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Indian Supreme Court confirms the limits of its jurisdiction to intervene on foreign seated arbitral award

In the recent decision in *Reliance Industries Limited & Anor v Union of India*, the Supreme Court of India turned down the Indian government's application to set aside an UNCITRAL arbitral award against it, ruling that it must apply instead to the English courts. This ruling confirms the current trend in pro-arbitration jurisprudence emanating from India and has further clarified the limits of Indian judicial authority over foreign-seated arbitrations.

In this case the parties had included an express choice of English law to govern the arbitration agreement which appeared key in limiting the Indian court's jurisdiction to set aside the award. In the absence of such a clause, there is often uncertainty as to which law (e.g., the law of the seat or the substantive law of the main contract) governs the arbitration agreement when a dispute arises.

The background to this case and why this ruling is important

International parties to arbitration agreements with Indian counterparties have, with good reason, typically been wary of intervention by the Indian courts in the arbitral process. Often, this intervention has come by way of applications under Part I of the Arbitration and Conciliation Act 1996 (the "**Indian Arbitration Act**") to annul or set aside arbitral awards. (These usually can only be set aside or annulled by the courts of the place where the arbitral award was made.)

Part I provides for a considerable degree of judicial supervision over the arbitral process and was originally intended to apply only to arbitrations conducted in India. In the controversial ruling in *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105 ("**Bhatia**"), the Supreme Court of India extended the application of Part I to arbitrations seated outside India, unless it was expressly or impliedly excluded by the parties. This paved the way for a number of extreme decisions, where the Indian courts were prepared to set aside foreign arbitral awards.[1]

Key issues

- The impact of *Bhatia* on arbitration agreements entered into before 6 September 2012 is further eroded.
- The decision shows the potential benefits of an express choice of law governing the arbitration agreement.

In *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552 ("**Balco**"), the Supreme Court of India finally reversed *Bhatia* and confirmed that Part I of the Indian Arbitration Act only applies to

[1] See, for example, *Venture Global Engineering v Satyam Computer Services Ltd* (2008) INSC 40, where the Indian Supreme Court held that an LCIA award made in London could be set aside on the basis that it was contrary to Indian law (under Part I of the Indian Arbitration Act).

arbitrations seated in India[2]. However, the *Balco* decision was expressly stated to be relevant to arbitration agreements concluded *after* the date of the *Balco* judgment, i.e. 6 September 2012. Part 1 of the Indian Arbitration Act could still apply to foreign seated arbitration agreements that preceded this date.

Now, the *Reliance Industries* decision has further eroded the impact of *Bhatia* on arbitration agreements entered into before 6 September 2012.

The background facts of Reliance Industries Limited v Union of India

The dispute arose from two oil and gas production-sharing contracts signed in 1994. While the contracts were governed by Indian law, each contract provided that the arbitration clause would be governed by English law. Following the constitution of the UNCITRAL tribunal, the tribunal issued a consent award in 2011 confirming that the arbitration would be seated in London.

In 2012, the tribunal issued an award which was challenged by India on the grounds of public policy. The Delhi High Court upheld its jurisdiction over the challenge, which prompted Reliance to bring a special appeal directly to the Supreme Court of India.

Eroding the impact of Bhatia on pre-Balco arbitration agreements

The Supreme Court of India found that while the principles in *Bhatia* still applied to the arbitration agreement (as it pre-dated *Balco*), because the parties had consciously agreed that (i) the seat of arbitration was London; and (ii) English law governed the arbitration agreement, they could no longer contend that Part I of the Indian Arbitration Act was applicable to the arbitration agreement.

The Supreme Court of India observed that the decision of the Delhi High Court would "*lead to a chaotic situation where the parties would be left rushing between India and England for redressal of their grievances*." It therefore concluded that any application to set aside the award must be made in the English courts.

The importance of an express choice of law clause governing the arbitration agreement

The doctrine of severability in international arbitration law establishes that an arbitration agreement may be governed by a law other than the governing law of the main contract. Issues often arise where the main contract does not provide for a governing law for the arbitration agreement. While there is some authority for the proposition that the law of the arbitral seat governs the arbitration agreement[3], this principle is not cast in stone and there is room for a counterparty to argue that the law governing the substantive contract should be the law governing the arbitration agreement.

The ruling in *Reliance Industries* demonstrates the utility of including an express choice of law clause governing the arbitration agreement as it shortcuts protracted arguments, which a difficult counterparty may run, on what the applicable law of the arbitration agreement should be.

In this case, the fact that the parties had expressly provided that English law was the law governing the arbitration agreement appeared to be a key factor in the Supreme Court of India's decision that Part I of the Indian Arbitration Act could not be applicable.

Conclusion

At a practical level, the *Reliance Industries* decision directly affects parties which have entered into arbitration agreements with Indian counterparties before 6 September 2012 (i.e. pre-*Balco*) but which may not have expressly excluded Part I of the Indian Arbitration Act. More importantly, the decision also represents another significant milestone in the recent trend towards recognition of arbitral independence in the Indian courts.

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2 See Clifford Chance briefing "*Indian Supreme Court scales back intervention in foreign-seated arbitrations*" dated 11 September 2012.

3 *Sulamerica CIA Nacional de Seguros SA v. Enesa Engenharia SA - Enesa* [2012] EWCA Civ 638 which was referred to in the Indian cases of *Balco* and *Enercon (India) Ltd.* and *Ors. v. Enercon GMBH and Anr.* 2014III AD (S.C.) 161.

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