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"Eitzen Bulk Ltd. v. Ashapura Minechem Ltd."[*]

Abstract:

The central theme of this Case Comment is the Basic Structure of International Arbitration in India, which involves a trace back to the original mistake which was Bhatia International v. Bulk Trading and Co., which was repeated in Satyam Computers v. Venture Global and the case which finally unknotted the problem, i.e. Bharat Aluminium Co. v. Kaiser Aluminium Technical Services. (BALCO)

For those who are yet uninitiated in this specific issue, this case basically involves the controversy on exclusion of Part I of the Arbitration and Conciliation Act, 1996 in the case of foreign arbitral awards. This meant that all arbitral awards would be put through the rigour of appeals under Indian courts, having years wasted in litigation. This was seemingly resolved in the BALCO case, however, through a use of prospective overruling, the BALCO decision would only take effect on agreements made after the date of decision, 6th September 2012, leaving cases still in the clutches of the wrong law. The decision of Eitzen Bulk A/s v. Ashapura Minechem Limited has remedied this situation by reconciling the Pre-BALCO law with the BALCO decision .

The final parts of the paper analyze the possible impacts and repercussions of this decision and give the author's view on the same.

Introduction

The Indian Arbitration story began only recently when this form of dispute resolution was given formal recognition through the Arbitration and Conciliation Act, 1996, which was based on the UNCITRAL Model Recommendation. This Act however proved to be woefully inadequate in catering to the specific problems that Arbitration poses in India; that is to provide speedy resolution of disputes with minimal judicial interference which is in fact the unique selling point (USP) of Arbitration. This situation was only compounded by our judicial system which has acquired worldwide repute in unending delays, lasting decades at times.

Such an abysmal state of affairs has not only affected India's Arbitration development but has also had a profound impact on India's ability to attract foreign investment. One need look no further than the current struggle faced by the ruling party to attract investment which can be ascribed to the failure of an effective system of redressal for any disputes. This is something even foreign arbitral tribunals have bemoaned of in cases such as *White Industries Australia*

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Ltd. v. The Republic of India[1], wherein Indian Courts were heavily criticized as they were unable to provide an efficacious remedy to an Australian Company, in lieu of which it was awarded huge damages violation of its Treaty guaranteed rights of an effective legal remedy through Indian Courts.

These failures however, hold no water against the larger problem of the treatment given to foreign seated arbitrations and the subsequent refusal on their part to use India as a destination for arbitration, the main consequence of which is the major impact upon India's chances of global economic domination. This saga (which could be dubbed the basic structure doctrine issue of Arbitration, given the number of cases and amendments it has witnessed)[2] began with the case of *Bhatia International v. Bulk Trading S.A. & Anr.*[3] (referred to as "Bhatia International").

In this case the Apex Court laid down that Part I of the Arbitration Act, which contained all the substantive provisions regarding challenges to appointment of arbitrators[4], challenges to arbitral awards[5] as well as grant of interim measures[6] would be applicable to all arbitrations (both domestic and international) unless the parties specifically agree otherwise. This simple statement sent shockwaves in the arbitration community as the applicability of Part I essentially meant that each arbitral award could be put under judicial overview for even the minutest defect, which in an Indian context meant a further delay of a decade, at the very least.

This interpretation ultimately led to the development of twin tests to determine whether the parties wanted to exclude application of Part I. The first test amongst these was the Express Exclusion Test, which as its name suggests refers to an express direction by the parties in the arbitration clause to exclude application of Part I of the Act and its associated benefits. However, the second test, namely the Implied Exclusion Test, was far more complicated and involved a determination of intent of the parties through several factors such as Choice of Arbitral Seat, Choice of Law, location where assets of the parties are situated etc., thus leading to a case to case basis adjudication. While the Court laid down this test, it unfortunately did not lay down the definitive criteria to determine what constitutes implied consent. This created confusion in the Courts as different judges began to apply different standards to determine intention of the parties with regards to the applicability of the challenge an review provisions in Part I of the Act.

This position, although opposite to popular practice was time and again reaffirmed in cases such as *Venture Global Engineering v Satyam Computer Services Ltd. & Anr.*[7] and *M/S Sumitomo Heavy Industries Ltd vs Oil & Natural Gas Company*.[8] However, finally in 2012 the famous *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Ltd*.[9] (referred to as

[1] White Industries Australia Ltd. v. The Republic of India**,** UNCITRAL, Final Award (Nov. 30, 2011).
[2] Keshavananda Bharti v. State of Kerala, AIR 1973 SC 1461 (referring to the Basic Structure Doctrine Chain of Cases which culminated with this decision).
[3] Bhatia International v. Bulk Trading S.A. & Anr., AIR 2002 SC 1432.
[4] S. 11, The Arbitration and Conciliation Act, 1996.
[5] S. 34, The Arbitration and Conciliation Act, 1996.
[6] S. 9 & 17, The Arbitration and Conciliation Act, 1996.
[7] Venture Global Engineering v Satyam Computer Services Ltd. & Anr., AIR 2014 SC 3218.
[8] M/S Sumitomo Heavy Industries Ltd vs Oil & Natural Gas Company, AIR 2010 SC 3400.
[9] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Ltd, (2012) 9 SCC 552.

"BALCO") finally brought in a modicum of clarity by declaring that Part I, including Sec. 9 (relating to interim measures by Courts), would be excluded merely by choosing a foreign seat for arbitration. This position has since been widely acclaimed as the first of India's pro-arbitration movement, but suffered a fatal flaw as it adopted a unique type of prospective overruling; which was to make the law established therein applicable only to "arbitration agreements" entered into subsequent to the decision as opposed to the cases arising after the decision.

India has however begun a new chapter in its Arbitration Story through the enactment of the Arbitration and Conciliation (Amendment) Act 2016, which is an essential step in matching the International Arbitration model in India to the existing International Best Practices followed worldwide. The amendments brought forth by this legislation have smoothened the path and settled some judicial interpretations which were otherwise murky and confusing.

Under this Act one major amendment was the overruling of BALCO through legislative enactment. To understand this one need look no further than the Proviso to Sec. 2(2)[10] which clearly states that Sec. 9, 27 and clause (a) of sub section (1) and sub section (3) of Sec. 37 would squarely apply even to International Commercial Arbitration. This has resolved the problem posed by the BALCO decision which though intended well, ended up creating problems for parties which wished to obtain any interim restraints on the use of property in dispute, thus reopening the gates for applying to Courts for interim measures.

The problem that lies in this exclusion or non-exclusion of Part I is that the sole reason parties choose foreign arbitration is for a speedy resolution of disputes followed by unhindered enforcement of the awards. However, the application of Part I to such arbitrations would defeat both these motives. While parties are amenable to review of awards by foreign courts which tend to resolve the issue in a matter of months, the deep lying fear of every corporation in Indian Courts is their ability to end up tying up assets for years in litigation and arbitral appeals. BALCO came as a ray of hope to these corporations with its strong pro-arbitration stance of completely excluding application of Part I in the case of International Commercial Arbitrations.

However, in the Post-BALCO era, it would seem that the ghost of Bhatia International shall continue to haunt parties who entered into an agreement prior to 6th September, 2012, a date etched into Indian arbitration memory. While the BALCO judgement was hailed as a victory for India's pro – arbitration stance, its prospective effect left many including the appellant in the case seething for justice. This is evidenced in the case of *Eitzen Bulk A/s v. Ashapura Minechem Limited*,[11] yet another decision by the Indian Supreme Court wherein even after 4 years of the BALCO judgement, the Bhatia International law has been applied. This application of incorrect law even after a correct pronouncement has been debated extensively by various Indian Courts after the revolutionary BALCO judgement of 2012. The current case may have finally settled the dust on the long standing issue of foreign seated arbitrations and their review under Indian Law.

[10] S. 2(2) proviso, The Arbitration and Conciliation Act, 1996.
[11] Eitzen Bulk A/s v. Ashapura Minechem Limited, CIVIL APPEAL Nos. 5131-5133 and 5136 of 2016 (Supreme Court, 13/05/2016).

The case involved a typical Maritime arbitration scenario where two parties entered into a Contract of Affreightment in the format of a Standard Charter Party Agreement to facilitate the freight of bauxite from India to China. Under the arbitration clause present in the agreement both parties agreed to resolve all of their disputes by reference to the London Maritime Arbitrators Association (LMAA), with each party given the power to appoint one arbitrator each of their choice and an umpire in case of disagreement on appointments. The contract further specified that English Law would be applied by the arbitrators to resolve the dispute.

After a dispute arose between the parties, the matter was referred to a sole arbitrator in accordance with the arbitration clause. The proceedings were held in London according to English Law and the Arbitrator held Ashapura Minechem Ltd. (referred to as "Ashapura") liable for damages in tune of 36 million USD along with interest. Initially this contract and the arbitration clause itself were sought to be challenged by Ashapura, which however was subsequently withdrawn. However, once the arbitrator rendered the award, the Ashapura resorted to the provisions of Sec. 34 of the Arbitration Act and sought to immediately obtain an injunction and restraint on the enforcement of the award. This attempt failed miserably as the District Court of Jamnagar dismissed the application. This led to the filing of a Writ Petition under Art. 226 of the Constitution in which the High Court assumed jurisdiction and stated that the Sec. 34 proceedings shall continue.

On the other hand the winning party i.e. Eitzen Bulk A/S (referred to as "Eitzen) obtained enforcement orders for the award in several jurisdictions including UK, USA, Belgium and Netherlands. They finally approached the Bombay High court under Sec. 47 and 49 of the Act to obtain enforcement of the arbitral award and contended that the Gujarat High Court proceedings were invalid as this being a foreign award, Indian Courts had no jurisdiction to adjudicate the dispute. This evidently led to a clash with the Gujarat High Court proceedings which admitted the appeal under Sec. 34 and were considering merits including the plea made by Ashapura to dismiss the arbitral award. Thus, the appeals, questioning the award under Sec. 34 and the enforcement petition under Sec. 47 and 49 came under consideration in the Supreme Court.

While considering this issue the Supreme Court relied on several previous judgements such as *Union of India v. Reliance Industries Ltd. & Ors*.[12]and *Harmony Innovation Shipping Limited v. Gupta Coal India Ltd. & Anr.*[13] which have since clarified the legal position that the Bhatia International case had created. All of these decisions pertained to agreements prior to the BALCO decisions and slowly but surely were merging the Pre- BALCO and Post –BALCO position. The Reliance Industries case in particular took a giant stride in the right direction by declaring that the two factors which would determine implied exclusion were the choice of arbitral seat and the choice of law applicable to the arbitration.

The Supreme Court squarely applied these principles to the case at hand and considered the facts in detail. On this basis they came across two important facts which helped them arrive on the conclusion that Part I was indeed excluded. The first was that the parties had appointed an umpire, which though was valid and provided for in the arbitration clause, found no place

[12] Union of India v. Reliance Industries Ltd. & Ors., (2015) 10 SCC 213.
[13] Harmony Innovation Shipping Limited v. Gupta Coal India Ltd. & Anr, (2015) 9 SCC 172.

under the Arbitration and Conciliation Act, 1996. This concept was in itself borrowed from the English Arbitration Act, in particular Sec. 21 which provided for the same. This was construed by the Court to show clear intent on the part of the parties to follow the English Arbitration Act in the proceedings and satisfy one of the criteria.

The second was that the proceedings were conducted in their entirety at the arbitral seat in London and the English Arbitration Act provided for appeals on arbitral awards rendered, in Sec. 67, 68 and 69. Thus, the proper place to appeal the decisions would be in English Courts instead of appealing the award in India.

The Court, in a traditional Indian fashion, went further to analyze several previous decisions which reiterated this stand such as *Reliance Industries Ltd. & Ors. v. Union of India*[14] which relied on the decisions of BALCO and *Enercon (India) Ltd. & Ors. v. Enercon GMBH & Anr.*[15] to elucidate that the Bhatia stance needed to be watered down in order to match the correct law already declared. This was supported by various English Court decisions such as *Sulamerica Cia Nacional de Seguros SA v. Enesa Engelharia SA Enesa*[16] and *C v. D.*[17]

Up until this point the proceedings progressed in a fashion similar to any other International Arbitration adjudication in Indian Courts. The distinguishing factor lies in Para 32 and 33 of the judgement which took the pre-existing two factor test to determine implied exclusion and watered it down to simply one criteria. In the words of the Court *"It would not be necessary to specify which law would apply to the Arbitration proceedings, since the law of the particular country would apply ipso jure."* To arrive at this conclusion the Court relied upon Redfern and Hunter on International Arbitration which explains this issue simplistically in the following passage:

"It is also sometimes said that parties have selected the procedural law that will govern their arbitration, by providing for arbitration in a particular country. This is too elliptical and, as an English court itself held more recently in Breas of Doune Wind Farm it does not always hold true. What the parties have done is to choose a place of arbitration in a particular country.

That choice brings with it submission to the laws of that country, including any mandatory provisions of its law on arbitration. To say that the parties have 'chosen' that particular law to govern the arbitration is rather like saying that an English woman who takes her car to France has 'chosen' French traffic law, which will oblige her to drive on the right-hand side of the road, to give priority to vehicles approaching from the right, and generally to obey traffic laws to which she may not be accustomed. But it would be an odd use of language to say this notional motorist had opted for 'French traffic law'. What she has done is to choose to go to France. The applicability of French law then follows automatically. It is not a matter of choice."

[14] Reliance Industries Ltd. & Ors. v. Union of India, 2014 (7) SCC 603; Also see *Videocon Industries Ltd. v. Union of India, AIR 2011 SC 2040; Dozco India (P) Ltd. v. Doosan Infracore Co. Ltd., (2011) 6 SCC 179; Yograj Infrastructure Ltd. v. Ssang Yong Engg. & Construction Co. Ltd., (2012) 12 SCC 359.*
[15] Enercon (India) Ltd. & Ors. v. Enercon GMBH & Anr., (2014) 5 SCC 1.
[16] Sulamerica Cia Nacional de Seguros SA v. Enesa Engelharia SA Enesa, [2012] EWCA Civ 638 (2012, Court of Appeals).
[17] C v. D, [2007] EWHC 1541 (Comm) (2007, High Court).

The outcome that flows from this decision is that while using the implied exclusion test declared in Bhatia International, the determination of exclusion of Part I will be done merely on the basis of choice of a foreign arbitral seat. This has essentially watered down the Bhatia International Test to match the BALCO judgement of 2012, thereby bringing uniformity in the Pre-BALCO and the Post-BALCO position.

While this may seem like a small modification, its ramifications in India's international arbitration are enormous as this would help resolve long pending cases and clear the arbitration backlog that India is suffering from, which is indeed monumental. Any further cases which are being entertained could simply be dismissed on the grounds of choice of foreign arbitral seat while review would only be allowed in enforcement proceedings.

This decision comes as at an opportune time for the current Government which has been struggling to garner foreign investment. The judiciary being one of the fundamental pillars in an investment decision perhaps this opportunity to finally forget the ignominy of Bhatia International will be well appreciated. The present system serves to protect the interests of Multi - National Corporations (MNCs) by avoiding the trouble of ferrying across countries fighting multiple litigations as appeals in India have become more of a sore loser's tool to bind up the assets.

Under this new regime and the Courts judgement finally bringing some clarity; India can perhaps begin its journey to rival the arbitration elite (the UK, US, Singapore, Stockholm, Paris, Hong Kong) and set up an arbitration institution. This would, at best, resolve the remaining few shortcomings and bring a sense of stability which is an admirable trait in any arbitration regime, and at worst, end the much dreaded multiplicity of proceedings and the unnecessary frivolous appeals to arbitral awards.