IMPACT OF BALCO ON RIGHT TO SHIP ARREST IN INDIA.

INTRODUCTION:
The recent BALCO decision of the Supreme Court of India (the "Supreme Court") has, already, been widely discussed and scrutinized. In this article we move a step further and analyse the impact the BALCO decision may have on the right of invoking the admiralty jurisdiction in India in aid of a foreign arbitration seated outside India. In India, a party has the right to invoke the Admiralty Jurisdiction of the Indian littoral court and arrest a vessel, as an interim relief, to secure its claim being tried in a foreign seated arbitration. The question that we attempt to address in this article is, whether the Indian courts, in light of the BALCO decision, would continue to allow arresting vessels (being an interim relief) in aid of arbitrations seated outside India?

BRIEF BACKGROUND:

1. Interim Relief under the Indian Arbitration and Conciliation Act, 1996 (the "Arbitration Act"):

1.1 The Arbitration Act is based on the UNCITRAL Model Law. The Arbitration Act is divided into four parts (a) Part I deals with arbitrations seated in India; (b) Part II deals with arbitrations seated outside India and (c) Part III and IV deal with conciliation and supplementary provisions. Section 9 (the "S.9"), contained in Part I of the Arbitration Act allows parties to move the courts for an interim relief to secure their claim in aid of arbitration proceedings in India.

1.2 PRE BALCO: In Bhatia International, the Supreme Court was posed with the question whether the court could grant interim measures for foreign seated arbitration. After considering the provisions of the Arbitration Act, the Supreme Court was of the view that, in the absence of provisions for interim measures in Part II of the Arbitration Act but based on the interpretation of Sections 2(2) and 2(7) of the Arbitration Act the Court had the power to grant interim measures (contained in Part I of the Arbitration Act) for arbitrations seated outside India. Further, the Supreme Court held that on the interpretation of the provisions of the Arbitration Act, it could not be culled out that Part I of the Arbitration Act does not apply. Thus, the provisions of Part I of the Arbitration Act became equally applicable to foreign seated arbitrations unless the parties by agreement, express or implied, exclude all or any of its provisions.
1.3 **POST BALCO:** In BALCO, the Supreme Court has overruled Bhatia International and held that provisions of Part I of the Arbitration Act will not apply to foreign seated arbitrations prospectively in respect of disputes arising from agreements entered subsequent to 6th September, 2012. As a result, Indian Courts do not have the jurisdiction to grant interim reliefs (under S.9) to secure claims in foreign seated arbitrations. Even inter-partite suits for interim relief (under Order 39 and 40 of Civil Procedure Code) will not be maintainable in aid of foreign seated arbitrations.

2. **Right of ship arrest in India:**

2.1 In India, only the littoral High Courts are vested with Admiralty Jurisdiction; this jurisdiction being conferred pursuant to the Colonial Courts of Admiralty (India) Act, 1891. The right to arrest a vessel is derived from the pre-independence Admiralty Act, 1861 (similar to the English Admiralty Act 1860). In the absence of any legislative development in admiralty laws, the Supreme Court of India in the cases of M.V Elisabeth and M.V Sea Success respectively held that the Arrest Convention, 1952 and the Arrest Convention, 1999 (the "1999 Convention") would be applicable in India despite India not being a signatory to either the Arrest Convention, 1952 or the 1999 Convention.

3. **IMPACT OF BALCO ON SHIP ARREST:**

In considering the impact of BALCO on ship arrest in India, we are guided by the decision of the Bombay High Court in the case of M.V. Golden Progress wherein a larger bench of 3 judges (full bench) was constituted to reconsider two conflicting decisions passed by 2-judge benches of the High Court.

3.1 **Case Summary:**

The main issue before the full bench was the maintainability of a suit in the admiralty jurisdiction of the court initiated for the purpose of securing a claim being arbitrated. The full bench was called upon to consider two conflicting decisions of the Court in M.V. Mehrab wherein the court held that in its admiralty jurisdiction, the court has the power to arrest a ship to secure a claim in future or pending arbitration and M.V Indura Valley wherein the court held that a suit in admiralty jurisdiction for securing the claim in arbitration was not maintainable but the remedy was to make an application for interim relief in terms of Section 9 of the Arbitration Act.

3.2 The two issues that therefore arise are: (i) Whether an application under S.9 of the Arbitration Act is maintainable for the arrest of a vessel for obtaining the security of an Award that may be made in the arbitration proceeding?; and (ii) If the answer to the aforesaid question is in the negative, whether a suit only for arresting a ship by way of obtaining the security in the pending arbitration can be maintained or proceeded with?
3.3 **Decision:**

i. The full bench of the High Court of Bombay held that an application under S.9 of the Arbitration Act is not maintainable for the arrest of the vessel for obtaining security of an award that may be made in arbitration proceedings. The view to the contrary in m.v. Indurva Valley, to that extent is overruled.

ii. An action in *rem* (in admiralty jurisdiction) for recovery of the claim and arrest of the vessel where the parties have agreed to submit the dispute to arbitration can be maintained and in such case if by way of an interim measure, the vessel is arrested or the security provided to obtain the release of the vessel, matter shall proceed in accord with Article VII of the 1999 Convention.

3.4 **Reasoning:**

The reasoning given by the full bench in coming to a finding that a remedy of a vessel arrest could not be equated with a S.9 application are as follows:

i. **Jurisdiction of the court:** The court considered the definition of a “Court” under S.9 of the Arbitration Act. Under S.9, the principal civil court of original jurisdiction (the “District Court”) has been conferred with the subject matter jurisdiction to grant interim relief in support of arbitrations. Whereas, in India, the jurisdiction to order ship arrests is vested only in certain High Courts. Therefore, the District Courts, which are not vested with the power to pass an order of ship arrest, cannot grant the remedy of a vessel arrest under a S9 application.

ii. **Nature of the action:** The court drew a distinction between the nature of a S9 application and an admiralty action for the arrest of a vessel. A ship arrest is a right in *rem* i.e. a party proceeds against the vessel (*res*) as if the vessel has a juridical personality whereas a S9 application is an action in *personam* wherein the proceedings are initiated against a particular person. The court also relied on the decision in the case of Tuyuti and stated that the admiralty jurisdiction of a court empowers it to issue a warrant of arrest which is different to a S9 application which allows a court to pass an order for securing a claim.

Further, when a vessel is arrested it may affect the rights of parties having a maritime claim against the vessel but who are not a party to the suit. In an action in *rem* all such parties are allowed to intervene in the suit. However, under a S9 application, parties affected by an order passed under a S9 application are not allowed to intervene in the suit.

iii. **Application of the 1999 Convention:** The court held that since the 1999 Convention was considered to be a part of the law of India it had to be given effect to. Article II of the 1999 Convention explicitly provides that a ship may be arrested for the purpose of obtaining security, notwithstanding that the maritime claim in
respect of which the arrest is affected is to be arbitrated. Article VII provides for the procedure for proceeding thereafter. The court held that Article VII specifically provides for the retention of security, obtained by arrest of a ship in the action in *rem*, for satisfying the judgment and award of arbitral tribunal. Therefore, the application of Article VII would be in line with accepted international practices and principles. Also, the Court observed: “the application of Arrest Convention, particularly Article VII is in accord and in conformity with the observations made by the Supreme Court in *m.v Elisabeth* and *m.v. Sea Success I*”.

4. **Concluding Remarks**:

To sum up, the full bench found that a S9 application being an action in *personam* and a ship arrest being an action in *rem*, the two actions are different. To that extent, a true construction of S9 may not include a right to allow an arrest of a vessel as a remedy.

More importantly, the 1999 Convention and the 1952 Arrest conventions, which are treated to be a part of the law of India contain unequivocal provisions allowing parties the right to initiate an action in *rem* to obtain security for claims being tried in foreign seated arbitrations.

Since the Section 9 remedy may not be open to parties seeking the arrest of a vessel, parties would necessarily have to approach the High Court of competent admiralty jurisdiction to seek such relief. To this extent, the decision in BALCO may not impact the right to arrest a vessel in order to secure an arbitration claim being adjudicated in a foreign seat. However, since this is a decision of a High Court, it is merely persuasive and not binding on other High Courts of India.

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4 Read with several other legislations. For a detailed understanding kindly refer to the decision in M.V Elisabeth v. Harwan Investment and Trading Pvt. Ltd., 1993 Supp (2) SCC 433 (the "M.V. Elisabeth").
6 J.S. Ocean Liner Llc v. M.V. Golden Progress, 2007 (2) ARB LR 104 Bom 2007 (the "Golden Progress")