Dispute Resolution Hotline

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SUPREME COURT OPINES AGAINST FORUM SHOPPING IN FOREIGN SEATED ARBITRATIONS

- Supreme Court holds that forum shopping resorted by Union of India is nothing but abuse of the process of Court;
- Supreme Court affirms that in a pre BALCO agreement, Part I will be impliedly excluded if either, the parties decided on a foreign seat; or if the parties agreed on a foreign law to govern the arbitration agreement;
- Another pro-arbitration ruling by the Supreme Court aimed at reducing judicial interference in foreign seated arbitrations.

Recently, the Supreme Court of India **("Supreme Court")** in *Union of India* **("Appellant")** *v. Reliance Industries Limited & Ors*[1] **("Respondents")** while hitting hard at the forum shopping tactics adopted by the Appellant, has given clarity on the principle of implied exclusion held in *Bhatia International v. Bulk Trading S.A. and Anr.*[2] **("Bhatia International")**. This ruling is significant for agreements entered into by the parties before the decision in *Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Service, Inc. and Ors*[3] **("BALCO")**, which continues to be governed by the principles laid down in *Bhatia International*.

FACTS

Reliance Industries Ltd **("RIL")**, the Appellant, Enron Oil and Gas India Ltd **("Enron")** and Oil and Natural Gas Corporation **("ONGC")** had entered into two Production Sharing Agreements **("PSC")**. Subsequently, in 2005, Enron was substituted with BG Exploration and Production India Limited **("BG Exploration")**. In or around 2010, disputes arose between RIL and the Appellant, where the latter invoked the arbitration as per the PSC. The arbitration agreement provided for venue to be London and was governed by the laws of England, while the substantive law governing the PSC was Indian.

RIL, Appellant and BG Exploration agreed to change the seat of arbitration to London, England and consequently a final partial consent award **("Partial Consent Award")**.

On September 12, 2012, the Arbitral Tribunal passed another final partial award **("Partial Final Award").** The Partial Final Award was challenged by the Appellant under section 34 of the Arbitration and Conciliation Act, 1996 **("Act")**. While the High Court held that the petition under section 34 is maintainable, the Supreme Court overturned the decision of the High Court **("SC Ruling")** and observed that Part I is not applicable in the instant dispute[4]. Thereafter, a review and curative petition was preferred which was eventually dismissed.

The Appellant again approached the High Court by an application under section 14 of the Act **("Application")**. The Application was dismissed by the High Court and aggrieved by the same; the Appellant preferred a special leave petition before Supreme Court.

CONTENTIONS

Appellant

It was argued that:

- As per the terms of the PSC, it could only be amended if all the parties thereto agreed in writing to such amendment. As ONGC being a party to the PSC had not signed the Partial Consent Award, therefore, the Partial Consent Award was without jurisdiction and consequently the seat of the arbitration could not have been in London.
- The pronouncement in SC Ruling would be of no effect since the issue being asserted concerns jurisdictional objection, and therefore the doctrine of *res judicata* would not apply.

Respondents

It was argued that the pronouncement in SC Ruling being final inter se parties binds the parties both by way of *res judicata* and as a precedent. The Respondents assailed that decision in SC Ruling had left no scope for ambiguity as regards non-applicability of Part I of the Act. Lastly, the Respondents also asserted that the Appellant had made equivalent application before the Permanent Court of Arbitration, which had already rejected their objections towards nomination of the particular arbitrator.

JUDGMENT

The Supreme Court upheld the decision of the High Court and opined that Part I of the Act would not be applicable in the instance case.

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The Supreme Court held that cases governed by *Bhatia International* have to be read with the two caveats:

- Agreement wherein the seat is stipulated to be in India or where otherwise on facts it cannot be concluded that the arbitration is seated outside India, that the *Bhatia International* principle will apply;
- Those agreements which provide or can be construed to have provided that the law governing the arbitration agreement is the Indian law that the *Bhatia International* principle will apply.

The Supreme Court looking at the facts concluded that the seat is London and that the arbitration agreement is governed by English law. Accordingly, Part 1 of the Act would not be applicable.

While answering Appellant's contention that the findings in SC Ruling is not res judicata, Supreme Court dismissed the Appellant's plea and observed that the effect of clause 34.2[5] of the PSC raises a mixed question of fact and law and not a pure question of jurisdiction unrelated to facts. Supreme Court also observed that the Application was preferred after getting an adverse judgment from the Permanent Court of Arbitration and therefore is an abuse of the process of the Court.

ANALYSIS

In arriving at the decision, the Supreme Court has referred several earlier rulings with respect to the principle of implied exclusion laid down in *Bhatia International* (*National Thermal Power Corporation v. Singer Company*. This ruling provides a good gist on the evolution of the principle of implied exclusion over the years.

Once again, the Supreme Court has given a very pro-arbitration signal to negate any unnecessary challenge to arbitral proceedings held in foreign jurisdictions or foreign awards even in case of arbitrations governed by the decision in *Bhatia International*. By holding that the Appellant's application under section 14 of the Act, to be an abuse of the process, the Supreme Court has sent a strong message not to indulge in forum shopping.

– Alipak Banerjee, Ashish Kabra & Vyapak Desai
You can direct your queries or comments to the authors

[1] Special Leave petition (Civil) No 11396 of 2015

[2] 2002 4 SCC 105; In Bhatia International, the Supreme Court held that in cases of international commercial arbitrations held out of India, provisions of Part I of the Act would apply unless the parties by agreement, express or implied, exclude all or any of its provisions.

[3] (2012) 9 SCC 552. In BALCO, the Supreme Court made Indian arbitration law seat centric and held that Part I of the Act will only apply for arbitrations seated in India. However, the Supreme Court clarified that this ruling would have prospective effect. Therefore, the agreements entered into by the parties before September 6, 2012 would continue to be governed by the principles laid down in Bhatia International.

[4] *Reliance Industries Limited and Anr v. Union of India,* (2014) 7 SCC 603

[5] Clause 34.2 of the PSC prescribed that any clause in the PSE can only be amended if all parties agree in writing.

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