

## LEGAL ALERT

### The Arbitration and Conciliation (Amendment) Ordinance, 2015: Impact on law laid down in BALCO

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In recent times there has been a rapid increase in commerce and industry which has led to parties resorting to arbitration to avoid delayed and protracted litigation. However, in India, the Arbitration and Conciliation Act, 1996 was failing to serve the purpose of alternate dispute resolution. The Arbitration and Conciliation (Amendment) Ordinance, 2015 (No.9 of 2015) ("**Ordinance**") dated 23.10.2015, has given a radical overhaul to The Arbitration and Conciliation Act, 1996 ("**the Act**"). The amendments brought about by the Ordinance aim at rendering the Act more object oriented.

One of the significant amendments that the Ordinance has introduced is the shift from the law laid down in **BALCO** qua applicability of Part I of the Act to the Foreign Seated Arbitrations. In order to appreciate the impact of the Ordinance, it is necessary to know the legal position pre & post **BALCO**.

#### Legal position before BALCO

The question as to whether part I of the Arbitration and Conciliation Act, 1996 would apply to foreign seated arbitrations was first examined by the Hon'ble Supreme Court of India in a celebrated judgment by a three Judge bench in the year 2002 titled **Bhatia International vs. Bulk Trading SA**<sup>1</sup> ("**Bhatia International**"). The core issue before Hon'ble Supreme Court was the interpretation of Section 2(2) of the un-amended Act which stated that, "*This Part shall apply where*

<sup>1</sup> (2002)4 SCC 105

*the place of arbitration is in India.*" The Hon'ble Apex Court had compared the said provision with the UNCITRAL Model Law<sup>2</sup>, which clearly stated in its preamble that, "*the provisions of this Law... apply **only** if the place of arbitration is in the territory of this State.*"

The Act is based on the UNCITRAL Model law and while interpreting section 2(2) of the un-amended Act the Court had held that during the enactment of the legislation, the word "*only*" was excluded from the provision on purpose. The court further observed that the intention of the legislature behind the exclusion was to make Part I of the Act applicable upon arbitrations held outside India unless the intention of the parties was to expressly or impliedly exclude its applicability. One of the several reasons given for reaching to such a conclusion was that incase Part I was held to be inapplicable to arbitrations held outside India, then the parties would be left remediless when seeking interim injunctions as provided for in Part I from the Court

#### Legal position after BALCO

The Hon'ble Supreme Court of India in the case of **Bharat Aluminium and Co. vs. Kaiser Aluminium and Co.**<sup>3</sup> (**BALCO**) had revisited the law laid down in **Bhatia International** and overruled the same. In the landmark judgment pronounced by the

<sup>2</sup> The UNCITRAL Model Law on International Commercial Arbitration was prepared by UNCITRAL, and adopted by the United Nations Commission on International Trade Law on 21 June 1985.

<sup>3</sup> (2012) 9 SCC 552

Constitution Bench of Hon'ble Supreme Court of India on September 06, 2012 it was concluded that "Part I of the Arbitration & Conciliation Act, 1996 is applicable only to the arbitrations which take place within the territory of India". The Hon'ble Apex Court had observed as under:

*"In our opinion, the provision contained in Section 2 (2) of the Arbitration & Conciliation Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration & Conciliation Act, 1996 is limited to all arbitrations which take place in India"* (Emphasis Supplied).

### **Difficulties associated with the decision in BALCO**

Though the law laid down in **BALCO** was the correct law on legal parameters, however, it also posed certain difficulties<sup>4</sup>. The nature of difficulties faced was as follows:-

- i) Where the assets of the party would be located in India, and there would be a likelihood that the party would dissipate its assets in the near future, no efficacious remedy would be available. Neither the foreign Court, nor the arbitral tribunal would provide an effective remedy to the arbitral party.
- ii) **BALCO** was prospective, but it was an interpretation of already existing law and was thus declaratory. In absence of retrospectivity, the courts were being compelled to apply the incorrect law to the arbitration agreements entered before 06.09.2012.

### **Legal position after Ordinance**

<sup>4</sup> Law Commission of India, "Amendments to the Arbitration and Conciliation Act, 1996", Report no. 246

By way of the Ordinance an endeavor has been made to overcome the difficulties associated with **BALCO**. In order to effectively resolve the difficulties posed by **BALCO**, the Ordinance has enlarged the scope of Section 2 (2) of the Act. Section 2 (2) of the Act lays down the 'Scope' of Part-I of the Act. Prior to Ordinance Section 2 (2) of the Act read as follows:

*"This Part shall apply where the place of arbitration is in India"*.

The Ordinance has now inserted a *proviso* to Section 2 (2) of the Act which provides as under:

*"PROVIDED that subject to an agreement to the contrary, the provisions of section 9 (Interim measures etc. by court), section 27 (Court assistance in taking evidence) and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of part II of this Ordinance"*<sup>5</sup>.

<sup>5</sup> However, it is observed that there is an apparent error in the drafting of the proviso to Section 2 (2) of the Act. Going by the intention of the legislation and in view of the provision of Section 37 as it stands after Ordinance, instead of inserting clause (a) of sub-section (1) of section 37 in the proviso, the Ordinance should have inserted clause (b) of sub-section (1) of section 37 in the proviso. This is because clause (a) of subsection (1) of the new Act, deals with Appeal from an order refusing to refer parties to arbitration under Section 8. However, it could not have been the intention of the legislation to make the appeal from Section 8 applicable to Foreign Seated arbitrations in as much as Section 8 is not applicable to these arbitrations. Hence, It appears that the insertion of clause (a) of sub-section (1) of section 37 in the proviso is a clerical error and the same should be replaced with clause (b) of sub-section (1) of section 37 otherwise the Proviso inserted in Section 2 (2) of the Act would not serve its purpose.

In the post Ordinance scenario besides Section 27 and Section 37 (1) (a), Section 9 would also be applicable to the International Commercial Arbitration even if the seat of arbitration is outside India meaning thereby that a party to a Foreign Seated Arbitration can resort to the remedy available under section 9 of the Act and seek interim protection/relief against the opposite party. However, the advantage extended by the proviso to Section 2 (2) of the Act cannot be availed in case of each and every Foreign Seated Arbitration and the same could be availed only if the following conditions or qualifications attached to it are fulfilled:

- (i) There should be no agreement to the contrary meaning thereby that Section 9 of the Act would be applicable to a Foreign Seated Arbitration unless the intention of the parties is to expressly or impliedly exclude its applicability.
- (ii) An arbitral award made or to be made in such place is **enforceable** and **recognized** under the provisions of Part II of this Ordinance. Hence, the award should fulfill the following criteria:
  - a) The award should either be New York Convention Award or Geneva Convention Award;
  - b) The award is made or to be made in such territory with which India has reciprocal arrangement in terms of Section 44 (b) and Section 53 (c) of the Act;
  - c) The award should fulfill the conditions for enforcement of foreign award laid down in Section 48 and Section 57 of The Act.

To conclude it may be said that the modification made by the Ordinance in case of Foreign Seated Arbitrations is a welcome change. However, from the scheme of the Act it is clear that Sections 9, 27 and

37(1) (a) and 37 (3) of the Act would apply only to arbitrations having seat in such countries with which India has reciprocal arrangements in terms of the Act.



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