

Dispute Resolution Hotline

November 13, 2017

INDIAN ARBITRATION ACT: IS THIS THE END OF THE APPLICABILITY DEBATE? (GOVERNMENT OF WEST BENGAL V. CHATTERJEE PETROCHEM AND KATRA HOLDINGS V. CORSAIR INVESTMENTS LLC & ORS)

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Arbitration analysis: On the fifth anniversary of the BALCO decision, Sahil Kanuga, co-head of international dispute resolution practice, Payel Chatterjee, a senior member and Mohammad Kamran, a member of the same team at Nishith Desai Associates, consider whether the dust is finally settling on the much-debated issue of the applicability of Part I of the Arbitration and Conciliation Act, 1996 (the Act) to foreign-seated awards. The issue has re-surfaced before various courts at different stages due to badly drafted arbitration clauses, prospective applicability of the Balco case and the newly enacted amendments to the Act in 2015.

ORIGINAL NEWS

Government of West Bengal v Chatterjee Petrochem AP No 1046 of 2016 and GA No 211 of 2017 (not reported by LexisNexis® UK)

Katra Holdings v Corsair Investments LLC & Ors Arbitration Petition No 436 of 2016 (not reported by LexisNexis® UK)

PRE-AND-POST BALCO ERA

Bhatia International v Bulk Trading S.A. Bhatia International v Bulk Trading (2002) 4 SCC 105 (not reported by LexisNexis® UK), entailed that Part I of the Arbitration and Conciliation Act, 1996 will apply to all arbitrations (whether domestic or foreign-seated) unless the parties to a foreign-seated arbitration expressly or impliedly excluded the application of provisions of Part I of the Act.

The decision in *Bharat Aluminium Co v Kaiser Aluminium Technical Service* 2012 9 SCC 552 (Balco) (not reported by LexisNexis®), by a five-judge constitutional bench, laid down a blanket rule that Part I of the Act had no application to arbitrations that were seated outside India, irrespective of the fact whether parties chose to apply the Act or not.

However, it was to apply only prospectively ie to arbitration agreements entered into after 6 September 2012. The Supreme Court in *Harmony Innovation Shipping Ltd v Gupta Coal India Ltd & Anr* 2015 (3) SCALE 295 (not reported by LexisNexis®) clarified that pre-Balco arbitration agreements (executed prior to 6 September 2012) must be considered based on the principles laid down in *Bhatia International*. This effectively led to two parallel streams of law being developed insofar as arbitration was concerned.

AMENDMENTS TO PART I OF THE INDIAN ARBITRATION AND CONCILIATION ACT

Pursuant to the *Balco* decision, the Indian courts had no jurisdiction to intervene in arbitrations which were seated outside India and part I of the Act was not applicable to such arbitrations. Therefore, parties to a foreign seated arbitration were blocked out of the Indian courts in seeking interim relief under section 9, Part I of the Act. This posed significant concerns for foreign parties. To iron out such issues, some welcome changes were made for international arbitrations seated outside India, in amendments to the Act effective 23 October 2015. After the amendments, inter alia, sections 9, 27, and 37(1) and (3) in Part 1 of the Act became applicable to foreign seated arbitrations, unless an agreement exists to the contrary.

In addition to above, the amendments made several other changes including guidelines to determine ineligibility, independence, and impartiality of arbitrators, expeditious disposal with timelines for arbitration proceedings etc. They were aimed at taking drastic and reform oriented steps to bring Indian arbitration law at par with global standards and provide an effective mechanism for resolving disputes with minimum court interference. The task now rested with the judiciary to eliminate the remnants of the past and set the ball rolling for the new regime.

Recently, the Bombay High Court and the Calcutta High Court have refused to entertain a challenge to foreign arbitral awards, applying the above principles. The Bombay High Court in *Katra Holdings v Corsair Investments LLC & Ors Arbitration Petition* No 436 of 2016 (not reported by LexisNexis® UK) held that Part I of the Act will not apply to arbitration proceedings where the parties have agreed to conduct the arbitration in New York in accordance with the Rules of American Arbitration Association (the AAA Rules).

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Soon thereafter, the Calcutta High Court, in Government of *West Bengal v Chatterjee Petrochem AP* No 1046 of 2016 and G.A. No. 211 of 2017 held that Part I of the Act will not apply to arbitration, where the parties agreed to conduct arbitration in Paris in accordance with the Rules of Arbitration of International Chamber of Commerce (the ICC Rules). These orders demonstrate a continued pro-arbitration approach and a positive wave of arbitration in India.

KATRA HOLDINGS CASE

The dispute in *Katra Holdings* arose in relation to several transactions under a Restated Escrow and Transaction Settlement Agreement dated 12 May 2007 (the RETS Agreement) between the parties. Clause 15 of the RETS Agreement entailed that the disputes, if not settled in good faith, shall be submitted to arbitration to be conducted in accordance with AAA Rules and *'the place of arbitration shall be New York, New York or such other place as may be agreed upon by the parties'*. Clause 16 provided that the RETS Agreement shall be governed by the laws of India except in relation to certain specified provisions, which shall be governed by New York law.

A three member arbitral tribunal passed the final award in New York, USA. The award was challenged under section 34(2)(ii)(b) of the Act before the Bombay High Court on the grounds of public policy. However, a preliminary objection was raised on the maintainability of the application as Part I of the Act stood excluded as the juridical seat of arbitration was outside India. The issue before Bombay High Court was to determine whether the seat of arbitration was in India or outside India.

It is well settled that the mere choosing of the juridical seat of arbitration attracts the law applicable to such location. It would not be necessary to specify which law would apply to the arbitration proceedings, since the law of that particular country would apply *ipso jure* (*Eitzen Bulk SA v Ashapura Mnechem Limited CA* No 5131-5133 of 2016; *CA* No. 5134-5135 of 2016; *CA* No 5136 of 2016)(not reported by LexisNexis® UK). The Bombay High Court relied on *Union of India v Reliance Industries & Ors* (2014) 7 SCC 603 which further expounded *Bhatia International* to clarify that where the juridical seat is outside India or where the law other than Indian law governs the arbitration agreement, Part I of the Act would be excluded by necessary implication. The Bombay High Court noted that since the parties had agreed that arbitration proceedings would be conducted in New York in accordance with the AAA Rules, it could not contend that the proper law of the agreement, ie, Indian Law, would apply to the arbitration proceedings.

Further, the Bombay High Court also relied on *Yograj Infrastructure Limited v Ssang Yong Engineering and Construction Company Limited* (2011) 9 SCC 735 (not reported by LexisNexis® UK), which dealt with a similar arbitration clause and concluded that if the seat of arbitration is clearly laid down in the arbitration clause, the parties cannot rely on the proper law of the agreement. Since the arbitration was seated in New York, USA and the Federal Arbitration Act (USA) was the law governing the arbitration proceedings, application of Part I was by necessary implication excluded.

CHATTERJEE PETROCHEM CASE

The dispute in Chatterjee Petrochem case emanated out of an agreement dated 12 January 2002 (Sale Agreement) for the sale of majority shareholding of Haldia Petrochemicals Limited to Chatterjee Petrochem (Mauritius) Co by the government of West Bengal. The relevant dispute resolution clause in the Sale Agreement provided that *'disputes and differences between the parties will be settled in accordance with the ICC Rules. The venue of arbitration will be in Paris and the law applicable to the contract will be Indian law'*.

The arbitral tribunal made the final award dated 9 September 2016 in Paris, which was challenged under section 34 of the Act. The issue before the Calcutta High Court was whether there was an express or implied agreement between the parties to exclude Part I of the Act. *Shashoua and others v Sharma* [2009] EWHC 957 (Comm)

The Calcutta High Court observed that there is no difference between seat, venue and place of arbitration unless there is agreement between the parties that seat would be in one place and hearings would take place in other places (*Shashoua v Sharma*). This is in line with the issue dealt in the recent Indian Supreme Court decision of *Roger Shashoua v Sharma* [2017] (Civ Appeal No.2841–2843) adopting international best practices and a hands-off approach in case of foreign awards giving effect to the intention of the parties.

The Calcutta High Court relied on the same series of judgments which were considered in *Katra Holdings*. The ruling held that although parties have chosen Indian law, the seat or venue of the arbitration was chosen as Paris. Therefore, the law governing the agreement to arbitrate and enforcement of challenge to the award is the law of the place where the seat of arbitration is located or in other words, Paris. Thus, it was held that parties had agreed to exclude Part I of the Act and the application was dismissed. The Calcutta High Court clarified that the law in *Bhatia International* would apply, as the agreement was entered prior to the *Balco* decision.

WHAT ARE THE PRACTICAL IMPLICATIONS?

These two judgments are excellent examples of a continued thrust towards a pro-arbitration environment in India. Party autonomy and a non-interference approach by the Indian courts have paved the way for international commercial arbitration. Interestingly, the Indian High Courts in both these cases have sought to adapt a rational interpretation and concluded that if the arbitration agreement provides for the venue of arbitration coupled with the curial law of the place, the term 'venue' would be construed to mean 'seat' of arbitration.

The Supreme Court in *Balco* and *Enercon* (Civil Appeal No.2086 of 2014 (Arising out of SLP (C) No. 10924 of 2013), decided on February 14, 2014 (not reported by LexisNexis® UK) had distinguished the concept of seat and venue and explained their significance in arbitration proceedings. The distinction between seat and venue of arbitration assumes significance when foreign seat is assigned. In such scenario, Part I would be inapplicable to the extent inconsistent with arbitration law of the seat.

Interestingly, both High Courts ignored the distinction created by the Supreme Court between seat and venue. The courts in both *Katra Holdings* and *Chatterjee Petrochem* relying on the principles of *Reliance Industries* and *Bhatia International*, have categorically held that once the parties choose to arbitrate in a foreign country in accordance with the rules of an international arbitration institution, they by necessary implication choose such foreign country as the

seat and accordingly exclude the application of Part I of the Act.

The two rulings ensure that the picture of the arbitration regime in India, which over the years has suffered from judicial interference, has continued to evolve and change with courts continuing to adopt a more hands-off approach towards arbitration and specifically international commercial arbitrations seated outside India. It provides immense relief to the parties across the world and makes a point that the legislative mandate is for courts to aid, support and facilitate arbitration.

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— **Mohammad Kamran, Payel Chatterjee & Sahil Kanuga**
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