

The Jurisdiction of Indian Courts over Arbitrations Seated Outside India. An Outsider's Perspective.

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The potential intervention of Indian courts over foreign seated arbitrations is a hot topic in international arbitration. On 28 May 2014, the Supreme Court of India ("SCI") heated up the debate by handing down a judgment in *Reliance Industries Limited & Anr v Union of India*. The SCI found that Indian courts had no jurisdiction to set aside an award made in London – which is undoubtedly correct. But can this recent SCI decision be considered a development in Indian arbitration-related case law?

Facts

The disputes between *Union of India* and *Reliance* arose from two oil and gas production-sharing contracts. These contracts were governed by Indian substantive law, and provided for UNCITRAL arbitration, with the seat in London, and the arbitration agreement governed by the laws of England. *Reliance* commenced arbitration, and *Union of India* challenged the arbitrability of certain claims. On 12 September 2012, the tribunal issued a final partial award concluding that the claims put forward by *Reliance* were arbitrable.

Union of India started proceedings to set aside that award in the Delhi High Court, India. These proceedings were filed according to Section 34, Part I, of the Indian Arbitration and Conciliation Act 1996 ("ACA"). Section 34, in essence, provides for the application for setting aside an arbitral award.

Although the seat of the arbitration was London, the Delhi High Court accepted jurisdiction to hear the set aside proceedings. It reasoned this decision on three points: (i) the applicability of Part I of the ACA had not been excluded; (ii) English procedural law did not extend to issues of arbitrability or challenges to an award; and, (iii) since the dispute raised by *Union of India* carried considerations of the public policy of India, the jurisdiction of the Indian courts could not be excluded.

Reliance, in turn, lodged a special appeal in the SCI. It argued that the parties had excluded the application of Part I of the ACA and, therefore, the set aside proceedings should have been filed in the seat of the arbitration, i.e., English courts.

The SCI overturned the Delhi High Court's decision on jurisdiction. It found that the Indian courts had no jurisdiction to hear the set aside proceedings because the arbitration agreement provided for: (i) London-seated arbitration; and (ii) English law as the law governing the arbitration agreement.

According to the SCI, this “would clearly show that the parties have by express agreement excluded the applicability of Part I of the [Indian Arbitration Act] to the arbitration proceedings”.

Analysis

The question that arises in *Reliance v Union of India* is: do the national courts of the seat have exclusive jurisdiction to hear set aside proceedings? Although the answer seems clear, and the issue has been settled in many jurisdictions,[fn]See for recent examples: **Brazil**, 3 April 2014: *First Brand do Brasil v Petroplus Sul*, Apelação no. 0014578-23.2004.8.26.0100, Tribunal de Justiça de São Paulo. **Mauritius**, 28 March 2014: *Cruz City 1 Mauritius Holdings v Arsanovia Limited*, record no. 107967, Supreme Court of Mauritius.[/fn] it is not the case in India.

In 2002, the SCI concluded in *Bhatia* [fn]*Bhatia International v Bulk Trading SA and Anr.* (2002) 4 SCC 105 (“*Bhatia*”), the Supreme Court of India. [/fn] that: “[i]n 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”. *Bhatia* meant that Indian courts assumed jurisdiction to set aside awards rendered in arbitrations with a foreign seat.

On 6 September 2012, the SCI amended its position in *Balco*,[fn]*Bharat Aluminium v Kaiser Aluminium* (2012) 9 SCC 552 (“*Balco*”), the Supreme Court of India. [/fn] and decided that Part I of the ACA does not apply to foreign seated arbitrations. Indian courts, therefore, have no jurisdiction to hear set aside proceedings if the seat is outside India. However, the SCI only partially solved the issue as it determined that *Balco* has prospective application.

As such, both *Bhatia* and *Balco* are good law. And the jurisdiction of Indian courts over arbitral proceedings with a nexus to India is dependent upon the date on which the parties entered into the arbitration agreement:

- Arbitration agreements entered into before 6 September 2012, foreign seat: Indian courts have jurisdiction to hear proceedings to set aside an award, unless the application of Part I of the ACA had been excluded by agreement of the parties.
- Arbitration agreements entered into after 6 September 2012, foreign seat: Indian courts have no jurisdiction to entertain set aside proceedings.

In *Reliance v Union of India*, the parties entered into the arbitration agreement in 1994. The SCI therefore focused on the intention of the parties, and concluded that a seat in London, coupled with reference to English law as the law applicable to the arbitration agreement, evinced the parties’ intention to exclude the application of Part I of the ACA. The fact that the arbitration agreement was governed by English law was a key factor considered by the SCI to reach its conclusion.

Therefore, *Reliance v Union of India* set out a two-fold test in order to circumvent the Indian courts’ jurisdiction for arbitration agreements entered into prior to 6 September 2012: (i) foreign seat; and (ii) arbitration agreement governed by foreign law.

Commentary

Reliance v Union of India correctly curbed the jurisdiction of the Indian courts. However, somewhat problematically, the SCI did not clarify what would happen in the following scenarios:

- Seat in London, Indian substantive law, and no agreement with respect to the law applicable to the arbitration agreement; or
- Seat in London, Indian substantive law, and arbitration agreement governed by Indian law.

The courts of the seat of the arbitration have “supervisory” jurisdiction over an award. In other words, the courts of the seat ought to have exclusive jurisdiction to hear set aside proceedings. Moreover,

the selection of London as the seat means that the arbitral proceedings will be mandatorily conducted in accordance with the English Arbitration Act (“EAA”).^[fn]Section 2(1) of the English Arbitration Act provides that the provisions of Part 1 of the Act are to apply where the seat of the arbitration is England or Wales.^[fn] Thus an application to set aside the award must be filed before the English courts, in accordance with the grounds specified in sections 67, 68 or 69 of the EAA.^[fn] Schedule I of the English Arbitration Act provides for its mandatory provisions. Sections 67 and 68 apply to any arbitration with seat in England or Wales. But parties may opt out section 69.^[fn] This automatically renders Section 34 of the ACA incompatible with any arbitral proceedings seated in London.

Hence the law applicable to the arbitration agreement should be entirely irrelevant. Equally, it should not matter whether parties intend to exclude the application of the Part I of the ACA. Selection of the seat *ipso facto* grants exclusive jurisdiction to the courts of the seat to set aside awards.

From the perspective of a non-Indian lawyer, it is difficult to understand why the ACA, which is a national law, should cross India’s borders and govern arbitral proceedings with a foreign seat.

In *Reliance v Union of India*, even if the parties had agreed to (i) Indian substantive law, plus (ii) Indian law as the law of the arbitration agreement – the English courts should have retained exclusive jurisdiction to set aside the award.

This was the case in *Union of India v McDonnell*.^[fn] *Union of India v McDonnell Douglas Corporation* [1993]^[fn] 2 Lloyd’s Rep 48. Although this decision is prior to the English Arbitration Act 1996, and the Indian Arbitration and Conciliation Act 1996, the position remains.] The parties agreed on Indian substantive law and Indian law to govern the arbitration agreement, with a London seat. Moreover, the parties expressly agreed to arbitral proceedings conducted in accordance with the Indian Arbitration Act 1940. The English Commercial Court reasoned that, by choosing the seat of the arbitration, the parties incorporate the laws of that country to govern their arbitral proceedings. Thus the parties had chosen English law as the law to govern their arbitral proceedings, while importing from the Indian Arbitration Act 1940 only those provisions which were not inconsistent with the choice of English arbitral procedural law. For these reasons, the court concluded that any award made by the tribunal was subject to the supervisory jurisdiction of the English courts.

In addition, it should be immaterial whether the set aside proceedings are based on grounds of non-arbitrability or public policy. The nature of the challenge does not interfere with the jurisdiction of the courts of the seat to set aside an award. In *Reliance v Union of India*, the English courts, while deciding set aside proceedings, would have to ascertain which law governs the arbitrability of the claims. But the English courts’ jurisdiction is neither dependent on the law applicable to issues of non-arbitrability, nor to the law applicable to the arbitration agreement (if different).

In order to understand the issue fully, the SCI should not have asked:

– Did the parties agree to exclude Part I of the ACA?”

Instead, the SCI should have asked:

– Does the selection of the seat grant exclusive jurisdiction to the courts of seat to set aside an award?

In *Reliance v Union of India*, the SCI implied that it could have reached a different conclusion if Indian law applied to the arbitration agreement. Worryingly, this approach raises more questions than it answers.

Conclusion

In *Reliance v Union of India*, the position should have been that the Indian courts had no jurisdiction

because London was the seat of the arbitration – and not because the parties excluded Part I of the ACA, or because the applicable law to the arbitration agreement was English.

The law applicable to the arbitration agreement governs, amongst other things, the substantive validity of the arbitration agreement itself. But this law has no influence in respect to the jurisdiction to set aside an award.

This post submits that the SCI's test "*did parties agree to exclude the application of Part I of the ACA*" is improper. This means that Indian courts, as well as the courts of the seat of the arbitration, could have concurrent jurisdiction to set aside an award. This is a recipe for uncertainty and conflicting decisions. In addition, neutral decision-makers are highly desirable in international arbitration. And neutrality is seriously undermined if one party is allowed to bring the dispute back to the courts of its home jurisdiction.

Moreover, *Union of India* may still deploy the arbitrability and public policy defences to resist enforcement of an award in India (art. V(2)(a)(b) New York Convention).

According to this outsider's perspective, it seems that the SCI cured the patients' disease, but did so while prescribing the incorrect medication. Meanwhile, the ghost of the *Bhatia* decision – which clashes with international case law – may still haunt parties that entered into arbitration agreements executed prior to 6 September 2012, and did not expressly exclude Part I of the ACA.

All views expressed in this post are that of the author alone and do not necessarily represent the views of his institution.