news flash

October 2012

Bharat Aluminum Company Limited ("BALCO") V/s. Kaiser Aluminum Technical Service, Inc. ("Kaiser")

INTRODUCTION

Existing position:

In Bhatia International v Bulk Trading S.A & Anr. ("Bhatia International") and Venture Global Engineering v Satyam Computer Services Ltd & Anr ("Venture Global"), the Supreme Court had held that Part I of the Arbitration and Conciliation Act, 1996 ("Act") setting out the procedures, award, interim relief and appeal provisions with respect to an arbitration award, would apply to all arbitrations held out of India, unless the parties by agreement, express or implied, exclude all or any of its provisions. The Supreme Court set aside the doctrine in Balco V. Kaiser.

Brief Facts

1. An agreement dated 22 April, 1993 ("Agreement") was executed between BALCO and Kaiser, under which Kaiser was to supply and install a computer based system at BALCO's premises.

2. As per the arbitration clause in the Agreement, any dispute under the Agreement would be settled in accordance with the English Arbitration Law and the venue of the proceedings would be London. The Agreement further stated that the governing law with respect to the Agreement was Indian law; however, arbitration proceedings were to be governed and conducted in accordance with English Law.

3. Disputes arose and were duly referred to arbitration in England. The arbitral tribunal passed two awards in England which were sought to be challenged in India u/s. 34 of the Act in the district court at Bilaspur. Successive orders of the district court and the High Court of Chhattisgarh rejected the appeals. Therefore, BALCO appealed to the Supreme Court ("Court").

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4. Another significant issue to be adjudged, in the case of Bharti Shipyard Ltd. v/s Ferrostaal AG & Anr. (clubbed together with the above petition for hearing), was applicability of section 9 (interim measures) of the Act. The parties had initially agreed to get their disputes settled through arbitral process under the Rules of Arbitration of the International Chamber of Commerce, at Paris, subsequently, mutually agreed on 29 November, 2010 to arbitration under the Rules of London Maritime Arbitrators Association, in London.

5. During the pendency of arbitration proceedings in London, an injunction application was made by appellants, Bharti Shipyard Ltd., before the District Judge at Mangalore, against the encashment of refund bank guarantees issued under the contract (u/s 9 of the Act). The applications were allowed and were consequently challenged in High Court of Bangalore. The Bangalore High Court set aside the application so allowed on the grounds that the appellants had an alternative remedy (u/s 44 of the Act, being interim reliefs for international arbitration) in the courts of London and further since the substantive law governing the contract, as well as the arbitration agreement, is English law, the English courts should be approached. This was also challenged in this petition to the Supreme Court.

6. The appeal filed by Bharat Aluminum Co. before the Division Bench of the Supreme Court was placed for hearing before a three Judge Bench, as one of the judges in the Division Bench found that judgment in Bhatia International and Venture Global was unsound and the other judge disagreed with that observation.

Held

The judgment in detail analyses, the provisions of various sections in the Act and applicability of Part I of the Act to international commercial arbitrations. Some significant issues dealt with in the judgment are as follows:

1. It was observed that the object of section 2(7) of the Act is to distinguish the domestic award (Part I of the Act) from the 'foreign award' (Part II of the Act); and not to distinguish the 'domestic award' from an 'international award' rendered in India. The term 'domestic award' means an award made in India whether in a purely domestic context, (i.e., domestically rendered award in a domestic arbitration or in the international arbitration which awards are liable to be challenged u/s 34 and are enforceable u/s 36 of the Act).

2. It was held that there is a clear distinction between Part I and Part II as being applicable in completely different fields and with no overlapping provisions.

3. The Court has also drawn a distinction between a 'seat' and 'venue' which would be quite crucial in the event, the arbitration agreement designates a foreign country as the 'seat'/ 'place' of the arbitration and also select the Act as the curial law/ law governing the arbitration proceedings. The Court further clarified that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings. It would, therefore, follow that if the arbitration agreement is found or held to provide for a seat / place of arbitration outside India, then even if the contract specifies that the Act shall govern the arbitration proceedings, Part I of the Act would not be applicable or shall not enable Indian courts to exercise supervisory jurisdiction over the arbitration or the award. It would only mean that the parties have contractually imported from the Act, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the English procedural law or curial law. Therefore, it can be inferred that Part I applies only to arbitrations having their seat / place in India.

4. The Court dissented with the observations made in Bhatia International case and further observed on a logical construction of the Act, that the Indian Courts do not have the power to grant interim measures when the seat of arbitration is outside India. A bare perusal of Section 9 of the Act would clearly show that it relates to interim measures before or during arbitral proceedings or at any time after the making of the arbitral award, but before it is enforced in accordance with Section 36 (enforcement of domestic awards). Therefore, the arbitral proceedings prior to the award contemplated u/s 36 can only relate to arbitrations which take place in India.

5. The Court further held that in foreign related international commercial arbitration, no application for interim relief will be maintainable in India, either by arbitration or by filing a suit.

Implications

1. This judgment shall be applicable prospectively (i.e. to all the arbitration agreements executed after September 6, 2012).

2. As a result of this judgment, the seat of arbitration has now gained paramount importance for determining the applicability of Part I of the Act.

3. The judgment also draws a distinction between the seat of arbitration and the place of arbitration. It therefore contemplates a situation where even though the parties have provided for a particular place for arbitration, that some of the proceedings themselves may be conducted in other territories as may be convenient to all.

4. This judgment also ensures that foreign award (i.e. an award passed outside India) can no longer be challenged by an Indian entity u/s 34 of the Act and that the party which seeks to resist the enforcement of the award has to prove one or more grounds set out in section 48 of the Act.

5. No interim relief u/s 9 of the Act or order 39 of the CPC (both pertaining to injunction) would be available where the seat of arbitration is outside India. As interim orders from foreign courts and arbitration tribunals are not enforceable in India such a situation would leave foreign parties remediless.

Disclaimer

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