Choice of Seat of Arbitration akin to Exclusive Jurisdiction Clause- Pre-BALCO Arbitrations

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The question of applicability of the provisions of Part I of the Arbitration and Conciliation Act 1996 (hereinafter referred as 1996 Act) to the international commercial arbitrations held outside India has time and again come up before the Supreme Court of India **(**"Supreme Court"**)** and various High Courts. The Bhatia International[1] had initially settled the question of applicability of the provisions of Part I of the 1996 Act to International Commercial Arbitrations held outside India, by holding that the 1996 Act shall be applicable to all arbitrations, including those arbitrations which are held outside India, unless the parties expressly or impliedly exclude the applicability of all or any of its provisions. The Bhatia International judgment was eventually overruled by a constitution bench judgment in Balco v. Kaiser[2], but only prospectively i.e. was made applicable only for disputes arising out of agreements which were entered after 6th September 2012. This meant that the Bhatia International judgment is still applicable to all arbitrations agreements entered prior to 6th September 2012.

The Supreme Court and various High Courts have considered a variety of foreign factors including procedural rules of a foreign arbitral institution[3], law governing the arbitration agreement[4]which along with the foreign seat could exclude the application of Part I of the 1996 Act.

In all the disputes arising out of Pre-Balco arbitration agreements, the Courts have been consistently holding that the 'foreign seat' is not akin to exclusive jurisdiction clause, i.e. mere choosing of a foreign seat does not confer exclusive jurisdiction to the said venue and will not exclude the applicability of Part I of the 1996 Act.

However, in a course correction, the Supreme Court in the case of Eitzen Bulk A/S v. Ashapura Minechem Ltd. & Anr.[5], has observed that the mere choosing of juridical seat of arbitration attracts the law applicable to such location and that it would not be necessary to specify which law would apply to the arbitration proceedings, since the law of the particular country would apply *ipso jure*.

Factual Background

Eitzen Bulk A/S of Denmark (hereinafter referred to as `Eitzen') entered into the contract with Ashapura Minechem Limited of Mumbai (hereinafter referred to as `Ashapura') as charterers for shipment of bauxite from India to China. The Charter Party contained an Arbitration Clause having London as seat of arbitration and made the English law to apply to arbitration.

[1]Bhatia International v. Bulk Trading SA, (2002) 4 SCC 105.
[2] Bharat Aluminum and Co. vs. Kaiser Aluminium and Co. (2012) 9 SCC 552
[3]Yograj Infrastructure Ltd. vs. Ssangyong Engineering Construction Co. Ltd, AIR 2011 SC 3517;
[4]Videocon Industries Ltd. v. Union of India, (2011) 6 SCC 161; Reliance Industries v. Union of India, 2014 (4) CTC 75; Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd, (2015) 9 SCC 172; Max India Ltd. v. General Binding Corporation, 2009(3) ARBLR162(Delhi); Union of India v. Reliance Industries Ltd., MANU/SC/1064/2015
[5]CA No. 5131-5133 of 2016; CA No. 5134-5135 of 2016; CA No. 5136 of 2016; Decided on 13 May 2016; 2016(3) Arb LR Vol.121.

Disputes having arisen between the parties, the matter was referred to Arbitration by a sole Arbitrator. The Arbitration was held in London according to English Law. The Arbitral Tribunal published the Award dated 26.05.2009 thereby holding that Ashapura was liable and directed it to pay a sum of US$ 36,306,104 together with compound interest at the rate of 3.75 % per annum, besides other reliefs to Eitzen.

Having failed to stall the arbitration and then having failed in arbitral proceedings, Ashapura filed a petition under Section 34 of the 1996 Act challenging the award passed in London and seeking a restraint on the enforcement of the award before the District Court, Jamnagar. After a series of proceedings, the Division Bench of Gujarat High Court held that Ashapura is entitled to challenge the foreign award under Section 34 of the 1996 Act. Simultaneously, Eitzen proceeded before the Bombay High Court for enforcement of the foreign award on the basis that Part I of the 1996 Act has no application to a foreign award made in London under English Law. The learned Single Judge of the Bombay High Court allowed the petition for enforcing the foreign award holding that since the parties had agreed that juridical seat as London and made the English law to apply, there was an express and in any case an implied exclusion of Part I of the 1996 Act.

The current judgment arose out of the appeals against the decision of the Gujarat High Court holding that a Court in India has jurisdiction under Section 34 to decide objections raised in respect of a Foreign Award because Part I of the Arbitration Act is not excluded from operation in respect of a Foreign Award and also the decision of the Bombay High Court holding that Part I is excluded from operation in case of a Foreign Award and thereupon directing enforcement of the Award.

Judgment

The main question before the Supreme Court was whether Part I of the Arbitration 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. The Supreme Court went on to hold that since the arbitration clause clearly stipulates that the dispute shall be settled in London and English law would apply to the arbitration, the intention of the parties is manifestly clear to exclude the applicability of Part I of the 1996 Act and thus, the conduct of the arbitration as well as any objections relating thereto including the award shall be governed by English law. It further held that in this case two factors exclude the operation of Part I of the 1996 Act, first, the seat of arbitration which is in London and second, the clause that English law would apply.

The Supreme Court referred the judgment of Reliance Industries Limited and Anr. v. Union of India[6] which in turn relied upon Sulamerica v. Enesa, High Court of Justice (England) which says that seat of the arbitration is an important factor in determining proper law of the arbitration agreement. The Supreme Court held that it has been settled for quite some time now that Part I of the 1996 Act is excluded where the parties choose that the seat of arbitration is outside India and the arbitration is governed by the law of a foreign country. Quoting the famous passage from Redfern and Hunter on International Arbitration[7], the Supreme Court parting with the judgment made an interesting observation that

[6]Reliance Industries v. Union of India, 2014 (4) CTC 75

[7]"It is also sometimes said that parties have selected the procedural law that will govern their arbitration, by providing for arbitration in a particular country. This is too elliptical and, as an English court itself held more recently in Breas of Doune Wind Farm it does not always hold true. What the parties have done is to choose a place of arbitration in a particular country. That choice brings with it submission to the laws of that country, including any mandatory provisions of its law on arbitration. To say that the parties have 'chosen' that particular law to govern the arbi-

"as a matter of fact the mere choosing of juridical seat of arbitration attracts the law applicable to such location and that it would not be necessary to specify which law would apply to the arbitration proceedings, since the law of the particular country would apply ipso jure (emphasis supplied)."

In view of the above, the Court held that the foreign award passed in London cannot be interfered with under Section 34, which occurs in Part I of the 1996 Act and hence, dismissed the proceedings under Section 34 before the Gujarat High Court as untenable and upheld the judgment of the Bombay High Court enforcing the Foreign Award under Part II of the 1996 Act.

Conclusion

Prior to this judgment, as of now, the cases dealing with implied exclusion held that a mere designation of foreign seat will not exclude Part I of the 1996 Act and implicitly rejected the principle that choice of the seat of arbitration is akin to an exclusive jurisdiction clause (for all Pre-Balco Agreements).[8] However, by this judgment Supreme Court holds that a mere choice of foreign seat would attract the law applicable to such location and would suffice to exclude the applicability of Part I of the 1996 Act.

It appears the Hon'ble Supreme Court has applied the principles enunciated by Balco to a Pre-Balco arbitration, also harmonizing itself with the standard international practice, giving importance to the seat of an arbitration to the extent that it amounts to conferring exclusive jurisdiction to the chosen location.

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tration is rather like saying that an English woman who takes her car to France has 'chosen' French traffic law, which will oblige her to drive on the right-hand side of the road, to give priority to vehicles approaching from the right, and generally to obey traffic laws to which she may not be accustomed. But it would be an odd use of language to say this notional motorist had opted for 'French traffic law'. What she has done is to choose to go to France. The applicability of French law then follows automatically. It is not a matter of choice. Parties may well choose a particular place of arbitration precisely because its lexarbitri is one which they find attractive. Nevertheless, once a place of arbitration has been chosen, it brings with it its own law. If that law contains provisions that are mandatory so far as arbitration are concerned, those provisions must be obeyed. It is not a matter of choice any more than the notional motorist is free to choose which local traffic laws to obey and which to disregard."

[8] As Balco laid down the seat centricity principle and held that choice of seat of arbitration is akin to an exclusive jurisdiction clause.