Dispute Resolution Hotline

August 16, 2016

SUPREME COURT: FOREIGN JURIDICAL SEAT AUTOMATICALLY EXCLUDES PART I

SUPREME COURT:

- Reiterates that choosing a juridical seat of arbitration automatically attracts the law of such location to the arbitration proceedings;
- May have expanded upon the conditions required for implied exclusion of part 1 of the Arbitration & Conciliation Act, 1996 to foreign seated arbitrations;

INTRODUCTION:

The Supreme Court ("**Court**") in the case of *Etizen Bulk A/S* ("**Etizen**") *v Ashapura Minechem Ltd. and Anr.*[1] ("**AML**") has stated that the mere choosing of a juridical seat of arbitration would automatically attract the law applicable to such a location to the arbitration proceedings.

Setting aside a ruling of the Gujarat High Court and upholding a ruling of the Bombay High Court, the Court held that since the parties had agreed that the seat of the arbitration was London and English Law was applicable, there was an exclusion of Part I of the Arbitration & Conciliation Act, 1996 (**"Act"**).

FACTS:

Etizen had entered into a contract of affreightment with AML as charterers for shipment of bauxite from India to China. Disputes having arisen between the Etizen and AML, the matter was referred to arbitration as the charter party agreement contained an arbitration clause.

Before the commencement of the arbitration proceedings AML had filed proceedings in a District Court of Gujarat seeking an injunction against the commencement of arbitral proceedings. The District Court had dismissed these proceedings which ultimately reached the Supreme Court. The arbitration was held in London according to English Law. The Arbitrator passed an award holding AML liable to the tune of US$36,306,104.00 plus interest (**"Award"**).

Thereafter AML filed an application Section 34 of the Act for setting aside the Award. Simultaneously, Etizen had applied for enforcement of the Award in the Netherlands, USA, Belgium and UK, which jurisdictions have held the award to be enforceable as a judgment of the court. Etizen also filed proceedings for enforcement of the Award in India.

Etizen had filed a writ petition before the Gujarat High Court questioning the very jurisdiction of a Court in India to decide objections under Section 34 of the Act in respect of a foreign award. These proceedings were challenged and were also litigated till the Supreme Court.

Simultaneously, Etizen had filed enforcement proceedings in the Bombay High Court under Sections 47 to 49 of the Act, for enforcing the Award. The Bombay High Court held that since the parties had agreed that the juridical seat of the arbitration would be at London and English Law would apply, there was an express and in any case an implied exclusion of Part I of the Act. AML challenged this decision of the Bombay High Court before the Supreme Court.

ISSUE:

Whether in the given fact pattern, Part I of the Act is excluded from its operation in case of a foreign award where the Arbitration is not held in India and is governed by foreign law.

JUDGMENT AND CONTENTIONS:

In respect of the same Award, the Court was faced with conflicting decisions of the Gujarat High Court, which held that a court in India has jurisdiction under Section 34 of the Act to decide objections raised in respect of a foreign award because Part I of the Act is not excluded from operation and a decision of the Bombay High Court, which held that Part I is excluded from operation.

The Court did not take into consideration the law propounded in the case of *Balco v. Kaiser Aluminium Technical Services Inc.*[2] as the decision in that case does not govern arbitration agreements entered prior to September 9, 2012 (the contract in the present case was entered into on January 18, 2008).

Etizen contended that the arbitration clause in the contract, which stipulated disputes to be "*referred to Arbitration in London*" under English Law, clearly intended that Part 1 of the Act stands excluded.

The Court stated that the intention of the parties was to subject the disputes to English Law. This necessarily implied

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that any objection or challenge to the conduct of the arbitration or the Award would also be governed by English Law.

The Court referred to a Supreme Court judgment[3] which dealt with a similar fact pattern to observe the seat of arbitration was agreed to be London and that the arbitration proceedings were to be held in accordance with English Law therefore excluding the applicability of Part I of the Act.

Based on the aforementioned facts and reasons, the Court concluded that the award debtor would not be entitled to challenge the award by raising objections under Section 34 of the Act before an Indian Court.

Significantly, the Court thereafter cited a passage from *Redfern and Hunter on International Arbitration* and observed that the mere choosing of a juridical seat of arbitration would attract the law applicable to such a location to the arbitration proceedings thereby automatically excluding the operation of Part I of the Act.

ANALYSIS:

Effectively, by stating that it would not be necessary to specify which law would apply to the arbitration proceedings as long as the seat of arbitration has been defined in the arbitration agreement (since the law of the particular country would apply *ipso jure* to the arbitral proceedings), it may be argued that the Court has increased the ambit of law propounded by the Court in *Bhatia International v Bulk Trading S.A. and Anr*[4]. Therefore, arguably, in arbitration agreements governed under the *Bhatia International* regime, the requirement of express or implied exclusion of the operation of Part I of the Act may also be met in situations where parties have merely selected a foreign juridical seat of arbitration.

– Arjun Gupta, Sahil Kanuga & Vyapak Desai
You can direct your queries or comments to the authors

[1] Civil Appeal Number 5131-5133 of 2016
[2] (2012) 9 SCC 552
[3] *Reliance Industries Limited and another v. Union of India* 2014 (7) SCC 603
[4] (2002) 4 SCC 105

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