Conciliation Act, 1996, and clarified that Part I of the Act governs only Indian-centred arbitrations. The judgment also set out the difference between the notions of "seat" and "venue" of arbitration and stressed the courts of the seat of the arbitration had "supervisory jurisdiction" over the arbitral proceedings. This ruling drastically diminished judicial involvement in arbitrations that are held overseas and brought Indian arbitration law in line with the rest of the world. This paper examines the facts, legal problems, reasoning of the Court and consequences of the BALCO judgement. It also explores the effect of the decision on the growth of international commercial arbitration in India and its significance to International Commercial Arbitration's contribution to the development of India as a more arbitration friendly jurisdiction.

Analysis

The decision given in the case of **Bharat Aluminum Company v. Kaiser Aluminium Technical Services Inc. (2012)** by the Constitutional Bench of the Supreme Court marks a significant change in India's view on International Commercial Arbitration. This case provided clarification on the scope of judicial participation in foreign-seated arbitrations under the **Arbitration and Conciliation Act of 1996** (hereinafter referred to as "Act").[1] To keep up with the foundational principles and values of the New York Convention and UNCITRAL Model Rule, the ruling rendered in this case which is also famously known as the BALCO judgment, aims to protect future generations of Indian courts from obsolete and incorrect precedents and to promote a more arbitration-friendly legal system in India. The fact that this case marks a notable shift from the judgements rendered in the previous cases makes it of high importance. The willingness of the Supreme Court of India to take such a step portrays a strong message that Indian courts are no longer going to be reluctant to interpret Indian laws in accordance with the terms of international conventions. In this case, there was a commercial dispute between Kaiser Aluminium Technical Services Inc. and Bharat Aluminium Company (BALCO), primarily around cross-border contractual duties, the dispute arose from an arbitration decision that Kaiser Aluminium had received, which led BALCO to file an appeal

[1] Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc (2012) 9 SCC 552, 560

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under **Section 34 of the Arbitration and Conciliation Act, 1996**.[2] The appeal filed by BALCO brought up significant legal concerns about the jurisdiction of Indian courts over international commercial arbitration, especially when the seat of arbitration is located outside of India.

Facts of the Case

The agreement between the respondent, Kaiser Aluminium Technical Services Inc., and the appellant, Bharat Aluminium Company dated on April,22,1993 gave rise to this case. Kaiser by this agreement, was required to provide and set up a computer system at BALCO's business premises. A few differences emerged between them and it was stipulated in their Arbitration Agreement that in case of any disputes between them, they would have to be resolved in line with the English law, with London serving as the venue of the Arbitration proceedings.[3] On the other hand, the agreement also specified that Indian law would apply as the governing law with respect to the same agreement.[4] When the conflicts emerged, they were appropriately referred in England's Arbitral Tribunal, two awards that were made by the Arbitral Tribunal in England were attempted to be contested in India under **Section 34** of the Act before the district court located in Bilaspur.[5] The district court and the Chhattisgarh High Court rejected the appeals in a series of orders which led BALCO to file an appeal in the Supreme Court of India.

Issues Before the Court

1. Whether Part I of the Arbitration and Conciliation Act, 1996 applies to arbitrations seated outside India.
2. Whether an arbitral award rendered in a foreign-seated arbitration can be challenged under Section 34 of the Act before Indian courts.
3. Whether Indian courts possess jurisdiction to grant interim relief under Section 9 in respect of foreign-seated arbitrations.
4. Whether the expression "place of arbitration" under Sections 2(2) and 20 of the Act refers to the juridical seat or merely the venue of arbitration.
5. Whether the decisions in *Bhatia International* and *Venture Global Engineering* correctly interpreted the Arbitration and Conciliation Act, 1996.

The key questions in the case were whether a court has exclusive jurisdiction over other courts when it chooses a place as the seat of arbitration, and through this, the case points out the distinction between seat and venue.[6] It also discusses about the definition of "place of arbitration" as stated in **Sections 2(2) and 20 of the Arbitration & Conciliation Act**, that is, is it possible to contest the two awards made in England under **Section 34** of the Act in India

[2] Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc (2012) 9 SCC 552, 560
[3] Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc (2012) 9 SCC 552, 560
[4] Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc (2012) 9 SCC 552, 560
[5] Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc (2012) 9 SCC 552, 560
[6] Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc (2012) 9 SCC 552, 560

as well as whether **Section 2(2)** prevents **Part I** of the A&C Act from applying to arbitrations that are held outside India.[7] Finally whether or not **Section 9** of the Act would apply.

Judicial Position Before BALCO

Prior to this landmark judgement, the judicial approach to International Commercial Arbitration (ICA) must be thoroughly examined in order to understand the legal framework post the BALCO judgement. The pre-BALCO structure was largely shaped by two significant cases – **Bhatia Trading v. Bulk Trading and Venture Global v. Satyam Engineering**.[8] It was ruled by the Supreme Court of India in the case of **Bhatia Trading v. Bulk Trading**, that unless the parties specify the exclusion of Part I of the Act in their agreement, they will apply to the arbitrations held in a foreign country as well.[9] The court gave this judgement by stating that **Section 2(2)** of the Act does not specifically state that Part I does not apply to awards made in a foreign country. Consequently, Indian courts were able to take part in international arbitrations and issue temporary orders under Part 1, which included foreign decisions under **Section 34**.[10] This interpretation was further reinforced in the case of **Venture global v. Satyam Engineering** where the Supreme Court used **Section 34** of the Act to issue interim orders against an arbitral award made in an International Commercial Arbitration with the seat in a foreign country, the judgement also established the extraterritorial applicability of Part I of the Act, giving Indian courts the power to impede international arbitration processes even when they are conducted outside of India.[11]

Judgment and Reasoning of the Court

Presently, in this case, the court first clarified how to differentiate between a "seat" and a "venue" which may create a confusion in cases where the arbitration agreement specifies an international location as the arbitrators' "seat" and decides on the Indian law to serve as the crucial law governing the proceedings.[12] The court explained this by saying that choosing a foreign country as the arbitrators' seat would always mean that the laws of that country would be the governing law for the proceedings and those laws would only be used to supervise the arbitration proceedings.[13] In simpler terms, the court meant that a "seat" means suit of arbitration whereas "venue" means the geographical location of the arbitration. It follows that

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[7] 'Bharat Aluminium Co v Kaiser Aluminium Technical Service Inc [2010] 1 SC 72 (SC)' < https://www.drishtijudiciary.com/landmark-judgement/alternative-dispute-resolution/bharat-aluminium-co-v-kaiser-aluminium-technical-service-Inc-2010-1-sc- > accessed 8 November 2023
[8] Sana Quayyum, 'Judicial Intervention in Arbitral process: Analysis Post BALCO v Kaiser Aluminium Technical Service' (2022)< https://www.mediateguru.com/post/judicial-intervention-in-arbitral-process-analysis-post-balco-v-kaiser-aluminium-technical-service > accessed 5 March 2022
[9] Bhatia International v. Bulk Trading S. A. & Anr 2002 (4) SCC 105
[10] Bhatia International v. Bulk Trading S. A. & Anr 2002 (4) SCC 105
[11] Venture Global Engineering v. Satyam Computer Services Ltd. & Anr 2008 (4) SCC 190
[12] Friyana Damania, 'ANALYSIS OF BACLO JUDGEMENT' < https://viamediationcentre.org/readnews/MTEyOA==/Analysis-of-BALCO-Judgement >
[13] Friyana Damania, 'ANALYSIS OF BACLO JUDGEMENT' < https://viamediationcentre.org/readnews/MTEyOA==/Analysis-of-BALCO-Judgement >

in this case, even though the agreement stated that the Act regulates the procedures of the arbitration, if the arbitration agreement states a seat of arbitration in a foreign country, Part I of the Act would not be enforceable and will not permit the Indian courts to have any say or oversee the arbitration or the award in the event that the agreement is found stating the arbitration seat in a foreign country.[14] It is quite evident that Part I of the Act only applies to arbitrations that take place in India and hence, international commercial arbitrations conducted outside of India would not fall under Part I of the Act. In like manner, a claim seeking an interim injunction simplicitor based on an international commercial arbitration with a seat in a foreign country would not be enforceable in India.[15] When an award from an arbitration which is held outside India is requested to be enforced in India in line with Part II of the Act, then only it may come within the jurisdiction of an Indian court.[16] Secondly, by overruling the judgement of the Bhatia Case, the court's authority to give interim relief under **Section 9** of the Act was rendered unenforceable to international commercial arbitrations having their seat in a foreign country.[17] Even a brief study of **Section 9** of the Act would make it clearly apparent that it deals with temporary actions which are taken prior to, during, or following the arbitral procedures, as well as any period of time after the arbitral judgment is made and before it is put into effect in line with **Section 36** (enforcement of domestic awards) of the Act and hence only arbitrations conducted in India may be the subject of the arbitral proceedings preceding the award that **Section 36** addresses.[18] Thirdly, it would not be required by the parties to particularly exclude the provisions of Part I of the Act in agreements for arbitration that provide for arbitrations in a foreign country since the Indian courts would not have any authority to determine the explicit interests of the parties.[19] Lastly, all arbitrations both domestic and international which are held in India will still be regulated by Part I of the Act as the governing courts at the arbitration's seat, the Indian courts would have extensive jurisdiction under Part I of the Act to oversee and assist the arbitral process in arbitrations held in India, which includes the authority to set aside an award rendered in accordance with the arbitration.[20] This court's decision was enforceable subsequent to September 6, 2012.

[14] Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc (2012) 9 SCC 552, 560
[15] Bharat Aluminium Co v Kaiser Aluminium Technical Service Inc [2010] 1 SC 72 (SC) < https://www.drishtijudiciary.com/landmark-judgement/alternative-dispute-resolution/bharat-aluminium-co-v-kaiser-aluminium-technical-service-Inc-2010-1-sc-> accessed 8 November 2023
[16] Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc (2012) 9 SCC 552, 560
[17] Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc (2012) 9 SCC 552, 560
[18] Arbitration and Conciliation Act, s 36
[19] Ashish Chugh, 'The Bharat Aluminium Case: The Indian Supreme Court Ushers In a New Era' < https://arbitrationblog.kluwerarbitration.com/2012/09/26/the-bharat-aluminium-case-the-indian-supreme-court-ushers-in-a-new-era/ > accessed 26 September 2012
[20] Ashish Chugh, 'The Bharat Aluminium Case: The Indian Supreme Court Ushers In a New Era' < https://arbitrationblog.kluwerarbitration.com/2012/09/26/the-bharat-aluminium-case-the-indian-supreme-court-ushers-in-a-new-era/ > accessed 26 September 2012

Impact of the BALCO Judgment

The judgment gave a huge boost to the arbitration law in India in general. The Supreme Court reaffirmed the territorial principle, adding much-needed certainty to the legal regime of international commercial arbitration. The decision meant that arbitrations outside India will no longer be subject to Indian courts' supervisory jurisdiction, thus upholding the autonomy of the parties and the jurisdiction of the courts of the seat of the arbitration. This was done to make India's arbitration law complicit with internationally accepted ideals as contained in the UNCITRAL Model Law and the New York Convention.

The judgment also boosted the image of India as an arbitration-friendly country. Foreign investors and multinational corporations received more certainty with regard to enforcement of arbitration agreements and arbitral decisions with Indian parties. The limited powers of arbitration courts reduced the inefficiency of arbitration processes and limited the delays that could occur due to the small number of litigations in local courts. Moreover, the ruling brought about certain changes in the law, such as the Arbitration and Conciliation (Amendment) Act, 2015, which partially revived the provision of interim relief under Section 9 of the Arbitration and Conciliation Act, 1994, for some foreign-seated arbitrations. Hence the BALCO judgment helped to establish a modern and competitive arbitration regime in India on a global scale.

Critical Analysis

Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. is one of the most important cases involving arbitration in India. The Supreme Court rightly pointed out that over-entanglements of the courts in international commercial arbitration were counter to the spirit of the Arbitration and Conciliation Act, 1996. The territorial principle brought certainty in the application of part I of the Act, and guaranteed the exclusive jurisdiction of the courts of the seat of the arbitration. This method brought about greater autonomy for parties, recognized the intentions of the parties in the contract as well as the international standards of arbitration.

One more interesting aspect of the judgment is the explanation of the difference between the "seat" and the "venue" of the arbitration. Before BALCO, there was no clear definition, which led to confusion in interpretation of the law and the unnecessary litigation. The Court's interpretation was a significant clarification that helped eliminate ambiguity and create more certainty in drafting arbitration agreements. This therefore increased confidence among the commercial parties of the enforceability of their arbitration seat selection clause by Indian courts.

But, in spite of its impressive success, the verdict was not without its critics. The Court applied the ruling prospectively and thus did not apply it to arbitration agreements which were already in existence on 6 September 2012. This left unresolved issues from previous agreements to be interpreted using the Bhatia International principles for several years, effectively creating a legal grey area. Further, post-BALCO, in foreign-seated arbitration, the courts in India would not provide interim relief to the parties. This put a hurdle in the way when assets to be safeguarded were in India. While this was a significant move towards addressing this issue, the Arbitration and Conciliation (Amendment) Act, 2015, did point to some gaps in the current application of the BALCO principle.

In general, the judicial supervision/arbitral autonomy balance achieved in the judgment was a good one. It was a deliberate attempt by the Supreme Court to update Indian arbitration law and further underline India's dedication towards international commercial arbitration. Some legislative changes were still required, but the BALCO decision certainly laid the groundwork for further changes in the arbitration law of India.

Conclusion

The BALCO judgment is a turning point in the history of arbitration law in India. The Supreme Court, in Bhatia International and Venture Global Engineering, had already held that the territorial principle of international commercial arbitration prevails and that Part I of the Arbitration and Conciliation Act, 1996 only applied to arbitrations held in India.In Bhatia International and Venture Global Engineering, the Supreme Court restated this principle and determined that Part I of the 1996 Act applied only to arbitrations held in India. The judgment also answered the longstanding questions on the subject of the seat and the venue of arbitration and limited judicial interference in foreign-seated arbitrative proceedings.

The former criticism about the potential application of the judgment and the need for an interim order for foreign-seated arbitrations was followed by legislative reform and, subsequently, judicial rulings. Overall the advantages of BALCO in the long term outweigh its initial restrictions. The judgment brought a greater credibility to India as a pro-arbitration country, further promoted foreign investment and boosted confidence in the dispute resolution system in India. It remains one of the most comprehensive precedents for international commercial arbitration and will continue to be a benchmark in today's Indian arbitration practice.