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An Insider's Perspective on Reliance v Union of India: What the Supreme Court of India Got Right and What it Got Wrong

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A few days ago, this blog published an outsider's perspective on the decision of the Supreme Court of India (**SCI**) in *Reliance v Union of India* (*Reliance v Union of India*, Civ App No. 5675 of 2014 (Supreme Court of India)) which has been applauded by international practitioners around the world since it curbed the jurisdiction of Indian courts over an arbitration agreement supplementing the pro-arbitration jurisprudence coming from the SCI over the last two years. The writer has commented not only as an outsider but also and more particularly as a Civil Lawyer, proposing an excellent alterative to the court's approach. However, it may be necessary to have an insider's perspective on the judgment.

The dispute was between the Union of India (Respondent) on one side and Reliance India Limited and BG Exploration and Production India Limited (Claimants Appellants) and arose out of two Production Sharing Contracts (PSCs). The detailed dispute resolution clauses of the contract provided that:
i. The substantive law governing the contracts was: Laws of India,
ii. The law governing the arbitration agreement was: Laws of England
iii. The venue of arbitration was: London, England

The contract was amended at a later stage as follows:

> "Except the change of venue/seat of Arbitration from London to Paris, the [dispute resolutions clauses] Articles 32 and 33 of the [PSCs} shall be deemed to be set out in full…"

After the dispute arose and the arbitral tribunal was constituted, the tribunal rendered a Partial Consent Award recording that-

> "…the juridical seat (or legal place) of arbitration for the purposes of arbitration initiated under the Claimants' Notice of Arbitration… shall be London, England."

The Respondent contended that that "laws of India" included the Indian Arbitration and Conciliation Act, 1996 and since the contract was entered into before the BALCO judgment (since

it only laid down the law prospectively), the award can be challenged under section 34 of the Act before the Delhi High Court which went on to uphold jurisdiction.

In the present judgment, the Supreme Court of India overruled the Delhi High Court stating that it had *"wrongly intermingled issues relating to the challenge to the arbitral proceedings or the arbitral award"* which is exactly the issue my learned colleague points out as a logical inconsistency in the decision when he says "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."

The SCI went on to hold that even though the case had to be decided based on the position of law as laid down in *Bhatia International* (*Bhatia International v Bulk Trading*, (2002) 4 SCC 105 (Supreme Court of India)), the applicability of Part I of the Act had been impliedly excluded since London had been designated as the seat of arbitration and the parties had agreed upon approaching the Permanent Court of Arbitration and not the Chief Justice of India for appointment of the Chairperson of the arbitral tribunal and the arbitration proceedings had to be conducted as per the UNCITRAL rules.

At this stage I would like to explain the test of the implied exclusion of Part I of the Indian Arbitration & Conciliation Act, 1996 [**ACA**], which has been criticized in the aforementioned post. India is a common law jurisdiction with great focus on precedent. In the last decade, through its rulings in *Bhatia International* and *Venture Global* (*Venture Global Engineering v Satyam Computers*, Civ App No. 309 of 2008 (Supreme Court of India)), the SCI interpreted ACA to mean that a foreign award could be challenged in India just like a domestic award would be under Section 34. However, *Bhatia* had also provided a way out by saying that the application of Section I of the ACA (which applies only to domestic awards) would **not** extend to foreign-seated arbitrations if the parties had **expressly** or **impliedly** excluded the application of Part I of the ACA. Since these judgments have not been expressly overruled for contracts entered into before 6 September, 2012, the *Bhatia* requirement must continue to apply. The issue with regard to why the SCI decided to overrule *Bhatia* only prospectively, is a debate for another post.

Furthermore, despite the reputation of India as an arbitration-unfriendly jurisdiction, the SCI has previously acknowledged that courts of the seat enjoy exclusive supervisory jurisdiction. The court was faced with the contradiction in the position of law as put forth by *Bhatia* i.e. courts in India maintaining jurisdiction over a particular foreign-seated arbitration alongside that exercised by courts of the seat in *Enercon v Enercon* (*Enercon v Enercon*, Civ App No. 2086 of 2014 (Supreme Court of India)). In this case, the conflict was between the SCI maintaining jurisdiction versus sending the dispute to English courts owing to confusion with respect to whether 'London' was mentioned in the arbitration clause as the seat or the venue. Since the court ended up finding that it was included only as a venue and found that the parties intended New Delhi to be the seat, the court kept jurisdiction. (Whether or not their reasoning was sound was previously discussed here).

Since we are still in the domain of the determination of the various applicable laws, I must attempt to answer some other questions raised in the post. It was pointed out that-

> 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.

This question is not important to determine jurisdiction, because it is important to note that Indian courts understand that courts of the seat exercise exclusive supervisory jurisdiction. This question is important in the determination of what is the law governing the arbitration agreement.

First, if the seat would be London, Indian substantive law would be applicable to the subject matter of the dispute and there is no mention of the arbitration agreement, it would be necessary to refer to *NTPC v Singer* (*NTPC v Singer*, AIR 1993 SC 998 (Supreme Court of India)) which provides that substantive law is normally be the law governing the arbitration agreement as well. However, in exceptional circumstances and if there is no substantive law defined, the law of the seat will be deemed to be the governing law as the law bearing the "closest connection" to the dispute. (What such expectations would entail is an unclear matter.)

In the second scenario proposed, the law applicable to the arbitration agreement has been agreed upon as Indian law.

This gives me the right context to introduce my own analysis of the judgment. In Reliance the substantive issue raised was with regard to arbitrability. As agreed to by the SCI in the judgment (citing Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd Edn),

> …where the law governing the conduct of the reference [law of the seat] is different from the law governing the underlying arbitration agreement, the court looks to the arbitration agreement to see if the dispute is arbitrable, then to the curial law to see how the reference should be conducted and then returns to the [law governing the arbitration agreement] to give effect to the resulting award.

In saying so, the court, in my opinion correctly laid down the law with respect to jurisdiction and sent the case back to the courts of England. But we must not ignore the error made by the court with respect to arbitrability which is not being pointed out by any other scholars and practitioners discussing this case.

The court first recognized that the issue of arbitrability is governed by the law applicable to the arbitration agreement. By this line of reasoning, the English courts would decide the application to set aside the award by applying English law and the problem would only arise when an application of enforcement would be filed in India where Indian courts would be able to examine the decision on grounds of public policy. However, the court took a logical leap by going on to say that *"since substantive law governing the contract is Indian Law, even the Courts in England, in case the arbitrablity is challenged, will have to decide the issue by applying Indian Law viz. the principle of public policy etc."* It fails to stand to reason how the court in para 69 cites *Sumitomo Heavy Industries v ONGC* (*Sumitomo Heavy Industries v ONGC*, (1998) 1 SCC 305 (Supreme Court of India)) in respectful agreement with the case which clearly states that the issue of arbitrability is determined by the law governing the arbitration agreement but then in the dispositive para 74 (iii) goes back to the logic of the Delhi High Court to apply substantive law to the issue of arbitrability.

Therefore, though I respectfully disagree with the outsider's view of this case, I am not a supporter

of this judgment. Although it is certainly reflective of a better understanding of the principles of international commercial arbitration, it is not a judgment that should be lauded in its entirety as it has created a controversy, unintentionally as it may be, with respect to what law governs the issue of arbitrability.

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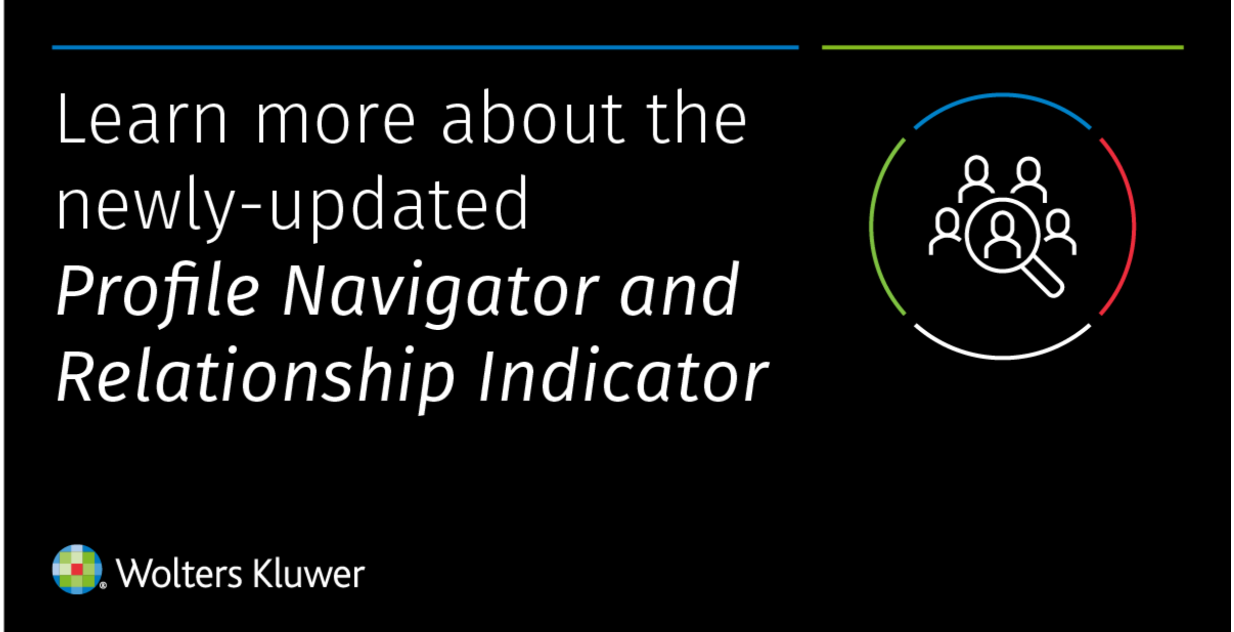

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