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India's Changing Outlook on International Arbitration

James Rogers (Norton Rose Fulbright LLP) · Tuesday, August 16th, 2011 · YIAG

Videocon Industries Ltd. Vs. Union Of India & Anr. (on 11 May, 2011)
The Supreme Court of India (the SCI) recently added to the contentious line of authority beginning with its ruling in *Bhatia International v Bulk Trading SA (2002) (4) SCC 105* concerning the power of the Indian courts to intervene in arbitrations held outside of India.

In the *Bhatia* case, the SCI held that the provisions of Part I of the Indian Arbitration and Conciliation Act 1996 (the Act) would apply to international arbitrations held outside of India unless the parties had agreed to exclude their application. The court reached its conclusion on the basis that, although Part I of the Act is expressed to apply "*where the place of arbitration is in India*", the Act does not expressly exclude the application of Part I to international arbitrations seated outside India. This has controversially been relied upon by the Indian courts in subsequent cases to set aside an arbitration award rendered outside of India and to interfere in the appointment of arbitrators in an arbitration where no arbitral seat was agreed.

In *Videocon Industries v Union of India*, the SCI reaffirmed the reasoning in *Bhatia* but confirmed that an express reference to another law in the parties' arbitration agreement can amount to an implied agreement to exclude the application of Part I of the Act.

BACKGROUND

The case arose out of a Production Sharing Contract (the PSC) executed between the Indian Ministry of Petroleum and Natural Gas and a consortium of four companies, including Videocon Industries Ltd. The PSC designated Indian law as the governing law of the contract and included an arbitration agreement providing for Kuala Lumpur, Malaysia as the "*venue*" of arbitration. Notwithstanding that Indian law governed the interpretation of the PSC generally, English law was designated as the law governing the interpretation of the arbitration agreement.

Hearings scheduled for early 2003 were interrupted by the South East Asian SARS epidemic, which lead the tribunal to shift its hearings first to Amsterdam and subsequently to London. The tribunal's order to shift proceeding to Europe was expressed to be with the consent of all the parties to the dispute, although not all of the parties to the PSC were involved in the dispute.

A partial award was rendered in 2005, which was challenged by India in the High Court of Malaysia. India also applied to the Delhi High Court under Section 9 (Interim Measures) of the Act for a declaration that Kuala Lumpur was the seat of the arbitration and a direction that the tribunal continue proceedings in Kuala Lumpur.

THE SCI'S DECISION

*Had the seat of arbitration change*d?

As English law governed the parties' arbitration agreement, the SCI referred to the English Arbitration Act of 1996 and, consistent with earlier Indian court authority, reasoned that it was possible to relocate the arbitration hearings to a convenient location without changing the seat of arbitration. The SCI also noted that the consent of all of the parties to the PSC was required in order to amend its terms, including the terms of the arbitration agreement. Although the parties to the dispute had given their consent to the hearings being held in Europe (as recorded in the tribunal's order), consent was not obtained from all of the parties to the PSC to a change in the seat of arbitration. Accordingly, the seat of the arbitration had not changed from Kuala Lumpur to London.

Had the parties excluded the application of Part I of the Act?

The SCI recognised the effect of the *Bhatia* case, accepting that the provisions of Part I of the Act would apply to international arbitrations held outside of India unless the parties had by agreement excluded their application. However, the SCI also referred to the later decision of the *Gujarat High Court in Hardy Oil and Gas v Hindustan Oil Exploration (2006) 1 GLR 658* which concluded that an agreement to exclude the application of the Act could be implied.

In *Hardy Oil* the contract was governed by Indian law while the contract further provided that, "*The place of arbitration shall be London and the … law governing the arbitration shall be English law*." This express reference to English law as the governing law of the arbitration was held to amount to an implied agreement to exclude the application of Indian law, and particularly Part I of the Act to the arbitration.

The arbitration agreement in the PSC differed from the agreement considered in the *Hardy Oil* case where the seat of arbitration was London and the "*arbitration*" was expressly governed by English law. The PSC instead provided that the "*arbitration agreement*" was governed by English law and that the seat of arbitration was Kuala Lumpur but did not expressly provide for a governing law of the arbitration. Nonetheless, the SCI concluded that this "*necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act … [and] that the Delhi High Court did not have jurisdiction to entertain the petition filed by [India] under Section 9 of the Act*."

OBSERVATIONS

The SCI's decision in this case restricts the scope for the Indian Courts to interfere in international arbitrations seated outside India, having given a purposive reading to

the intent of the parties regarding the choice of law governing the arbitration agreement and the arbitration process. This is a positive development for Indian arbitration and is to be applauded. However, the decision is curious in a number of respects.

The SCI dealt with the "*seat*" question first, determining that the seat of the arbitration remained in Kuala Lumpur. However, its subsequent finding that the Indian Courts did not have jurisdiction arguably prevents it making any such determination regarding the proper seat of the arbitration.

The SCI may also have confused the different laws at play, particularly the distinction between the law governing the arbitration agreement and the law governing the arbitration. *Hardy Oil* suggests that the reference to a law governing the arbitration, in other words, the law of the seat of the arbitration (in this case, Malaysian law), should have been determinative. However, the SCI instead placed reliance on the law governing the arbitration agreement without any indication that it recognised the distinction.

The distinction may not have altered the conclusion reached in this case. The application of Part I of the Act would arguably have been excluded by the agreement to Kuala Lumpur as the seat of the arbitration and therefore Malaysian law as the law governing the arbitration. However, it is unfortunate that the SCI's decision does not provide greater clarity. Although limiting the effect of *Bhatia*, the decision also serves to reinforce the difficultly the Indian courts have historically had in dealing with international arbitration.

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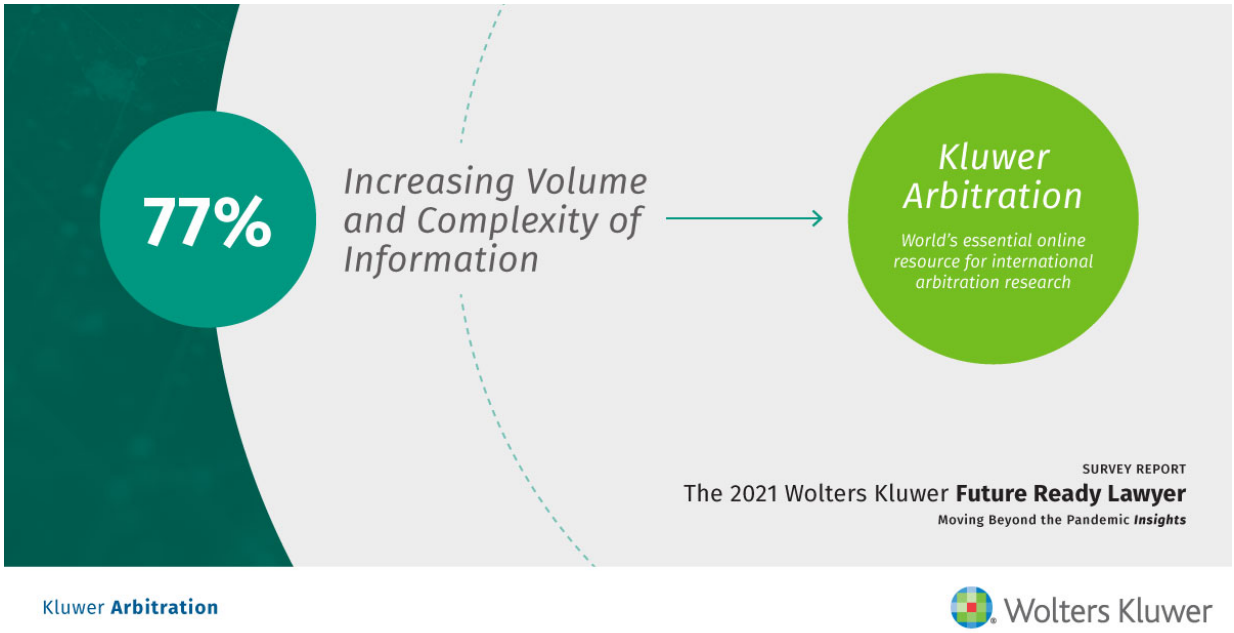

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