

Dispute Resolution Hotline

September 05, 2017

INDIAN SUPREME COURT AFFIRMS COMMITMENT TO COMMERCIAL COURT'S DECISION ON LONDON SEAT OF ARBITRATION (ROGER SHASHOUA V MUKESH SHARMA)

This article was originally published in the 11th August, 2017 edition of  LexisNexis®

Arbitration analysis: Moazzam Khan, co-head of international dispute resolution practice and Tanisha Khanna, a member of the same team at Nishith Desai Associates, examine the Indian Supreme Court's decision in *Roger Shashoua & Others v Mukesh Sharma & Others* affirming the court's fidelity towards principles laid down by foreign courts in determining the seat of arbitration and endorsing a 2009 decision of the Commercial Court in London in relation to the arbitration.

ORIGINAL NEWS

Roger Shashoua & Others v Mukesh Sharma & Others [2017] (Civ Appeal No.2841–2843)

PRACTICAL IMPLICATIONS

The Commercial Court in London ruled back in 2009 that London was the seat of arbitration and the courts in London had supervisory jurisdiction in relation to the proceedings in question (2009 ruling).

The Indian Supreme Court (SC) has now affirmed the principles laid down in the 2009 ruling and in doing so has tied the knot with a foreign judgment to form a binding precedent on lower courts in India

The facts that paved the way to the SC's decision are somewhat labyrinthine. A shareholders agreement containing an arbitration clause was entered into between the parties in the matter (arbitration agreement). Roger Shashoua and the other appellants ('appellants') sought an anti-suit injunction against Mukesh Sharma and the other respondents (respondents) from a commercial court in London in order to prevent them from partaking in, or commencing proceedings outside of London, as London was the seat of arbitration.

The judgment of the SC has safeguarded judicial comity from the 'home-wrecking' interference of domestic courts. No lasting union can be built on a shaky foundation, and the apex court's ruling too is anchored in the unambiguous observations of the apex courts in *BALCO v Kaiser Aluminum* [2012] 9 SCC 552 (*BALCO*) and *Enercon (India) Private Limited v. Enercon GMBH* [2014] 5 SCC 1 (*Enercon*). The SC's judgment is in step with international best practices in terms of respecting the sovereignty of a foreign award when the parties intended on a foreign seat.

WHAT WAS THE BACKGROUND TO THE SUPREME COURT'S DECISION?

Till death do signatories part from their seat of arbitration: the 2009 ruling

The pragmatic court in London studied the arbitration agreement and found that the only rational interpretation was that the parties had intended London to be the seat of arbitration, despite the fact that the word 'venue' had been employed. Thus, only the courts in London were endowed with supervisory jurisdiction.

The court reasoned that if the parties had indeed intended London to be the venue, but not the seat, they would have identified an alternate seat of arbitration. The court also inferred that this was the intent of the parties from their choice of the Arbitration Rules of the International Chamber of Commerce (ICC Rules), a supranational body of rules, to govern the arbitration agreement. The court's decision was solidified by the fact that there was absolutely nothing to suggest that the parties had merely chosen London as the venue for the hearings as a matter of convenience.

The court also noted the fact that London arbitration had attained the status of a well-known term in parlance, on account of which it was often chosen by foreign nationals in conjunction with a different law to govern their substantive rights. As a prospective suitor might, the court boasted of the superior legislative framework and supervisory powers of London courts which made them a popular selection for parties.

Upon having its jurisdiction affirmed by the Commercial Court, the arbitral tribunal in London rendered its award. However, as is the case with both modern break-ups and the enforcement of international arbitration awards, an unexpectedly lengthy period of time elapsed before the parties actually obtained closure to their dispute.

Courting chaos—multiple challenges to arbitral award

Far from putting the dispute to bed, the award was brought to Indian shores by the parties by initiating a sundry of actions before the domestic courts to set aside the arbitral award. The parties approached the district court in Uttar Pradesh, the High Court of Allahabad, and the High Court of Delhi. Eventually, the dispute was brought to the altar of

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The disputes boiled down to two issues—(i) whether a petition to set aside the arbitral award was maintainable and (ii) if so, whether it was the court in Uttar Pradesh or the court in Delhi which would have the territorial jurisdiction to hear the dispute. The SC directed that both issues be heard together by one court, ie the Delhi High Court (HC).

‘It’s not you, it’s me’—Delhi High Court asserts jurisdiction in lieu of Commercial Court

After several years of being snowballed from court to court, the issue was finally heard by the Delhi HC.

The Delhi HC ruled that the application to set aside the arbitral award was maintainable and the Delhi HC had the territorial jurisdiction to deal with the award (‘Impugned Order’). The Delhi HC’s decision divorced itself from both the principles laid down in the 2009 ruling, and the arbitration–friendly environment painstakingly nurtured by the SC in the post–*BALCO* era.

INDIAN SUPREME COURT OVERTURNS DELHI HIGH COURT’S VERDICT: ITS REASONING

Designation as to seat of arbitration tantamount to exclusive jurisdiction clause

Fortunately, upon appeal, the SC espoused the principles of the 2009 ruling, and struck down the Impugned Order.

The SC stated at the outset that as the arbitration agreement was entered into prior to 12 September, 2009, the principle stated in *Bhatia International v Bulk Trading S.A. and another* [2002] 4 SCC 105 (*Bhatia International*), would be applicable. The principle laid down in *Bhatia International* was that unless impliedly or expressly excluded by the parties, Part I of the Arbitration and Conciliation Act 1996 (the Act) would apply even to a foreign seated arbitration. The SC then navigated through innumerable judicial precedents that had interpreted the principle of implied/express exclusion laid down in *Bhatia International*.

The seminal decision of *Reliance Industries Ltd. & Anr v Union of India* [2014] 7 SCC 603 (*Reliance*), was referred to by the SC as authority that an agreement as to the ‘seat’ of an arbitration was tantamount to an exclusive jurisdiction clause. In relying on *Videcon Industries Ltd* [2011] 6 SCC 161, the SC impressed upon the fact that the provisions of an arbitration agreement were to be analysed very closely to assess whether Part I of the Act was expressly or impliedly excluded.

The SC then proceeded to assess the various contentions raised by the parties.

SC upholds appellants’ argument that 2009 ruling already affirmed in Balco and Enercon

When judicial precedents are somewhat ambiguous, it is customary for parties to indulge in a degree of ‘he said/she said’ to assert their interpretation of the law. This was the situation typified by the parties’ next set of arguments, and the SC’s interpretation of the critical issue constituted the kernel of this judgment.

The appellants had argued that the 2009 ruling had been accepted by the SC in *BALCO*, and in *Enercon*. Thus, the courts of India had already engaged with, and accepted, the principles of the 2009 ruling. The appellants seemed to be flirting with the idea that even if the principles in the 2009 ruling could not be accepted independently, they already formed a binding precedent by virtue of their acceptance by the SC in *BALCO* and *Enercon*.

The respondents, in turn, fervently countered this interpretation by arguing that the constitutional bench in *BALCO* had not approved the 2009 ruling. The observation to this effect in *Enercon* had been rendered without thoughtful regard to the law and facts by the SC.

The SC ruled in favour of the appellants. It took stock of the fact that the larger bench in *BALCO* had relied upon the 2009 ruling heavily, and reproduced entire paragraphs from the judgment. The court in *BALCO* had gone as far as adverting to the judgments relied upon by the Commercial Court in the 2009 ruling, such as *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] EWHC 426, and *C v D* [2007] 2 All ER (Comm) 557 and [2008] 1 All ER (Comm) 1001. The SC pointed toward the unambiguous statement of the SC in *Enercon* that ‘the observations made in *Shashoua* [which] have been approvingly quoted by this Court in *BALCO*.’ Successively, the SC in *Reliance* had also referred to the fact that *C v D* had been approved by the benches in *BALCO* and *Enercon*.

Ergo, the SC ruled that the ratio of the decision in *BALCO* reflected the principles underpinning the 2009 ruling, and the bench in *Enercon*, after weighing several authorities, had stated that these principles had been adopted by the SC in *BALCO*.

Held—principles of 2009 ruling formed ratio of Balco and Enercon

Leaving no stones unturned to cement the relationship between Indian courts and the principles underlying the 2009 ruling, the SC also clarified that the principles in the 2009 ruling had constituted the ratio of the decisions in *BALCO* and *Enercon*, and successive courts were thereby irrevocably bound to follow them.

The SC extracted the interpretation adopted by previous benches to the meaning of ‘ratio.’ In *Director of Settlements, A.P. and others v MR. Apparao and another* [2002] 4 SCC 638, for instance, it was lucidly described as ‘the principle found out upon a reading of the judgment as a whole, in the light of the questions before the court...’ Several other decisions of the apex court mirrored this interpretation.

In testing the factual situation on the cornerstone of these decisions, the SC ruled that the question that arose in *BALCO* as well as the discussion made by the *BALCO* bench in relation to the 2009 ruling was squarely within the context of the primary question before the SC in that decision – i.e., the applicability of Part I of the Act. Thus, the principles of the 2009 ruling undoubtedly formed the ratio of *BALCO*.

Accordingly, the SC’s decision solidified the union between the 2009 ruling and Indian precedents.

SC rejects respondents’ contention that 2009 ruling had not attained finality

Switching gears from attempting to divorce Indian courts from the principles of the 2009 ruling, to seeking to annul the effect of the 2009 ruling itself, the respondents crafted an argument that since the 2009 ruling had arisen in the

context of an anti-suit injunction, it had not obtained finality.

The SC cautioned that if the respondents' contention was to be accepted, it would lead to a violation of judicial discipline. Once the SC had accepted that the decisions in *BALCO* and *Enercon* which approved the 2009 ruling were binding precedents, it could not question the finality of the 2009 ruling. The SC disapprovingly labelled the argument as a complete anathema to law.

No harm, no foul—appellants did not waive right to contest jurisdiction by approaching domestic court

The respondents also asserted that as the appellants had approached the courts in India, they had waived their right to contest the issue of jurisdiction.

The SC relied upon *Kanwar Singh Saini v High Court of Delhi* [2012] 4 SCC 307, as advanced by the appellants. In that case, it had been held that the conferment of jurisdiction was a legislative function which could not be endowed by mere consent of the parties, nor by a court. Lest a court passed an order having no jurisdiction, it would amount to a nullity.

In view of this principle, the SC ruled that any filing of application by the appellants in the Indian court could not clothe such courts with jurisdiction, unless the law vested the same in such courts.

Arbitration agreement has no independent relationship with Indian courts

The SC proceeded to analyse whether there was any scope, independent of the aforesaid grounds, to rule that the courts in India could have set aside the arbitration award under the Act. The court answered this question in the negative.

The SC clarified that the arbitration agreement was not silent on the law and procedure to be followed, as it had specified that the arbitration proceedings would be in accordance with the ICC Rules. In *Enercon*, the distinction which had been created between 'venue' and 'seat' in the 2009 ruling had been accepted, and remained operative. The arbitration agreement had been interpreted in the 2009 ruling and it had been held that London was not the mere location, but the courts in London had supervisory jurisdiction.

The respondents, undoubtedly clutching at straws, argued that as the arbitration agreement had the closest and most real connection with India, the Indian courts would have supervisory jurisdiction as per the principle in *National Thermal Power Corporation v Singer Company* [1992] 3 SCC 551.

The SC's finding that the 2009 ruling had already been given effect to in *Balco* and *Enercon*, coupled with it striking down the contentions advanced by the respondents, led it to conclude that the courts in India did not have the jurisdiction to set aside the arbitral award.

WHAT OTHER PRACTICAL LESSONS CAN BE DRAWN FROM THE SC'S DECISION?

The conduct of the parties in the proceeding highlights a disturbing trend. As children of separated parents often take undue advantage of the situation by playing favourites with one, parties unhappy with an arbitration award rendered in a chosen seat are proceeding to challenge the award in another jurisdiction.

The remedy for both parents, as well as alternative jurisdictions, going forward, would be for each to support and encourage the rulings of the other, and refrain from entertaining such challenges at the threshold.

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— **Tanisha Khanna & Moazzam Khan**

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