HARMONY: THE SHIP THAT SAILED[1]

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Abstract

The determination of the intention of the parties to an arbitration agreement has always been a contentious issue. This aspect gets further complicated in case of 'multiple agreements' between the parties. In furtherance of the said observation, the authors discuss the recent judgment of the Hon'ble Supreme Court of India in the case of Harmony Innovation Shipping Limited v. Gupta Coal India Limited ("Harmony"). In light of this judgment, the authors endeavour to highlight the issue of interpretation of contracts and the much-discussed doctrines of 'presumed intention' and 'fair result'. Moreover, the authors elucidate upon the issue related to implied and express inclusion of the jurisdiction of Indian courts in light of Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc. ("BALCO") and Bhatia International v. Bulk Trading S.A. After proper scrutiny of the aforementioned, the authors conclude that the Supreme Court, in the case of Harmony, deviated from the path set out by BALCO and thus, amplified the prevailing uncertainty relating to interpretation of arbitration agreements.

1. Introduction

> *The rules laid down in respect of the construction of deeds are founded in law, reason, and common sense: That they shall operate according to the intention of the parties, if by law they may: And if they cannot operate in one form, they shall operate in that, which by law will effectuate the intention.*[2]
>
> - *Lord Mansfield, C.J.*

> *We can judge of the intent of the parties only by their words.*[3]
>
> - *Powell, J.*

From time immemorial, the intention of parties has played the most crucial role in determining and adjudicating a dispute. This aspect gets complicated when the intention of a party to multiple agreements has to be determined. To understand the intention of parties, when the same are not expressed by either of them, remains the most complex situation in the interpretation of contracts. While doing so, the courts have to weigh factors that go beyond the general reading of the contract. In such cases, the courts are required to weigh the presumed intention of the parties in order to deliver "fair result", thereby incorporating and applying to their optimum, the most crucial and intricate doctrines. This article is concerned with the issue of the interpretation of contracts, the doctrine of 'presumed intention and fair result' and the importance of implied and express exclusion of the jurisdiction of Indian Courts in view of the cases of *Bharat Aluminum Co.* v. *Kaiser Aluminum Technical Services Inc.*[4] ("*BALCO*") and *Bhatia International* v. *Bulk Trading S.A.*[5] ("*Bhatia*"). In light of the decision of the Supreme Court in the case of *Harmony Innovation Shipping Limited* v. *Gupta Coal India Limited*[6] ("*Harmony*"), the article seeks to analyze and

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[2] Goodtitle v. Bailey, [1777] 2 Cowp. 600 (Lord Mansfield, C.J.) (Gr. Brit.).

[3] Idle v. Cooke, [1704] 2 Raym. 1149 (Gr. Brit.).

[4] Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc., (2012) 9 S.C.C. 552 (India).

[5] Bhatia International v. Bulk Trading SA, (2002) 4 S.C.C 105 (India) [hereinafter *Bhatia*].

[6] Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd., A.I.R. 2015 S.C. 1504 (India).

discuss the settled principles by highlighting the (1) factual matrix, (2) arguments canvassed by the parties, (3) judicial analysis by the Supreme Court, (4) ratio delivered, followed by (5) a constructive analysis of the application of the concepts in the judgment and (6) conclusive remarks.

2. Facts

An agreement was entered into between the parties on 20 October 2010 ("Principal Agreement") in respect of 24 voyages of coal shipment belonging to Harmony Innovations Shipping Limited ("Appellant") from Indonesia to India. M/s Gupta Coal India Limited ("Respondent") undertook only 15 voyages and that resulted in disputes which stood referred to arbitration. Notably, an addendum to the Principal Agreement was executed with regards to the remaining voyages on 3 March 2013, while disputes arose in respect of the Principal Agreement. Arbitration proceedings were initiated with regard to the disputes arising out of the Principal Agreement and eventually an award was passed.

Following the passing of the award, with respect to the Principal Agreement, the Appellant filed an application before the District Court, Ernakulum seeking enforcement of the Award under the provisions of the Arbitration and Conciliation Act, 1996 ("Act"). In the interim, certain disputes arose between the parties in relation to the addendum, and arbitration proceedings were initiated by invoking the arbitration clause therein with regard to the said disputes. Faced with this situation, the Appellant filed an application under the Act seeking attachment of the cargos as an interim relief. The learned 2nd Additional District Judge, Ernakulum allowed a conditional order of attachment as was prayed.

The said interim order was assailed by the Respondent before the High Court of Kerala ("High Court") on the ground that it was passed without jurisdiction and hence was unsustainable in law. This contention was countered by the Appellant on the ground that the agreements were entered into prior to the decision in the case of *BALCO* and was essentially governed by the principles laid down in the case of *Bhatia.*

The High Court, having considered the Principal Agreement, the addendum and the decisions in *Bhatia* and *Venture Global Engineering* v. *Satyam Computer Services Limited*,[7] set aside the order on the foundation that Section 9 of the Act is limited to domestic arbitrations and has no applicability to international arbitrations. The High Court further held that clause 5 of the Principal Agreement, which is the arbitration clause, clearly spells out that the Principal Agreement is to be governed and construed according to English Law.

To elucidate, the said clause read as follows:

"5. *If any dispute or difference should arise under this charter, general average/arbitration in London to apply, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision or that of any two of them, shall be final and binding, and this agreement may, for enforcing the same, be made a rule of Court. Said three parties to be commercial men who are the members of the London Arbitrators Association. This contract is to be governed and construed according to English Law. For disputes where total amount claim by either party does not exceed USD 50,000 the arbitration should be conducted in accordance with small claims procedure of the London Maritime Arbitration Association*."

[7] Venture Global Engineering v. Satyam Computer Services Ltd., (2008) 4 S.C.C. 190 (India).

Thus, while the Principal Agreement does not provide for a law governing the arbitration clause itself, it only stipulates that the agreement or substantive law would be governed and construed according to English Law.

Further, the High Court dismissed the contention that since the addendum was entered into prior to *BALCO*, the principles laid down therein would not be applicable. In the alternate, the High Court viewed the law laid down by the Supreme Court in *BALCO* as declaratory in nature, to be considered the law at all times. It held that such a declaration could not be regarded as having prospective effect. Therefore, the fact that the Principal Agreement was entered into prior to *BALCO* was found to have no bearing and the petition under Section 9 of the Act was held not maintainable. Subsequently, the order of the High Court was challenged before the Supreme Court.

3. Contentions of the Parties before the Supreme Court

(A) Express or implied exclusion of Part I of the Act

The Appellants relied on the Supreme Court's decision in *Citation Infowares Ltd* v. *Equinox Corp,*[8] wherein it was held that unless the provisions of Part I are excluded by agreement between the parties either expressly or by implication, they would apply even where the international commercial agreements are governed by the laws of another country. Referring to the arbitration clause in the instant case, the Appellant urged that there existed no express or implied exclusion of the applicability of Part I. Therefore, it was argued that the courts in India have jurisdiction and the Learned Additional District Judge had not erred in exercising jurisdiction.[9]

To the contrary, the Respondent relied on the decision in *Reliance Industries Limited & Anr.* v. *Union of India,*[10] ("*Reliance Industries Ltd.*") wherein the Supreme Court discussed the principle stated in *Bhatia* and went onto hold that since the juridical seat of arbitration was in London and the laws governing the arbitration would be the laws of England, Part I would necessarily be impliedly excluded.

(B) Presumed intention

To bolster its argument, the Appellant contended that in the present case, the agreement stipulates that the Principal Agreement is to be governed and construed according to English law and that the same would have to be interpreted as a part of "curial law" and not as "proper law" or "substantive law", thereby entailing that the same could not be equated with the seat of arbitration. The Appellant, further added that to apply the principles of implied exclusion, a court has to test the "presumed intention" and it would be the duty of the court to adopt an objective approach and understand what could have been the intention of reasonable parties in the position of the actual parties to the contract.

To ascertain the "presumed intention" of the parties, the Respondent directed the Supreme Court's attention to various phrases such as "*arbitration in London to apply*", arbitrators are to be members of the "*London Arbitration Association"* and the contract "*to be governed and construed according to English Law*" and that if the dispute is for an amount less than US$ 50000, the arbitration is to be conducted in accordance with the small claims procedure of the London Maritime Arbitration Association. Notably, since there was no reference to any other law in the

[8] Citation Infowares Ltd v. Equinox Corp., (2009) 7 S.C.C. 220 (India) [hereinafter *Citation Infowares*].
[9] *Id.* at 12.
[10] Reliance Industries Limited & Anr. v. Union of India, (2014) 7 S.C.C. 603 (India).

arbitration clause, the Respondent emphasised that the "presumed intention" of the parties indicates that the juridical seat of arbitration was London.

(C) The test of "fair result"

The Appellant submitted that the case at hand neither had an express nor implied exclusion of Part I. That being said, to establish implied exclusion of the jurisdiction of courts in India, the "presumed intention" of the parties would have to be tested. The intention of reasonable parties to the contract and the concept of fair result would have to be borne in mind by the court. The application of the concept of "fair result" involves solving disputes according to commercial practice to arrive at a result considered fair in a particular business community. Courts must pay heed to the commercial background, the context of the contract and the circumstances of the parties so as to not lead to an unreasonable or unfair result. Thus, the Appellant insisted that they would be disadvantaged if the Court were to hold Part I as inapplicable to the present case.

The Respondent contended that since the juridical seat was in London and the parties had entered into the addendum after *BALCO* on 3 April 2013, it follows that the intended effect was to have the seat of arbitration in London. Further, a reference to Section 3 of the English Arbitration Act, 1996 ("English Act") was made in this regard. Section 3 of the English Act reads as follows:

"**3. *The seat of the arbitration*.** *—In this Part 'the seat of the arbitration' means the juridical seat of the arbitration designated—*

(a) by the parties to the arbitration agreement, or

(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or

(c) by the Arbitral Tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."

In this respect, the Respondent submitted that the juridical seat of the arbitration would be London since the parties had agreed upon the arbitrators to be commercial men who are members of the London Arbitration Agreement and that if the claim were for a lesser sum, the small claims procedure of the London Maritime Arbitration Association would be followed.

4. Judicial Analysis by the Supreme Court

The Supreme Court analysed a plethora of decisions to establish the methodology adopted by it in the past, with respect to establishing the law governing the juridical seat in arbitration proceedings. In this regard, the Supreme Court considered two aspects - (i) whether, upon construction of the clause, the ratio held in *Bhatia* would not apply and instead the ruling in *Reliance Industries Ltd.* would apply? and (ii) whether the execution of the addendum would attract the principles laid down in *BALCO* and oust the jurisdiction of courts in India?

With regard to the first proposition, the Supreme Court considered the "presumed intention" of the parties and the "fair result" of the construction of the arbitration clause in the present scenario. According to the Court, from the provisions of the arbitration clause, it was clear that if any dispute or difference would arise under the charter, arbitration in London would apply; that the arbitrators were to be commercial men who were members of the London Arbitration Association; the contract was to be construed and governed by English law; and that the arbitration for a lesser sum was to be conducted in accordance with the small claims procedure of the London Maritime Arbitration Association. Notably, no other provision in the agreement referred to any other law that would govern the arbitration clause. The court also relied on

Section 3 of the English Act, which states that the seat of the arbitration would mean the juridical seat of the arbitration.

With the aforesaid stipulations in mind, the Supreme Court appreciated that the "presumed intention" of the parties was to assign London as the juridical seat of the arbitration. Moreover, the commercial background, the context of the contract, the circumstances of the parties and in the background in which the contract was entered into, lead to the aforesaid conclusion.

With regard to the second proposition, the Supreme Court reasoned that *Bhatia* was rendered on 13 March 2002 and *BALCO* was delivered by the Constitution Bench on 6 September 2012. In the instant case, the arbitration agreement was executed prior to *BALCO* and the addendum came into existence only on 3 April 2013. In this respect, the court held that the pronouncement in *Bhatia* would be applicable to the facts of the case, since there was nothing in the addendum to suggest any arbitration and in fact it was controlled and governed by the conditions postulated in the Principal Agreement.

Further, the Supreme Court construed and thought it fit to interpret the arbitration clause as a proper or substantial clause as opposed to being a curial or a procedural one by which the arbitration proceedings are to be conducted and hence disposed to conclude that the seat of the arbitration will be at London.

5. Judgement of the Supreme Court

The Supreme Court concurred with the High Court on the finding that the courts in India will not have jurisdiction. However, in doing so, the Court based its judgment on the principles laid down by *Bhatia* as opposed to *BALCO*. Therefore, the Supreme Court concurred with the conclusion arrived at by the High Court, but notably for different reasons, and accordingly dismissed the appeal.

6. Striking a different chord to Harmony

(A) Express and implied exclusion

The issue of what amounts to "express" and/or "implied exclusion" of Part I has been the basis of several litigations before Indian courts. Hence, at this stage, it becomes imperative to properly understand the decision in *Bhatia*. In the said case, the agreement entered into between the parties contained an arbitration clause which provided that arbitration was to be as per Rules of Arbitration of the International Chamber of Commerce, 1998 ("ICC Rules"). The parties had agreed that the arbitration was to be held in Paris, France. The respondent approached the Additional District Judge, Indore, Madhya Pradesh, with an interim prayer under Section 9 of the Act. The appellant raised a plea stating that the Indore Court had no jurisdiction and the application was not maintainable. The said contention was dismissed by the Additional District Judge, which found favour with the High Court. Before the Supreme Court, it was urged, on behalf of the appellant, that Part I only applies to arbitration where the place of arbitration is in India and Part II would apply to arbitration with a place outside India. On the other hand, the respondent urged that unless the parties, by their agreement either expressly or impliedly exclude the provisions of the Act, Part I would also apply to all international commercial arbitrations including those that take place in India. In light of the contentions raised, the Supreme Court held that provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India, provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its

provisions. In that case, the laws or rules chosen by the parties would prevail. The Supreme Court examined and held that Article 23 of the ICC Rules permitted parties to apply to a competent judicial authority for interim and conservatory measures. Therefore, in such cases an application could be made under Section 9 of the Act.[11]

Interestingly, where the parties have designated a foreign proper law but not a seat of arbitration, the Supreme Court has, on two occasions, held that such a condition would not amount to an "implied exclusion" of Part I. In both *Indtel Technical Services Private Limited* v. *WS Atkins Rail Limited*[12] and *Citation Infowares Limited* v. *Equinox Corporation,*[13] it was held that in international commercial arbitrations, where the governing law of the contract is a foreign law, Part I would still apply and that a mere choice of a foreign law as the governing law of the agreement cannot be construed as an express or implied exclusion of Part I.[14]

However, a slight departure was made in *Yograj Infrastructure Ltd.* v. *Ssang Yong Engg & Construction Co. Ltd.*,[15] wherein the curial law regulating the procedure of the conduct of the arbitration was the Arbitration Rules of the Singapore International Arbitration Centre, 2007 ("SIAC Rules"). The SIAC rules, vide Rule 32, state that where the seat of the arbitration is Singapore, the law of arbitration would be the International Arbitration Act of Singapore. By virtue of the aforesaid rule, the Court held that the proper law being the Singapore law, the Act would not apply to the arbitration proceedings. However, the Court opined that in the absence of any other stipulation in the arbitration clause with regard to the law governing the arbitration proceedings, it is well settled that the law governing the contract would apply.

As a welcome change, in *BALCO*, the Supreme Court outlined the crucial distinction between foreign and domestic awards under the Act. The Court clarified that Part I applies not only to arbitrations in India where both parties are Indian, but also to international commercial arbitrations which take place in India. The awards in arbitrations seated in India are domestic awards, distinguishable from foreign awards for the purposes of the Act.[16]

In the present case, the Supreme Court seems to have deviated from the trend that was set by *BALCO*, where it laid down clear interpretation of the provisions of the Act. To the contrary, the Court has, on the basis of the principles held in *Bhatia* and subsequent cases prior to *BALCO*, held that Part I would be applicable. However the construction of the present arbitration clause ousts the jurisdiction of the courts in India by invoking the principle of implied exclusion. To elucidate, the Supreme Court considered facts such as - the law governing the contract was English law; the arbitral tribunal was to comprise of persons from the London Arbitration Association; and the English Act expressly stipulates in Section 3 that the seat of arbitration would mean the juridical seat of arbitration, and concluded, as per *Bhatia*, that the arbitration clause had impliedly excluded the jurisdiction of the courts in India.

It is the authors' opinion that the Court ought to have dwelled on whether the disputes arising from the addendum fall within the parameters of *BALCO* or *Bhatia*. Such an exercise was crucial

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[11] *Bhatia, supra* note 6, at 8.
[12] Indtel Technical Services Private Limited v. WS Atkins Rail Limited, (2008) 10 S.C.C. 308 (India).
[13] *Citation Infowares, supra* note 9.
[14] Sanjeev Kapoor, *Court Implies Exclusion of Part I of the Arbitration Act in Favour of Alternative Law*, INTERNATIONAL LAW OFFICE (June 30, 2011).
[15] Yograj Infrastructure Ltd. v. Ssang Yong Engg & Construction Co. Ltd., (2011) 9 S.C.C. 735 (India).
[16] Umer Akram Chaudhry, *Marking their Territory: Bharat Aluminum v. Kaiser Aluminum Technical Services (2012),* KLUWER ARBITRATION BLOG (Sep. 13, 2012), *available at* http://kluwerarbitrationblog.com/blog/2012/09/13/marking-their-territory-bharat-aluminum-v-kaiser-aluminum-technical-services-2012/.

to examine whether the Court could exercise jurisdiction under Part I. In holding that the addendum was executed following *BALCO*, the Court could have considered and applied the doctrine of "presumed intention" to better understand that the parties may have designated the seat of the arbitration to be outside India, thereby ousting the jurisdiction of the Indian Courts under Part I, in accordance with *BALCO*.

(B) The concept of juridical seat

The seat of the arbitration is known to be the juridical seat of arbitration, which can be designated by the parties to the arbitration agreement or by any arbitral tribunal or other institution or person empowered by the parties to do so.[17] Considering that the present case deals with an agreement that identifies a venue for the arbitration and does not expressly stipulate a "seat" of arbitration, it becomes pertinent to examine the renowned decision of an English Court in *Shashoua* v. *Sharma*[18] ("*Shashoua*"), which addressed an aspect of the issue: whether the selection of "venue" for arbitration implies choice of "seat"?

Shashoua concerned a joint venture which was incorporated in India and the proper law or law governing the shareholders' agreement was Indian law. The shareholders' agreement contained an arbitration clause which provided for ICC Rules for conduct of the arbitration and stated that "*the venue of the arbitration shall be London, United Kingdom"*. Disputes arose between the parties and an ICC tribunal was constituted in London. The tribunal passed an interim award against the defendant concerning costs. The claimants were granted leave to enforce the award by the English Court. However, the defendants challenged the jurisdiction of the English Court and approached the Indian Courts to set aside the award. The claimants applied for an anti-suit injunction from the English Courts to restrain proceedings in India and the claimants resisted the application contending that proceedings in India were justified as the seat of arbitration was in India.

The English Court proceeded to examine Section 3 of the English Act, which provides that in the absence of designation by the parties, the arbitral institution or the tribunal (if authorised by the parties) must determine the seat "*having regard to the parties' agreement and all relevant circumstances*". Cooke. J, recalled his decision in *C* v. *D*[19] and stated that an arbitration agreement would weigh more towards the *lex arbitri* than *lex causae*. Further, it was pronounced that an express designation of the arbitration venue as London and no designation of any alternative place as seat, combined with a supranational body of rules governing the arbitration and no other significant law to the contrary, qualified London as the juridical seat and English law as the curial law.[20]

In the authors' opinion, the Supreme Court in *Harmony* undertook the right steps in determining the juridical seat, by interpreting Section 3 of the English Act and phrases in the arbitration clause of the Principal Agreement such as "*arbitration in London to apply*", arbitrators are to be members of the "*London Arbitration Association"* and the contract "*to be governed and construed according to English Law*" and "*if the dispute is for an amount less than US$ 50000 then, the arbitration is to be conducted in accordance with the small claims procedure of the London Maritime Arbitration Association*". However, what may lead to confusion in future is the fact that the Apex court was quick to apply the express and implied principles as set out in *Bhatia* as opposed to its ruling in *BALCO*.

[17] Videocon Industries Limited v. Union of India, A.I.R. 2011 S.C. 2040 (India).
[18] Shashoua v. Sharma, [2009] EWHC (Comm) 957 (U.K.).
[19] C v. D, [2007] EWHC (Comm) 1541 (U.K.).
[20] Phillip Capper, *When is the 'Venue' of an Arbitration its 'Seat'?,* KLUWER ARBITRATION BLOG (Nov. 25, 2009), *available at* http://kluwerarbitrationblog.com/blog/2009/11/25/when-is-the-%E2%80%98venue%E2%80%99-of-an-arbitration-its-%E2%80%98seat%E2%80%99/.

(C) The Doctrines of "Presumed Intention" and "Fair Result"

The doctrine of presumed intention and the test of fair result are imperative to determine the intention of the parties in a case where the intention is ambiguous or not clearly expressed in the contract. However, the test to determine presumed intention would have to be undertaken by reading an agreement in its entirety and not limiting it to the dispute resolution clause. In the decision in *Harmony*, the Supreme Court ought to have dwelled on the construction and interpretation of the Principal Agreement and the subsequent addendum while trying to determine the presumed intention of the parties.

The application of the doctrine of presumed intention will have a bearing on the interpretation of contracts in general and with the intention of the parties in particular. Many a time, parties do not take into account the likelihood of the occurrence of an unforeseen event happening. In such cases, either the concerned party could not perform a particular clause in the contract, and as a consequence is sued for the same, or is subject to consequences that are a part of the agreement. In such circumstances, the doctrine of presumed intention allows the Court to read into the intention of the parties.

It is now settled law that courts may imply terms which are necessary in order to repair an intrinsic failure of expression in the contract or in other words, imply terms which would express the presumed intention and give business efficacy to the contract. The said law has now been used in a plethora of decisions to understand and construe the intent of the parties to a contract and more particularly the interpretation of a vague arbitration clause. In light of the application of the doctrine of presumed intention, the court in the case of *Mitsubishi Heavy Industries Limited* v. *Gulf Bank*[21] held as under:

"It is of course both useful and frequently necessary when construing a clause in a contract to have regard to the overall commercial purpose of the contract in the broad sense of the type and general content, the relationship of the parties and such common commercial purpose as may clearly emerge from such an exercise. However, it does not seem to me to be a proper approach to the construction of a default clause in a commercial contract to seek or purport to elicit some self-contained 'commercial purpose' underlying the clause which is or may be wider than the ordinary or usual construction of the words which each sub-clause will yield."[22]

The Court has further held in the case of *Cargill International S.A* v. *Bangladesh Sugar & Food Industries Corp.*[23] -

"In this connection [counsel] has rightly made the point that, when construing the effect of particular words in a commercial contract, it is wrong to put a label on the contract in advance and thus to approach the question of construction on the basis of a pre-conception as to the contact's intended effect, with the result that a strained construction is placed on words, clear in themselves, in order to fit them within such pre-conception...

On the other hand, modern principles of construction require the court to have regard to the commercial background, the context of the contract and the circumstances of the parties, and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result."[24]

The concept of fair result is an important and essential part of contract jurisprudence. It emanates from the interpretation of the implied covenants of a contract. Disputes pertaining to

[21] Mitsubishi Heavy Industries Limited v. Gulf Bank, [1997] 1 Lloyd's Rep. 343 (U.K.).
[22] *Id.* at 44.
[23] Cargill International S.A v. Bangladesh Sugar & Food Industries Corp., [1998] 1 W.L.R. 461 (U.K.).
[24] *Id.* at 45.

this arise when the contract does not express the nature of the disputes and the interpretation of the same in the manner as provided expressly in the contract would prejudice the interest of one of the contracting parties, thereby eliminating the opportunity of a fair result.

The concept plays a pivotal role, while being read in conjunction with the doctrine of presumed intention, for the reason that presuming the right intention of the party will enable the parties to derive a fair result. In deciding cases based on these doctrines, courts more often than not overlook the primary issues for consideration i.e. would either of the parties be prejudiced by not considering the position of the parties? Would there be injustice being caused by not presuming the intention of the parties?

In the case of *Harmony*, the Court while applying the said principles has only applied the same to the limited extent of interpreting the dispute resolution clause, whilst not taking into consideration more significant and essential components, namely;

(i) The commercial background;
(ii) The context of the contract;
(iii) The circumstances of the parties; and
(iv) The background preceding the contract.

A constructive interpretation of the doctrine on the basis of the above components or parameters would have irresistibly lead in the direction of the presumed intention of the parties, thereby leading to a fair result. In the said case, the Court, in order to apply the doctrine to the fullest, ought to have taken into consideration the addendum in the context of the above parameters. The non-consideration of the same has led to diluting the significance and importance of the application of the doctrine of presumed intention.

(D) Casting the sails for modifications to the contract

The primary rule of construction has been expressed by the maxim, "*ut res magisvaleat quam pereat"*. This principle follows from the general principle of interpretation that contract interpretation must always seek to determine the common intentions of the parties. Every effort should be made by the court to find meaning, looking at substance and not mere form. The assumption behind the invocation of the principle is that each contract is aimed at achieving the parties' common commercial objective. Businessmen may often record the most crucial agreements in a crude and summary fashion. It is accordingly the duty of the court to construe such documents fairly and broadly.

As a matter of practice, parties execute a principal agreement and thereafter, tend to make subsequent alterations or modifications. Such modifications may be exhaustive agreements that go by several colloquial terms such as "addendums", "deed of addition", "deed of amendment" and so on. Other such modifications or alterations may be as short as a one-page-letter, signed by the concerned parties altering a particular clause in a principal contract. Interestingly, some modifications that are exhaustive, such as the addendum in *Harmony*, may contain an arbitration clause which may be the same or similar to the arbitration clause contained in the principal agreement. Certain modifications may even contain an entirely new arbitration clause. Some addendums may even be precise to state phrases such as "*If any dispute or difference should arise under this addendum…"*. The examination of the aforesaid considerations is absolutely crucial for the court to undertake to establish whether a given modification or subsequent agreement flows out of the principal agreement or whether it amounts to qualifying as an entirely different contract in itself.

In the authors' considered opinion, the Court in *Harmony*, ought to have endeavoured to interpret the addendum in the backdrop of the Principal Agreement to conclusively hold that the addendum flows out of the Principal Agreement and is therefore governed by the ruling in *Bhatia*, thereby applying Part I. In the alternate, the Court could have interpreted the addendum and determined whether by executing the addendum, the concerned parties, in fact intended to apply the principles contained in *BALCO*, thereby ousting Part I and the jurisdiction of the Indian courts.

Thus, the Court in *Harmony* had the occasion and opportunity to introduce much required simplicity and stipulate guidelines for an effective determination of the intention of the parties that execute modified or subsequent agreements pursuant to a principal agreement.

7. Conclusion

The case of *Harmony* was a great opportunity for the Supreme Court to consider and analyse the application of pivotal doctrines concerning contracts, which have not been applied and interpreted to their optimum. In cases where there are multiple contracts involving the same parties and that flow out of a common principal agreement, the non-application of the said doctrines and principles have left a dent in the interpretation of contracts, more so, as in the present case, when parties are faced with a precarious situation of having multiple agreements which are executed in both the Pre-*BALCO* and Post-*BALCO* regimes.

In such situations, the Court ought to have considered in depth, analysed and interpreted the contract in a constructive manner, applying the settled principles and doctrines. Had the Court applied the said principles and doctrines in the manner they ought to have been, the Court could have clarified the correct interpretation that has to be afforded in cases involving multiple agreements.

The jurisdiction of courts in India in the context of international commercial arbitration remains a vexed issue. Over the last decade and a half, the Supreme Court has attempted to strike a balance between courts, arbitrators and parties involved, through a series of judicial pronouncements. The Apex Court could have cleared the air and clarified the various issues that have emerged post–*BALCO,* but has instead let the uncertainty propagate.

The case of *Harmony* was a chance for the Supreme Court to set a precedential stance with regard to interpretation of contracts and the interpretation on the applicability of the principles of *Bhatia* and *BALCO*. The judgment, although on a fair reading, has arrived at a conclusion which is reasoned and rational, the same could have been better clarified and would have served as a precedent. The cauldron of confusion shall remain and the wait shall continue, until the Court brings the ship back to dock.