THE "*BALCO-BHATIA* DICHOTOMY", 'IMPLIED EXCLUSION' & THE CASE OF *SAKUMA EXPORTS V/S LOUIS-DREYFUS*

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I. INTRODUCTION: THE MENACE THAT IS JUDICIAL INTERVENTION

In the maiden edition of the Indian Journal of Arbitration Law, Professor Martin Hunter describes India's tryst with arbitration as "journey to the only game in town".[1] There is possibly no better way to articulate the situation. Though India was one of the first signatories to the New York Convention in 1958 and even amended its laws in 1996[2] to initiate its proper rite of passage into the world of international arbitration, the reality has been far from satisfactory. In the past, India has been at the receiving end of immense criticism for several aspects of its regime. Her need for a robust arbitration system has now escalated to the status of a necessity. A large part of the blame lies with the proclivity of Indian courts in adopting, what has been described as an "overzealous interventionist attitude."[3]Engagement in excessive judicial intervention with respect to enforcement and annulment of awards, particularly foreign (or "outside-seated") awards, has been the cause of much discomfort in the world of international arbitration, invoking strong reactions.[4] While Indian courts find themselves burdened with matters as colossal in numbers, the interested parties have been rallying the call for a more efficient regime for dispute settlement – one that protects their interests by providing swift and certain relief.

In this respect, all three components of the title of this work, merit examination. The

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[1] J Martin Hunter, 'Journey to the Only Game in Town' [2012] (1) Ind J Arb L1.

[2] The Arbitration and Conciliation Act 1996.

[3] Ajay Kumar Sharma, 'Judicial Intervention in International Commercial Arbitration: Critiquing the Indian Supreme Court's Interpretation of the Arbitration and Conciliation Act 1996' [2014] (1) (3) Ind J Arb L6.

[4] S Rai, 'Proposed Amendments to the Indian Arbitration Act: A Fraction of the Whole?' [2011] (1) (3) J Int Disp Settl 169<http://connection.ebscohost.com/c/articles/84669876/proposed-amendments-indian-arbitration-act-fraction-whole> accessed 6 March 2016.

decisions of the Supreme Court of India in Bhatia International v. Bulk Trading S.A.[5]and Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.[6] (hereinafter BALCO)have been two of the most influential contributions by the Apex court regarding the question of involvement of domestic courts in arbitral proceedings.

These cases have implications that go beyond the realm of arbitration and the debate surrounding them, has bifurcated the issue's timeline into the new 'BALCO regime' and the erstwhile 'Bhatia regime'. The debate is underlined by the concept of segregation between Parts I and II of the Arbitration and Conciliation Act, 1996 (hereinafter A&C Act) dealing with domestic and foreign awards, receptively. In 2002, Bhatia International notoriously held that in the absence of express or implied exclusion, Part I of the A&C Act would apply to foreign-seated arbitrations as well. This opened the door for massive judicial intervention on account that a variety of Part I matters were now applicable to foreign awards. A decade later, in BALCO the Supreme Court had the opportunity to revisit this position of law. Overruling Bhatia International, albeit prospectively, the Court now ruled that Part I would not apply if the parties had chosen a foreign jurisdiction as the "seat" of their arbitration. This implied that parties could not apply to domestic courts for relief against a foreign award, including moving applications for interim measures, appeals against such interim measures, challenge to awards and appeal against an order of the arbitral tribunal on the ground that it does not possess the required jurisdiction. It bears note that it took the Indian judiciary, punch-drunk on the ever-expanding judicial powers granted to it by Bhatia, a solid ten years to restore its image as an arbitration-friendly jurisdiction.

The debates in the two cases (and a host of others) turn quite a bit on the idea of "implied exclusion" – that by choosing to seat their arbitration in a foreign (non-Indian) law, parties to an arbitration agreement impliedly oust the jurisdiction of the Indian courts in their dispute. Though there are various facets to the -BALCO-Bhatia debate, the culmination of one of those strands is the case of Sakuma Exports Ltd.[7]The Division Bench of the Bombay High Court in the matter ruled that Indian courts would have no jurisdiction in challenging an award issued by the Refined Sugar Association in London because in choosing London as the seat of their arbitration, the parties had impliedly ousted the jurisdiction of Indian courts.[8]

Dismissing the Special Leave Petition (hereinafter SLP) issued to vide Section 37 of the A&C Act; the Supreme Court declared that the High Court was correct in rejecting the

[5]*Bhatia International v Bulk Trading SA* (2002) 4 SCC 105.

[6]*Bharat Aluminum Company v Kaiser Aluminum Technical Services Incorporation* (2012) 9 SCC 552.

[7] *Yograj Infrastructure Limited v Ssang Yong Engineering and Construction* 2011 (9) SCC 735.

[8] *Sakuma Exports Limited v Louis Dreyfus Commodities and Uisse SA* 2015 (5) SCC 656.

Section 34[9] application made to it because it was based on correct appreciation of the law.

The controversy stems from the fact that the overruling in BALCO was prospective, implying that it applies only to disputes that arise out of arbitration agreements concluded after 6th September 2012. This would result in pre-BALCO arbitrations being exclusively governed by the dicta of Bhatia International, which would allow for judicial involvement through Part I. However, in Sakuma Exports (and several other post-Bhatia pre-BALCO judgments) the courts have chosen to deny itself the opportunity to intervene in matters, which legally, was completely within the periphery of its rights. This may, on the first impression, seem to fly in the face of the principle laid down in Bhatia and this work is dedicated to finding out whether the same is true. Even though the policy behind the cases has been to promote the pro-arbitration face of India, it must be seen whether the same is being done on a legally sound footing. The concerns on part of the critics seems fair enough – legal propriety should not be sacrificed unjustifiably on the altar of policy. This work is an attempt to lay some of these concerns to rest.

This piece is in three parts. Part I deals with the problem, while Part II deals with the "BALCO-Bhatia dichotomy" and the debate regarding implied exclusion of the jurisdiction of Indian courts. Part III analyses whether, in coming to its decision against a Section 34 application, the Supreme Court in Sakuma Exports Ltd. has correctly appreciated the law, as laid down by decisions preceding and Part IV concludes the same.

II. HOW FAR CAN YOU GO WITH BALCO? : REMEDYING A DECADE-LONG HANGOVER

It would be apt to begin by noting that the A&C Act, vide Section 2(2) has incorporated the UNCITRAL Model Law principle of territoriality with respect to arbitral awards. In line with the same, the drafters of the A&C Act chose to dedicate the first part of the Act to domestic and international commercial arbitration in India, while the second was reserved for foreign-seated awards.

Despite this, the Supreme Court in Bhatia International added to the arsenal of its supervisory powers and enabled Indian courts with the ability to provide a variety of reliefs to disputing parties with respect to arbitrations seated outside India. The Court ruled that "even though Part I was originally intended to be limited to domestic arbitrations and arbitral awards unless it was expressly or impliedly excluded by

[9] The Arbitration and Conciliation Act 1996.

agreement between the parties, it would also apply to foreign ones." It is pertinent to note that the powers of Indian courts under Part I are quite extensive, including grant of interim measures (Section 9), appointment of arbitrators absent agreement by the parties (Section 11), obtain evidence for re-examination (Section 27) and most importantly, the power to set aside arbitral awards (Section 34). This paved the way for the holding in Venture Global Engineering, [10]which allowed for the annulment of a foreign award after reviewing the tribunal's decision on merits – two things the Court could not have achieved with the assistance of the Act, as intended. By making the expansion of Part I the order of the day, the Bhatia-era of judicial intervention will be remembered for its utter disregard towards la règle du jeu, or the 'rules of the game'.

The decision of BALCO has been hailed as a "truly excellent judgment" by learned Professor Gary B. Born.[11]In the case, a five-judge bench of the Supreme Court prospectively overruled its earlier judgments in Bhatia International and Venture Global Engineering, declaring that Part I cannot be applied to international arbitrations. With this corrected perspective, India has said to set itself in the right direction in international arbitration.[12]There are two palpable positive changes that the BALCO regime has ushered in. First, even though the overruling was brought into effect prospectively, the change in attitude brought in by the case had a massive positive effect on "pre-BALCO" agreements.

In cases like Sakuma Exports Ltd. and Yograj Infrastructure[13], which involve arbitration agreements executed before the BALCO judgment, the law of Bhatia International is to prevail. Yet courts have exercised restraint regarding their position in the dispute settlement mechanism and have decided to conclude that even by following the dicta in Bhatia International, one can arrive at a situation where agreement between the parties regarding the selection of a foreign seat would result in the ouster of the court's jurisdiction. Though the legal correctness of this will be discussed subsequently, it is sufficient to note that this "spilling over" effect of the BALCO decision has proven to be a saving grace for those arbitrations that were executed pre-BALCO; otherwise sentenced to the Bhatia International fate.

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[10] *Venture Global Engineering v Satyam Computer Services Limited* 2010 (8) SCC 660.

[11] Gary B Born and SA Spears, 'International Arbitration and India: "A Truly Excellent Judgment!"' [2012] (1)(1) Ind J Arb L 4<http://www.ijal.in/sites/default/files/IJAL%20Volume%201_Issue%201_Gary%20Born%20%26%20Suzanne%20Spears.pdf>accessed 6 March 2016.

[12] Talat Ansari and Ila Kapoor, 'India is Moving in the Right Direction on Int'l Arbitration' (*Law360*, 11 April 2014) <http://www.kelleydrye.com/publications/articles/1825/_res/id=Files/index=0/1825.pdf> accessed 6 March 2016.

[13] ibid (n 306).

The second change has to do with the legitimate power of review of Indian courts under Part II of the A&C Act. After its judgment in BALCO, the Supreme Court has curtailed its ability to review the decision of the tribunal on merits. Another important point to be noted here is that the post-BALCO judgments have provided for a limited scope of refusing enforcement of awards on the grounds of "public policy". Specifically, the Shri Lal Mahal case refused to include "patent illegality" of a decision as a ground for challenge of the award.[14] Declaring that review on the basis of legality was impermissible since it amounted to the subject matter, i.e., the substance of the dispute. Thus it has now been held that the scope of review should be limited to the grounds of the challenge of domestic award under Part I.[15]In this sense, the Indian courts would have no "supervisory" jurisdiction and it would not be in their duty to assess whether some error has occurred in the original decision.

Hence, by virtue of the law laid down by the Supreme Court in Renusagar Power Plant,[16]an award will be annulled on the basis of "public policy" only if it is contrary to:

- The "fundamental policy" of Indian law
- Interest of India
- Justice or morality[17]

The court also clarified that the award sought to be enforced was a foreign award under Part II of the A&C Act [Section 48(2) (b)] and it would be impermissible to import the wider interpretation of "public policy" from cases like Saw Pipes[18]because they were concerned with respect to a domestic award under Section 34(2) (b) (ii). It can be seen that the Court has denied itself the opportunity of expanding its powers through the medium of review by limiting its scope to these three factors and chose not to include the ground of "patent illegality" in the said scope. This is indeed a very positive development keeping in mind that in the past, with cases like Saw Pipes[19]and Phulchand Exports, were going 'the Bhatia-way' with Part I expansion.

It is encouraging to note that post BALCO, there has been a flurry of cases that endorse a less intrusive approach to foreign arbitration. On the point of the relationship existing

[14] ibid.

[15] *Renusagar Power Plant Co Ltd v General Electronic Co,* (1994) AIR SC 860.

[16] ibid.

[17] *Oil & Natural Gas Corporation Ltd v Saw Pipes* 2003 (5) SCC 705.

[18] ibid.

[19] *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Ltd* (2014) 11 SCC 639.

between foreign arbitral tribunals and domestic courts, it is imperative to discuss three significant cases. First, in World Sports Group[20]the Supreme Court refused to apply a decision, which mandated that, only the domestic courts could look into allegations of fraud. One of the parties attempted to escape the jurisdiction of the arbitral tribunal, taking assistance from this earlier decision. The Court clarified that the decision does not apply to foreign awards. Instead, the Court found applicability of Section 45 of the A&C Act that reads as follows:

"45. Power of judicial authority to refer parties to arbitration - Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

In conclusion, the court ruled that the courts could refuse to make a reference to arbitration only if it comes to the conclusion that the arbitration agreement is "null or void, inoperative or incapable of being performed".[21]

Since the arbitration agreement was not made inoperative or incapable of being performed simply on account of an allegation of fraud, the court could not refuse to refer the parties to arbitration.

Enercon (India),[22]which is another significant case in the debate, deals with a long-standing dispute between joint venture partners where the primary question was regarding the valid conclusion of the arbitration agreement. Several attempts were made to vitiate the "workability" of the agreement but the Court highlighted the principle of "severability" dictates that the invalidity of the main contract would not prevent the arbitration clause from becoming operative. For example, it was argued that the agreement did not provide for a selection mechanism for a 3rd arbitrator and therefore the same was "unworkable". However, the Court ruled that it was so obvious that the two selected arbitrators would select the third that a "practical" (not a "pedantic") approach would still allow for the workability of the agreement.

The Court clarified that its duty, as far as foreign arbitration goes, was to interpret agreements so as to "make them work" and not to defeat their purpose through

[20] ibid (n 23).

[21] *Enercon (India) Ltd v Enercon Gmbh* 2014 (5) SCC 1.

[22] ibid (n 14) (Talat Ansari).

intervention.[23] In this sense, the BALCO era represents a significant departure from the earlier prevailing judicial mindset. After a laborious 10-year exile, arbitration-friendliness has become the catch phrase of 21st Century Indian arbitration.

III. THE INBETWEENERS: GETTING IN THE MIDDLE OF BHATIA AND BALCO

As has been mentioned above, the concern seems to stem from the fact that though legally, pre-BALCO agreements are to be governed by the erstwhile law as laid down by Bhatia International, and yet Indian courts seem to be applying the pro-arbitration stance of BALCO to such cases by repeatedly denying themselves the opportunity of involvement. The error is in our understanding of the two regimes as distinct, rigid, watertight components – that the law in Bhatia International totally mandates judicial intervention and that in BALCO completely excludes it.

The matter is not so black and white; there exists immense scope for gray areas. In order to respond to the controversy and before getting into an exploration of the Bombay High Court verdict in Sakuma Exports Ltd., two recent cases require attention.

The first one is Harmony Shipping.[24]This case involved an agreement that was signed before the BALCO decision of 6th September 2012 with an addendum that was executed after the said date. In this regard, Harmony Shipping is the leading case discussing the fate of such "in-between" agreements. The court had to consider two distinct questions: First, whether Bhatia International or BALCO law would apply? And second, if agreements were indeed able to oust the jurisdiction of Indian courts, would it be done utilising the principles of Bhatia International or BALCO? The appellants in the case relied on the case of Bhatia International and the 2006 decision of Citation Infowares to argue that since there was no express exclusion mentioned in the agreement, it would not be permissible to oust the jurisdiction of Indian courts. On the other hand, the Respondent brought to light that the juridical seat in the case, as decided by agreement between the parties, was London. It was argued that BALCO's "seat-centric" approach to international arbitration should be adopted and since the addendum was executed post-BALCO, the law of Bhatia International ceased to exist with respect to the dispute and should not apply. In this regard, reliance was placed on the recent Reliance Industries[25] case.

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[23] *Harmony Innovation Shipping Ltd.vGupta Coal India Ltd* AIR (2015) SC 1504. See also Chakrapani Misra, 'Harmony: The Ship that Sailed'(2015) 4(1) Ind J ArbL,<http://www.ijal.in/sites/default/files/Volume%20IV%2C%20Issue%201.pdf> accessed 6 March 2016.

[24]*Reliance Industries Ltd v Union of India* 2014 (7) SCC 603.

[25]*U&M Mining Zambia Ltd v Konkola Copper Mines* [2013] EWHC 260.

The Court took bits from both sides of the argument. It held that though the addendum made no material change to the arbitration clause and for the same, Bhatia International would be the law to be applied. Since the main agreement pre-dated the BALCO judgment the application of the principles laid therein was rejected on account of the doctrine of prospective overruling. However, the court mentioned that utilizing the dicta of Bhatia International regarding the fact that the jurisdiction could still be impliedly excluded and applying the fact matrix to the same, it had reached the conclusion that there indeed had been such an implied exclusion in the present matter.

In case, the three factors that were given analytical weight were: that the arbitration was seated in London, the arbitrators were London Arbitration Association members and the fact that the contract stipulated English law as the law applicable to the substance of the dispute. Thus, even though the application of BALCO was rejected, the final conclusion of employing the dicta of Bhatia International was that, after giving due regards to the facts of the case, the jurisdiction of the Indian courts would be ousted.

The second case in this category is that of Konkola Copper Mines,[26] in which two significant questions of law were adjudicated upon. Firstly, it held that the question of whether Part I is applicable or not i.e. whether or not it has been expressly or impliedly excluded by agreement between parties is to be decided with respect to the principles of Bhatia International. Secondly, it established that once it was decided that Part I applies, the question of which court would have jurisdiction to entertain Section 9 or Section 34 applications would be guided by the principles of BALCO, where the seat is the centre of gravity for deciding which court can exercise jurisdiction.[27]

Thus, for pre-BALCO arbitrations agreements, which would otherwise be amenable to the Bhatia International dicta, courts have shown a clear intention to avoid excessive judicial intervention.

The leading case in this respect is that of Vale Australia[28]where the Court decided to refuse reassessment of an award on its merits because it was a foreign seated award. Further, the Delhi High Court in NNR Global Logistics[29]has held that the word "may" in Section 48 is reflective of the legislative intent behind the provision; that it should be

[26]Alipak Banerjee, 'India: Have you amended your Arbitration Agreement post BALCO?' *(Mondaq,* 23 April 2015)<http://www.mondaq.com/india/x/391864/trials+appeals+compensation/Have+You+Amended+Your+Arbitration+Agreement+Post+BALCO> accessed 6 March 2016.

[27] *Vale Australia Pty Ltd vSteel Authority of India Limited* (2012) 2 Arb LR 132.

[28] *NNR Global Logistics v Aargus Global Logistics* (2012) SCC Online Del 5181.

[29] ibid (n 29).

discretionary and applied only when the enforcement is truly opposed to public policy. The problem of continued application of Bhatia International, despite the BALCO judgment, has been remedied to a considerable extent by the judgment of Konkola Copper Mines,[30]which held that the general observations on arbitration law made by the Court in BALCO would not operate prospectively.

The judgment further clarifies that the Supreme Court's verdict in BALCO is declaratory, with regard to several established positions of arbitral law. Thus, if any judgment before BALCO prescribes that the selection of an arbitral seat is irrelevant, it would not be the correct position of law and thus cannot be relied on.

The significance of this is that the reasoning of BALCO would apply to arbitrations despite the fact that the arbitration agreement was entered into before 6th September 2012.

IV. CONCLUSION: BHATIA WITH A LITTLE FLAVOR OF BALCO

The above section deals comprehensively with the possibility of implied exclusion of the jurisdiction of Indian courts in foreign seated arbitrations, even when the arbitration agreement was signed before 6th September 2012 and therefore subject to Bhatia International. The Bombay High Court decided the case of Sakuma Exports Ltd. on 15th November 2011. The agreement in question was executed between an Indian sugar importing/exporting company (Appellants in the SLP) and a Swiss Company by the name of Louis Dreyfus Commodities (the Respondent).

The contract was for the purchase of 27,000 metric tons of Brazilian white sugar, which was entered on 12th January 2010 and executed on 15th February 2010.[31] The terms of the condition of the same mandated that any dispute arising from the same would be referred to arbitration to the Refined Sugar Association in London for settlement. Further, it was stipulated that English law would govern the contract. The order of the tribunal constituted therein was challenged under Section 34 before the High Court of Bombay, which came to the conclusion that U.K law would be the substantive law of the dispute since the seat of arbitration is in London (by virtue of Rule 8 of the RSA) and therefore Part I is implied excluded. This is because the parties expressly and unmistakably decided English law as the governing law, thereby making the award of the RSA a foreign-seated award. The Supreme Court in Paragraph 7 of the judgment, completely in line with the law set out as before dismissed the SLP, because it envisioned the application of Bhatia International in light of the principles laid down in BALCO, and therefore, finding a workable middle ground.

[30] *Sakuma Exports Ltd v Louis Dreyfus Commodities Suisse SA* (2015) 5 SCC 656.