Indian Supreme Court reduces uncertainty associated with pre-2012 arbitration agreements

In the past few years, the Indian Supreme Court has issued a series of judgments which have strengthened the pro-arbitration stance of the Indian courts with regard to foreign-seated arbitrations. In the recent case of *Etizan Bulk A/S v Ashapura Minechem Ltd* (Etizan Bulk), the Indian Supreme Court firmly rejected Ashapura's attempt to set aside the award in India, on the basis that the seat of the arbitration was London and the arbitration agreement was governed by English law.

Background

Over the past 10-15 years, a number of Indian cases have been viewed by the international arbitration community as unnecessary interventions in the arbitral process. One specific area where such intervention was rampant was in the setting aside of arbitral awards by Indian courts. This affected India's image as a pro-arbitration jurisdiction. However, the past few years have witnessed a reversal of this trend to some degree, where a number of Indian courts have refused or reduced intervention in the arbitral process.

One notable judgment is the landmark decision of *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* (BALCO). In that case, the Supreme Court clarified that, in relation to arbitration agreements executed after 6 September 2012, the Indian courts had no power to grant interim measures, set aside awards or in any way interfere with foreign seated arbitrations. The Supreme Court achieved this by holding that Part I of the (Indian) Arbitration and Conciliation Act, 1996 (the Indian Act), dealing with provisions such as the setting aside of awards rendered in India, was not applicable to foreign seated arbitrations. This was a greatly celebrated ruling as it reversed the controversial *Bhatia International* decision from 2002, which had opened the door for heavy-handed intervention by the Indian courts by making Part I of the Indian Act applicable to foreign-seated arbitrations.

However, in limiting the ruling to arbitration agreements after 6 September 2012, *BALCO* left a gap in respect of arbitration agreements executed prior to that date.

The Supreme Court tried to resolve the gap left by *BALCO* through its rulings in *Reliance,* as we explain below.

Reliance Cases

In relation to a pre-BALCO agreement, the Supreme Court held in the 2014 case of *Reliance Industries v Union of India* (Reliance I) that Part I of the Indian Act is excluded when the parties choose a foreign seat *and* a foreign law to govern the arbitration agreement.

Another round of litigation concerning Reliance Industries resulted in a 2015 decision of the Supreme Court (Reliance II) which extended this, holding that Part I of the Indian Act is not applicable to arbitrations seated outside India *or* where the arbitration agreement is governed by foreign law.

While *Reliance II* made some headway in clarifying the pre-2012 position (by confirming that Part I of the Indian Act is excluded if either a foreign seat or a foreign law governing arbitration is present), it also introduced a new uncertainty. For example, the Supreme Court held that Part I will continue to apply only where (a) the agreement stipulates that the seat is in India or (b) on whose facts a *judgment cannot be reached on the seat of the arbitration as being outside India*. Issues of uncertainty that immediately come to mind include the

threshold one has to satisfy in order to fulfil the second limb (i.e. on whose facts a judgment cannot be reached on the seat of arbitration as being outside India)?

Fortunately, *Etizan Bulk* has removed some of the uncertainty associated with *Reliance II.*

Etizan Bulk – present application

Developing on the existing jurisprudence, the Supreme Court in *Etizan Bulk,* unlike *Reliance II*, did not qualify the parties' criteria of choosing a foreign seat. In fact, this Supreme Court ruling suggests that the absence of a law to govern the arbitration proceedings would not impact the exclusion of Part I of the Indian Act when the parties choose a foreign seated arbitration.

In *Etizan Bulk*, the parties chose to resolve their disputes in accordance with the following pre-BALCO arbitration clause:

> "*Any dispute arising under this C.O.A. is to be settled and referred to Arbitration in London. One Arbitrator to be employed by the Charterers and one by the Owners and in case they shall not agree then shall appoint an Umpire whose decision shall be final and binding, the Arbitrators and Umpire to be Commercial Shipping Men. English Law to apply*...."

A dispute arose between the parties which led to the matter being referred to arbitration in London. An award was rendered and, under the award, Ashapura was made liable to pay damages.

Thereafter, Ashapura applied to set aside the award in the Indian courts. However, Etizan Bulk challenged the jurisdiction of an Indian court to hear setting-aside proceedings in relation to a foreign award. This led to multiple rounds of litigation before the lower courts. The matter finally reached the Supreme Court.

The Supreme Court in *Etizan Bulk* adopted its reasoning in *Reliance I* and held that Part I was inapplicable as the parties had chosen a foreign seat of arbitration and a foreign law to govern the arbitration agreement.

Further, the Supreme Court also reiterated its reasoning in *Reliance II,* that existence of a foreign seat or a foreign law governing the arbitration agreement is sufficient to exclude the applicability of Part I of the Indian Act.

Importantly, the Supreme Court in *Etizan Bulk* reaffirmed the well accepted principle that merely choosing a seat could lead to a presumption in relation to the law governing the arbitration proceedings. In such circumstances where the parties have chosen a foreign seat for arbitration, the Supreme Court noted that it would not be necessary to specify which law would apply to the arbitration proceedings, since the law of the particular country would apply *ipso jure*.

In *Etizan Bulk,* the Supreme Court ultimately rejected Ashapura's attempt to bring setting aside proceedings before the Indian courts and held the English courts – as the courts of the seat – to be the proper forum for any setting-aside application.

Implications

Etizan Bulk is the latest in a series of pro-arbitration decisions by the Indian Supreme Court starting from *BALCO*. It makes it clear that Part I of the Indian Act will not apply when the parties explicitly choose a foreign seat for arbitration, irrespective of the date of signing the arbitration agreement. This is in contrast to the earlier decisions of the Indian courts, which entertained setting-aside applications for foreign seated arbitrations.

This decision is a further step in the right direction in affirming the Supreme Court's stance of minimal intervention in foreignseated arbitrations and making Indian jurisprudence in line with internationally accepted principles. It also gives parties to foreign-seated arbitration agreements with Indian counterparties, entered into before September 2012, comfort that any arbitral awards arising out of their agreements will also be resistant to setting-aside challenges in India.

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Authors

Nish Shetty
Partner

T: +65 6410 2285
E: nish.shetty
@cliffordchance.com

Kabir Singh
Partner

T: +65 6410 2273
E: kabir.singh
@cliffordchance.com

Shobna Chandran
Senior Associate

T: +65 6410 2281
E: shobna.chandran
@cliffordchance.com

Matthew Brown
Senior Associate

T: +65 6506 2763
E: matthew.brown
@cliffordchance.com

Kartikey Mahajan
Associate

T: +65 6661 2045
E: kartikey.mahajan
@cliffordchance.com

Clifford Chance Asia
Clifford Chance Asia is a Formal Law Alliance between Clifford Chance Pte Ltd and Cavenagh Law LLP
12 Marina Boulevard, 25th Floor Tower 3,
Marina Bay Financial Centre, Singapore 018982

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www.cliffordchance.com
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