

International arbitration briefing

## The renewal of arbitration in India: *BALCO -v- Kaiser Aluminium*

The long-anticipated *BALCO* judgment has been handed down by the Indian Supreme Court<sup>1</sup>. It will be welcomed by the international business community, because it restricts the ability of the Indian courts to intervene in offshore arbitrations, and restores Indian arbitration to the position enjoyed ten years ago.

### Background

Companies investing in India that want to avoid the delays plaguing the Indian court system routinely agree to international arbitration in other countries. However, the Indian courts have become notorious for intervening in such arbitrations.

This problem stemmed originally from uncertainty over the powers of courts to issue interim measures in support of arbitration (for example, orders preserving assets until a final award is made). When the UNCITRAL Model Law on International Arbitration was first issued in 1985, it was left to individual countries to decide what powers their courts had to order interim measures. The Model Law merely stated that it was "not incompatible" with an arbitration agreement for a court to have such powers.

The Arbitration and Conciliation Act 1996 (Act) brought the Model Law into force in India. Section 9 of the Act set out the powers of the Indian courts to order interim measures, and was included in Part I of the Act, which applies if the arbitration takes place in India. That begged the question as to what powers were available if the arbitration takes place outside India. For example, if an arbitration takes place in Singapore but the relevant assets are in India, can the Indian courts prevent dissipation of the assets prior to the award? In *Bhatia International*<sup>2</sup> the Supreme Court decided that the courts did have such a power: section 9 did not just apply to Indian arbitrations but could also apply to foreign arbitrations.

However, that created more problems than it solved. If section 9 applied to foreign arbitrations, then by extension other parts of Part I could also apply. Consequently, in *Indtel Technical Services*<sup>3</sup>, the Supreme Court appointed an arbitrator for an arbitration seated outside India, under section 11 of the Act; and in *Venture Global*<sup>4</sup>, the Supreme Court set aside an arbitration award made in London, under section 34 of the Act. Foreign arbitrations, already regulated by the courts of the seat of arbitration, were exposed to intervention by the Indian courts.

In an effort to close the floodgates, some Indian judges took the view that parties could agree, expressly or impliedly, to exclude the application of Part I<sup>5</sup>. This led to standard wording to this effect being incorporated in arbitration clauses, but it was not a sustainable state of affairs.

### The answer in *BALCO*

Recognising the problems that had arisen, the Supreme Court consolidated a number of cases on this issue, and fast-tracked the matter to a hearing of a constitutional bench (five judges, who could overrule the previous Supreme Court judgments made by three judges). Signifying the importance of the matter, as well as hearing the parties, the Supreme Court also heard interventions by interested organisations, including the SIAC and LCIA India.

The judgment that has been handed down contains a detailed analysis of the Act, and relevant case law from India and elsewhere. At the end of this, the Supreme Court concludes:

- Following the Model Law, the Act recognises a "*territoriality principle*" in international arbitration. Supervision of an arbitration is for the courts of the jurisdiction where the arbitration is seated.
- Part I and Part II (which incorporates the New York Convention into Indian law) of the Act are mutually

exclusive and their provisions cannot be applied interchangeably.

- This means that no section of Part I applies to any arbitration seated outside India. The only powers that an Indian court can exercise in relation to foreign arbitration are set out in Part II of the Act, namely: to give effect in India to an agreement referring disputes to arbitration in another country; and to enforce foreign arbitration awards in India.

## Stings in the tail

There are two caveats at the end of the judgment. First, the Supreme Court recognises that, in overturning *Bhatia International*, it was also rejecting the solution that had been found there for interim measures in aid of foreign arbitrations. The Supreme Court acknowledged that there is a lacuna in the Act. Only the Indian Parliament can fill this, by amending the Act, and until then the Indian courts cannot order interim measures where the seat of the arbitration is outside India.

Secondly, in the very last paragraph, the Supreme Court has restricted the application of *BALCO* to disputes arising from arbitration agreements that are executed *after* the date of the judgment (6 September 2012). The reason given is "*to do complete justice*", but this is a curious restriction: why should the previous case law, which the Supreme Court concluded is wrong, continue to apply to agreements which will undoubtedly generate arbitrations for years to come?

## Further information

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## Conclusion

This judgment means that India has reverted to the position prior to *Bhatia International*. The Indian courts will not interfere in foreign arbitration, and there is now no need to amend arbitration clauses to cater specially for India.

However, the judgment has thrown into stark relief the impossibility of obtaining interim measures directly from the Indian courts, if an arbitration is seated elsewhere. Interim measures can still be obtained from an arbitral tribunal, and possibly from the courts where the arbitration is seated, but there are doubts as to whether these would be enforceable in India.

There also remains uncertainty as to arbitration agreements executed before 6 September 2012. The judgment in *BALCO* contains the analysis of a Supreme Court constitutional bench and cannot easily be ignored; but the Supreme Court has expressly directed the lower courts to do so, for agreements before that date. Faced with the potential for continuing interference from the Indian courts, parties might re-evaluate their existing arbitration agreements and, if possible, re-execute them in order to make the *BALCO* judgment applicable.

### Notes:

- 1 *Bharat Aluminium Co. -v- Kaiser Aluminium Technical Services Inc.* (Civil Appeal No. 7019 of 2005).
- 2 *Bhatia International -v- Bulk Trading S.A. and Anr* (2002) 4 SCC 105.
- 3 *Indtel Technical Services -v- WS Atkins* (2008) 10 SCC 308.
- 4 *Venture Global Engineering -v- Satyam Services Ltd and Anr* (2010) 8 SCC 660.
- 5 *Dozco India Pvt. Ltd. -v- Doosan Infracore Ltd* (2011) 6 SCC 179; *Videcon Industries Limited -v- Union of India* (2011) 6 SCC 161.

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