

# Dispute Resolution Hotline

July 23, 2013

## BOMBAY HIGH COURT CLARIFIES THE PROSPECTIVE APPLICATION OF BALCO

The Bombay High Court in *Konkola Copper Mines (PLC) v. Stewarts and Lloyds of India Ltd.*<sup>1</sup> has now clarified that it would not be appropriate to hold that the reasons which are contained in the ruling in *Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Service, Inc. and Ors.*<sup>2</sup> ("BALCO") would operate with prospective effect, and thereby to a certain degree have removed the ambiguity prevailing over the nature of prospective application of the BALCO judgment. The court explained that while the ratio of the BALCO judgment i.e. Part-I of the Arbitration and Conciliation Act, 1996 ("Act") would apply only to arbitrations seated in India, operates with prospective effect, the interpretation of Section 2(1)(e)<sup>3</sup> of the Act as provided by the Supreme Court would not be limited to a prospective application.

### FACTS

The Appellant had entered into certain contracts with the Respondents for the supply of particular materials. Dispute arose between the parties which were then referred to arbitration. The contracts entered into by the parties provided that the arbitration shall be conducted in accordance with the rules of arbitration of the International Chamber of Commerce and that the venue of arbitration shall be New Delhi. However, upon invocation of the arbitration, the Appellant proposed Mumbai as the 'place of arbitration'. Such proposal was accepted by the Respondent. The arbitral tribunal constituted, passed an award in favour of the Appellant and the Appellant prior to enforcement of the award filed a petition under Section 9 of the Act, seeking certain interim reliefs requiring disclosure and freeing of assets.

The single judge hearing the petition under section 9 of the Act dismissed the same stating that in view of the agreement between the parties Part I of the Act stood excluded and the mere fact that parties had agreed to the venue/place of arbitration as Mumbai, would not confer jurisdiction on the court in India.

Both parties were aggrieved by the order, filed an appeal as both parties asserted Part I of the Act applied however, the dispute was whether the jurisdiction was vesting with the High Court of Bombay or with High Court of Kolkata where the cause of action is said to have arisen.

The Respondent submitted that as the cause of action for the dispute has arisen in Kolkata, the Calcutta High Court would have jurisdiction over the dispute. The Respondents provided that by virtue of the judgment in *Bhatia International v. Bulk Trading S.A.*<sup>4</sup> ("Bhatia International"), Indian courts may have jurisdiction even though the place of arbitration was not in India and accordingly various High Courts had held that place of arbitration was irrelevant for deciding the question of jurisdiction under Section 2(1)(e) of the Act. It was submitted that the court which would have territorial jurisdiction over the place where the cause of action is said to have arisen in relation to the dispute would be the court for the purposes of section 2(1)(e) of the Act.

The Appellants on the other hand argued that Parties had agreed to Mumbai as the place of arbitration. Further the in the *BALCO* judgment, the Supreme Court had clarified that the meaning of 'Court' as provided under Section 2(1)(e) of the Act would include the court of the place of arbitration. Therefore, the Bombay High Court had jurisdiction to hear the petition under Section 9 of the Act.

Thus, the issue *inter alia* was whether the interpretation of Section 2(1)(e) as provided under the BALCO judgment would apply only prospectively or would the interpretation be also applicable to agreements entered into by the parties prior to September 6, 2012.

### JUDGMENT

The court initially taking note of the agreement reached between the parties provided that Mumbai is the seat of the arbitration.

The court then analyzed that if Mumbai was the seat of arbitration does Section 2(1)(e) confer jurisdiction on courts whose original civil jurisdiction extended over the place of arbitration, to deal with petitions under Section 9 of the Act. In this regard, the court noted that in *BALCO*, the hon'ble Supreme Court had held that section 2(1)(e), grants jurisdiction to both the courts i.e. the court within whose jurisdiction the seat of arbitration is located and the court within whose jurisdiction the cause of action is said to arise or the subject matter of the suit is situated. Accordingly, by virtue of the interpretation of Section 2(1)(e) in *BALCO* judgment, the Bombay High Court would have jurisdiction over the petition under section 9 as the place/seat of arbitration was Mumbai. The court cited the following text from the *BALCO* judgment:

*"In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary*

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as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located."

Thus, it was to be understood if such interpretation of section 2(1)(e) as provided under BALCO would be applicable to arbitration agreements entered into prior to September 6, 2012.

The court noted that that the power of prospective ruling has been evolved by the courts to protect the rights of the parties and to save transactions which were effected due to the law which was previously applying.

Accordingly, it was seen that the Supreme Court had given the principle i.e Part I would apply only to arbitrations which have their seat in India, a prospective application to protect the transactions which were effected on the basis of the law laid down in *Bhatia International*. The court observed that the Supreme Court had molded the relief only to the extent that the ratio i.e. that the Part I shall apply only to arbitrations seated in India was to apply prospectively. This would mean that for international commercial arbitrations where seat is outside India under arbitrations agreements before September 6, 2012, the Part I may still apply unless it is expressly or impliedly excluded.

The court thus noted that it would be inappropriate to also apply the reasons contained in the BALCO judgment prospectively.

Accordingly, the court proceeded to set aside the order of the learned single judge and granted ad-interim reliefs in terms of temporary injunction against disposal of assets and sent the matter back for disposal on the merits of the case.

## ANALYSIS

A lot of debate surrounded the prospective application of the *BALCO* ruling. The *BALCO* judgment completely changed the landscape of the arbitration law in India and along with it the approach which was adopted by the courts towards arbitrations. The judgment discussed at length the meaning, scope and purport of various provisions of the Act before coming to the conclusion. However, the prospective application to the judgment gave rise to a significant amount of ambiguity regarding whether such prospective application would also extend to the reasons as provided or the interpretation provided under the judgment to certain provisions while arriving at the decision.

Accordingly, the present judgment of the Bombay High Court does lend assistance to a certain degree and is indicative of the fact that not everything that has been provided under the *BALCO* judgment is prospective in nature and the interpretation to various provisions of the statute as provided would not be limited to a prospective application.

As per the judgment, the question regarding whether Part I would apply to an arbitration where the arbitration agreement was entered into prior to September 6, 2012 would be decided in accordance with the principle laid down in the *Bhatia International* case. However having once decided that Part I applies, the question which court would have jurisdiction to entertain applications under Section 9 or Section 34 etc. would be decided in accordance with the principles provided in the *BALCO* judgment.

- Prateek Bagaria, Ashish Kabra and Vyapak Desai  
You can direct your queries or comments to the authors

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<sup>1</sup> Appeal (L) No. 199 of 2013 in Arbitration Petitioner No. 160 of 2013 with Notice of Motion (L) No. 915 of 2013; and Appeal (L) No. 223 of 2013 in Review Petition No. 22 of 2013 in Arbitration Petition No. 160 of 2013

<sup>2</sup> (2012) 9 SCC 552

<sup>3</sup> "**Court**" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes

<sup>4</sup> (2002) 4 SCC 105

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