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How the Reliance saga brought clarity to the applicability of Bhatia International

Olga Boltenko and Kartikey Mahajan (Clifford Chance) · Monday, November 30th, 2015

Any discussion on the Indian Arbitration and Conciliation Act, 1996 (the "**Act**") is incomplete without a reference to the scope of judicial interference introduced by the Supreme Court of India (the "**SCI**") through its judgment of *Bhatia International v. Union of India* (2002 4 SCC 105) ("**Bhatia International**"). Two judgments of the SCI, dated 28 May 2014 and 22 September 2015 respectively, in relation to Reliance Industries Ltd ("**RIL**") and Union of India ("**UOI**") have brought about further clarity to the application of Bhatia International. However, the judgment dated 22 September 2015 has introduced yet another uncertainty in terms of applying the Bhatia International principles. We analyse these judgments in this post.

Ghosts of Bhatia and clarity by BALCO

Bhatia International held that for arbitrations seated outside India, unless the parties agree to exclude the application of Part-I of the Act, *either expressly or by necessary implication*, the courts in India will exercise concurrent jurisdiction with the court of the seat. What constitutes implied exclusion was a question left for subsequent judgments to decide. This ushered in an era of uncertainty in India's arbitration jurisprudence as the answer largely depended on – 1) the seat of arbitration and curial law, 2) the law applicable to the arbitration agreement, and 3) the law applicable to the substantive contract. The rulings of the SCI suggested that Part I of the Act will be excluded if a combination of a foreign seat with foreign curial law or a foreign seat with foreign law to govern the arbitration agreement is present in the arbitration agreement (*Videocon Industries Limited v. Union of India and Anr.* (2011 6 SCC 161) ("**Videocon**"); and *Yograj Infrastructure Ltd. v. Ssang Yong Engineering and Construction Co. Ltd.* (2011 9 SCALE 567) (("**Yograj**"))).

Finally in 2012**,** the SCI decision of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, Inc.* (("BALCO", (2012) 9 SCC 552) overruled Bhatia International prospectively and categorically stated that Part I of the Act shall not apply to arbitrations seated outside India. The choice of a foreign seat was enough – there being no need to expressly or impliedly exclude the application of Part I. Due to prospective overruling, an agreement entered prior to 6 September 2012 with a foreign seat was still be subject to the rule in Bhatia International.

Factual Background and judgments of Reliance cases

Before proceeding to analyse the Reliance cases, it is important now to understand the factual background and the separate judgments of this saga. Two Production Sharing Contracts (**"PSCs"**)

were entered into between RIL, UOI, Enron Oil and Gas India Ltd ("**Enron**") and ONGC. The PSCs were subsequently amended to substitute Enron with BG Exploration and Production India Limited ("**BG**"). The arbitration agreement provided for the venue to be London (which was later consented to by parties as the seat) and was governed by the laws of England, while the substantive law was Indian law. Sometime in 2010, disputes arose between RIL and UOI whereby the arbitration clause was invoked.

The arbitral tribunal issued a partial award that became the subject matter of a setting aside petition (under section 34 of Part I of the Act) filed in the Delhi High Court by the UOI. The Delhi High Court decided that the setting aside petition was maintainable. The SCI by a judgment dated 28 May 2014 ("**Reliance I**"), reversed the ruling of Delhi High Court by holding that Part I of the Act was inapplicable. The Supreme Court arrived at this conclusion by finding the presence of a foreign seat *and* a foreign law governing the arbitration agreement as an express exclusion of Part I of the Act.

Thereafter, a second round of litigation was started by UOI. This time, UOI approached the Delhi High Court by an application for terminating the mandate of the arbitrator (under section 14 of the Act which is under Part I). This application was dismissed as being non-maintainable due to inapplicability of Part I of the Act in light of Reliance I. The UOI appealed to the SCI on the ground that arbitration agreement was pre-September 2012, making Part I applicable in light of BALCO and Bhatia International.

The SCI delivered its judgment on 22 September 2015 ("**Reliance II**") wherein it held that Part I of the Act will be excluded by necessary implication *'if juridical seat is outside India or where law other than Indian law governs the arbitration agreement'*. Due to the presence of a foreign seat and as well as a foreign law to govern the arbitration agreement, the SCI held Part I to be excluded.

The Court further went on to hold that, *'it is only those cases in which agreements stipulate that the seat of the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration as being outside India that would continue to be governed by the Bhatia principle. Also, it is only those agreements which stipulate or can be read to stipulate that the law governing the arbitration agreement is Indian law which would continue to be governed by the Bhatia rule'*.

Analysis of Reliance cases

Both Reliance I and Reliance II, have tried to clarify the applicability of Bhatia International to agreements pre-dating 6 September 2012. Interestingly, Reliance I held that the presence of both a foreign seat and a foreign law governing the arbitration agreement will lead to the exclusion of Part I, meaning that the presence of both elements were thought to be crucial for exclusion of Part I. This was in consonance with the earlier rulings of the SCI in Videocon and Yograj, where it relied on a combination of foreign factors relating to seat, curial law and law governing the arbitration agreement, to hold Part I of the Act as excluded.

However, Reliance II has further relaxed the criteria for excluding the application of Part I by requiring only the presence of either a foreign seat or a foreign law to govern the arbitration agreement. Thus, as long as parties choose either of these foreign elements, Part I of the Act will be excluded.

The Reliance II judgment appears to blur the distinction between the contracts entered into both pre and post BALCO. The SCI by way of BALCO made Part I inapplicable to agreements post 6

September 2012 by choosing a foreign seat and Reliance II makes Part I inapplicable to pre 6 September 2012 agreements by choosing a foreign seat or a foreign law to govern the arbitration agreement. Thus, it seems that Reliance II has not left the Indian courts with any teeth to interfere in the arbitration process by relying on Bhatia International.

Leaving aside the positive outcome of Reliance II in terms of reducing the scope of interference by Indian courts, it may have also introduced a new uncertainty. The SCI held that the *Bhatia International* principle 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* (emphasis added). The latter is unclear: is the SCI referring to those arbitration clauses, which do not refer to the word 'seat' at all, or is the Court hinting at the distinction of venue and the seat?

The Indian courts, previously, have carved out a clear distinction between venue and seat (*Enercon (India) Ltd. and Ors. v. Enercon GMBH and Anr.*, (2014) 5 SCC 1). It might be possible that the court in the second limb is suggesting those cases where the venue of the proceedings is outside for convenience, while the seat is inside India. The Reliance II judgment ultimately leaves some scope of uncertainty, which much like the entire Indian jurisprudence on arbitration, will need to be dealt with by a subsequent judgment of the Indian courts.

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