

## BALCO returns: Implied exclusion of Part 1 of the Arbitration & Conciliation Act, 1996

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Sometime in 2005, a Civil Appeal by the name of *Bharat Aluminium Company v. Kaiser Aluminium Technical Services*<sup>1</sup> lay before the Apex Court for consideration. On 16<sup>th</sup> of January, 2007, Justice Markandey Katju who was part of the bench hearing the appeal expressed his reservation in respect of the correctness of the decisions of the Hon'ble Supreme Court in *Bhatia international*<sup>2</sup> and *Venture Global*<sup>3</sup>. Pursuant to the reservation, the legal question of the interpretation of Clause (2) of Section 2 of the Arbitration and Conciliation Act, 1996 (Hereinafter called the Act) was placed before the Constitution bench culminating in the landmark judgment of *BALCO, 2012*<sup>4</sup> which overruled *Bhatia International* with a prospective effect.

Previously *Bhatia International* had laid down that the provisions of Part I would apply even to arbitrations held outside India, unless all or any provisions of Part I were expressly or impliedly excluded by parties.

*Bhatia International* still holds good in so far as arbitration agreements pre-dating *BALCO* i.e. 6<sup>th</sup> September, 2012 are concerned.

Recently, on 28<sup>th</sup> of January, 2016, the *original BALCO appeals* have finally been decided in *BALCO, 2016*<sup>5</sup> wherein the residue of the Constitution Bench Judgment was the subject matter of the present appeals. A bench of three

judges of Hon'ble Apex Court while finally deciding the real question/issue in the aforesaid

*BALCO* appeals has echoed the view taken in *Union of India v. Reliance Industries*<sup>6</sup>:-

*“20. The last paragraph of Bharat Aluminium's judgment has now to be read with two caveats, both emanating from paragraph 32 of Bhatia International itself-that where the Court comes to a determination that the juridical seat is outside India or where law other than Indian law governs the arbitration agreement, Part-I of the Arbitration Act, 1996 would be excluded by necessary implication. Therefore, even in the cases governed by the Bhatia principle, it is only those cases in which agreements stipulate that the seat of the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration as being outside India that would continue to be governed by the Bhatia principle. Also, it is only those agreements which stipulate or can be read to stipulate that the law governing the arbitration agreement is Indian law which would continue to be governed by the Bhatia rule.”*

In the case at hand the Hon'ble Supreme Court was confronted with the following clauses of the arbitration agreement Viz., Article 17 and Article 22 which read as follows;

### **“Article 17-ARBITRATION**

*17.1: Any dispute or claim arising out of or relating to this agreement shall be in the first instance endeavor to be settled amicably by negotiation between the parties hereto and failing which the same will be settled by arbitration pursuant to English Arbitration Law and subsequent amendment thereto.*

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<sup>1</sup> C.A. No. 7019 of 2005 (Hereinafter called the “original BALCO appeals”)

<sup>2</sup> *Bhatia International v. Bulk Trading S.A.* (2002)4SCC105

<sup>3</sup> *Venture Global Engineering Case v. Satyam Computer Services Ltd* (2008) 4 SCC 190

<sup>4</sup> *Bharat Aluminum and Co. vs. Kaiser Aluminium and Co.* (2012) 9 SCC 552

<sup>5</sup> C.A. No. 7019 of 2005 and C.A. No. 3678 of 2007 (Hereinafter called BALCO II)

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<sup>6</sup> 2015(10)SCALE140

*17.2: The arbitration proceedings shall be carried by two arbitrators, one appointed by the Petitioner and one by Respondent chosen freely and without any bias. The Court of arbitration shall be wholly in London, England and shall use the English language in the proceedings. The finding and award of the Court of Arbitration shall be final and binding.*

*17.3: Before entering upon the arbitration, the two Arbitrators shall appoint an Umpire. If the two arbitrators are not able to reach an agreement on the selection of an Umpire, the Umpire shall be nominated by the International Chamber of Paris.*

#### **Article 22: GOVERNING LAW**

*This agreement will be governed by the prevailing law of India and in case of Arbitration, the English Law shall apply."*

The Hon'ble Apex Court after carefully analyzing the aforesaid clauses observed that a close perusal of the terms between the parties would clearly show that the first part of Article 22 is on the law governing the contract and in the second part the parties intended to lay down the law applicable to the arbitration agreement, viz., the proper law of the agreement of arbitration. In other words, the agreement as a whole would be governed by Indian Law, and in case of arbitration, the English Law will apply.

Therefore, it is clear that the parties have agreed in expressed terms that the law of arbitration would be English Arbitration Law.

In light of the above, The Hon'ble Court has held that it is clear that the law applicable to arbitration agreement in the present case is English Law. Once it is found that the law governing the arbitration agreement is English Law, Part I of the Indian Arbitration Act stands impliedly excluded.

The implied exclusion principle has been revisited by the Hon'ble Apex Court yet again very recently in May, 2016 in the matter of *Eitzen Bulk A/s Vs. Ashapura Minechem Ltd.*<sup>7</sup>

Where in the Hon'ble Court dealing with the similar contract clauses has held that:

*"It is too well settled by now that where the parties choose a juridical seat of arbitration outside India & provide that the law which governs arbitration will be a law other than Indian law, Part 1 of the Act would not have any application and therefore, the award debtor would not be entitled to challenge the award by raising objections under section 34 before a court in India. A court in India would not have jurisdiction to entertain such objection U/s 34 in such a case"*

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<sup>7</sup> *Eitzen Bulk A/s v. Ashapura Minechem Ltd.*, Supreme Court of India, decided on 13.05.2016