

## Supreme Court on Challenge to Pre-BALCO Awards

Pre-BALCO foreign awards cannot be challenged under Section 34 of Arbitration & Conciliation Act, 1996

### Introduction

The Hon'ble Supreme Court of India in its recent judgment<sup>1</sup> delivered on 26.11.2020, has reaffirmed that even if a contract is entered to or an award is rendered, pre-BALCO, a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act") cannot be resorted to, for challenging a foreign award.

### Facts of the Case

1. On 30.01.1995, Jindal Drugs Limited ("**Respondent**") entered into four related agreements with Engineering Chur AG ("**Enco**") to set up an ascorbic acid plant in India.
2. In March, 1995, with the consent of the Respondent, Enco assigned the agreements to Noy Vallesina Engineering SpA ("**Appellant**").
3. Subsequently, disputes arose between the parties and the Appellant terminated the agreements.
4. On 31.10.1996, the Respondent filed a request for arbitration under one of the agreements, before the International Chamber of Commerce ("**ICC**"), in accordance with the arbitration clause contained therein.
5. On 01.02.2000, after considering the claims and the counter claims of both the parties, the ICC tribunal made a partial award rejecting the Respondent's claims and awarding CHF 44,33,416 in favour of the Appellant. The ICC tribunal directed the parties to file their written submission on interest and cost to make the final award.
6. On 20.02.2000, the Respondent filed a petition before the Hon'ble Bombay High Court challenging the partial award passed by the ICC tribunal.
7. On 01.03.2000, the Hon'ble Bombay High Court admitted the petition, issued notice to the Appellant, and passed an



**Rohit Jain**  
Senior Associate  
E: [rohit@singhania.in](mailto:rohit@singhania.in)

<sup>1</sup> C.A. No.8607/ 2010, *Noy Vallesina Engineering SpA v. Jindal Drugs Limited & Ors.*

interim injunction restraining the Appellant and the ICC tribunal from continuing with the arbitral proceedings.

8. The ICC tribunal opined that the interim order passed by the Hon'ble Bombay High Court was without jurisdiction and not binding upon it and consequently, proceeded further.
9. The Appellant filed its written submissions on interest and cost before the ICC tribunal while the Respondent submitted that in light of the interim order, it did not wish to make any further submissions.
10. The ICC tribunal proceeded and passed the final award on 22.10.2001.
11. On 06.02.2002, the Ld. Single Judge of the Hon'ble Bombay High Court dismissed the petition, filed by the Respondent under Section 34 of the Act, holding that since the partial award was a foreign award, a challenge under Section 34 of the Act, was not maintainable against it.
12. The Respondent preferred an appeal<sup>2</sup> against the aforesaid final order before the Division Bench of the Hon'ble Bombay High Court.
13. During the pendency of the said appeal, the Appellant applied under Sections 47 and 48 of the Act, for enforcement of the partial and final awards passed by the ICC tribunal.
14. The execution petition was allowed by the Ld. Single Judge of the Hon'ble Bombay High Court in favour of the Appellant and subsequently, both the parties filed cross appeals against the said impugned final order.
15. On 28.04.2008, the Division Bench of the Hon'ble Bombay High Court passed the impugned judgment in favour of the Respondent setting aside the final order dated 06.02.2002 passed by the Ld. Single Judge of the Hon'ble Bombay High Court, holding that a foreign award can be challenged through a petition preferred under Section 34 of the Act. Hence, the present appeal was filed before the Hon'ble Apex Court.

### **Issue before the Apex Court**

The issue before the Hon'ble Apex Court was that whether a challenge under Section 34 of the Act, to a foreign award passed before the BALCO judgment, maintainable?

### **Appellant's Submissions**

The Appellant submitted that a foreign award cannot be challenged under Section 34 of the Act. The reliance placed by the Division Bench of the Hon'ble Bombay High Court on *Bhatia International v. Bulk Trading S. A. Anr*<sup>3</sup> ("**Bhatia International**") and *Venture Global Engineering v. Satyam Computers Services Ltd. & Anr.*<sup>4</sup> ("**Venture Global**") in the impugned judgment is untenable in light of the fact that both Bhatia International and Venture Global have been overruled by the

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<sup>2</sup> Appeal No.519 of 2002.

<sup>3</sup> (2002) 4 SCC 105.

<sup>4</sup> (2008) 4 SCC 190.

Constitutional Bench of this Hon'ble Court in the case of *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc*<sup>5</sup> ("**BALCO**"). Hence, the award under consideration being a foreign award, cannot be challenged under Part I of the Act.

The Appellant submitted that the conduct of arbitration and any challenge to an arbitral award shall be governed by the law of the country where the arbitration has been conducted. The Appellant further submitted that it is well settled that "*pre-BALCO awards involving agreements which stipulate that the seat is in India and that the governing law is Indian law, would not be read by BALCO. However, cases where the seat is not in India or the law governing the arbitration is not Indian law, would be bound by BALCO*". Therefore, the impugned judgment of the Division Bench of the Hon'ble Bombay High Court is not maintainable and deserves to be set aside.

### **Respondent's Submissions**

The Respondent relied on Bhatia International and Venture Global and submitted that since the arbitration agreements concerning the present case were made before the BALCO judgment, they would continue to be governed by pre-BALCO rules. Since, in this case, the arbitration agreements were entered into, and awards too were rendered during the prevalence of Bhatia International principle, the decision passed in BALCO or any subsequent judgment could not be applied.

The Respondent further submitted that though the arbitration agreement stipulated that the arbitration was to be in London, under ICC; however, the governing law was stipulated to be Indian law. Therefore, it is clear that the parties intended the governing law to be Indian.

### **Analysis and Findings of the Apex Court**

The Hon'ble Apex Court observed that the decision of Bhatia International and Venture Global has been revisited by the Hon'ble Apex Court in BALCO. The Hon'ble Apex Court further observed that it is now well settled law laid down in a catena of judgments<sup>6</sup> that the curial law i.e. the law governing the challenge to an arbitral award, shall be the law of the seat of the arbitration.

The Hon'ble Apex Court relied upon the decision rendered in *IMAX Corporation v. E-City Entertainment (India) Pvt. Ltd.*<sup>7</sup> ("**IMAX**"), wherein the award under consideration was also a pre-BALCO award and the parties had chosen to resolve the dispute through ICC. The Hon'ble Apex Court, in the IMAX case, held as under:

*"29. We find that in the present case, the seat of arbitration has not been specified at all in the arbitration clause. There is however an agreement to have the arbitration conducted according to the ICC Rules and thus a willingness that the seat of arbitration may be outside India. In any case, the parties having agreed to have the seat decided by ICC and ICC having chosen London after consulting the parties and the parties having abided by the decision, it must be held that upon the decision of ICC to hold the arbitration in London, the parties agreed that the seat shall be in London for all practical purposes. Therefore, there is an agreement that the arbitration shall be held in London and thus Part I of the Act should be excluded."*

<sup>5</sup> (2012) 9 SCC 552.

<sup>6</sup> *Union of India v. Reliance Industries*, (2015) 10 SCC 213 and *Roger Shashoua v. Mukesh Sharma*, (2017) 14 SCC 722.

<sup>7</sup> (2017) 5 SCC 331.

The Hon'ble Apex Court further relied on the latest decision passed in the case of *Government of India v. Vedanta Ltd.*<sup>8</sup> where again the award under consideration was pre-BALCO. The seat of arbitration was Kuala Lumpur and the governing law of the arbitration agreement, was English law. The Full Bench of the Hon'ble Apex Court categorically held that despite the governing law of the arbitration agreement being English law, the curial law, i.e. the law governing the challenge to the award, will be Malaysian law.

Having regard to the aforesaid precedents, regarding the applicability of BALCO in respect of agreements entered into and awards rendered earlier, with respect to the law of the seat of arbitration and exclusion of the applicability of Part I of the Act, considering the seat of arbitration in the present case being London, the Hon'ble Court held that the impugned judgment of the Hon'ble Bombay High Court could not be sustained.

Since the cross appeals to the final order passed by the Ld. Single Judge of the Hon'ble Bombay High Court in the execution petition filed by the Appellant were pending, the Hon'ble Apex Court, without giving any finding on the merits, further held that in light of the decision passed in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*<sup>9</sup> ("**Fuerst Day Lawson**"), the appeal filed by the Appellant was maintainable however, the appeal filed by the Respondent was not maintainable under Section 50 of the Act.

Another interesting observation by the Hon'ble Apex Court was that Fuerst Day Lawson decision having been rendered more than 10 years back is a settled law, and the Respondent could not have been ignorant of the same. Therefore, if the Respondent choses to avail any alternate remedy qua the enforcement proceedings, the question of limitation will be open to be adjudicated upon.

## **Conclusion**

1. The curial law shall be the law of the seat of arbitration.
2. Challenge to a foreign award is not maintainable under Section 34 of the Act.
3. Even in contracts entered into and awards rendered pre-BALCO, the curial law of the arbitration would be the law of the seat of arbitration.
4. A further appeal by a party aggrieved by an order of enforcement of foreign award, even under the later enacted Commercial Courts Act, 2015, is not maintainable in light of Section 50 of the Act.

No person can be ignorant of the law. In case a law is well settled, and a party has wilfully been ignorant, in case of any subsequent proceedings by the party on the subject matter, the question of limitation will be left open.

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<sup>8</sup> 2020 SCC Online (SC) 749.

<sup>9</sup> (2011) 8 SCC 333.

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