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Further reassurance from the Indian Supreme Court for companies arbitrating Indian disputes abroad

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Three years after its landmark judgment in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, Inc.*, the Supreme Court of India in its decision in *Union of India v. Reliance Industries* has reaffirmed its commitment to adopting a pro-arbitration, anti-interventionist approach to international arbitration, and reassured foreign investors with pre-2012 arbitration agreements.

Background: The *Bhatia* problem

The Indian Arbitration and Conciliation Act 1996 (the 1996 Act) is based on the UNCITRAL Model Law and contains two distinct parts: Part I, which applies to arbitrations seated in India; and Part II, which governs the recognition and enforcement of arbitral awards in arbitrations seated outside India.

Notwithstanding this clear demarcation in the 1996 Act, the Supreme Court of India, through a string of widely criticised rulings in the last decade, expanded the scope for judicial interference in foreign seated arbitrations far beyond what the 1996 Act envisaged.

It began with *Bhatia International v. Bulk Trading (Bhatia)*, where the Supreme Court held that Part I of the 1996 Act applied equally to arbitrations seated outside India, unless the parties had expressly or impliedly excluded its application in their arbitration agreements. Applying this logic, the Supreme Court decided Indian Courts had the power to grant interim relief in a foreign (Paris) seated arbitration. While this power can be useful, subsequent decisions of the Supreme Court used the *Bhatia* dictum in far more intrusive ways – for example, by appointing arbitrators in arbitrations seated outside India, and setting aside foreign awards. The long arm of the Indian judiciary caused serious problems for companies embroiled in (foreign seated) arbitrations with recalcitrant counterparties who often used *Bhatia* strategically: to invite the interference of Indian courts in foreign arbitrations and derail the arbitral process.

The (limited) solution: *BALCO*

The *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, Inc. (BALCO)* decision in 2012 reversed this trend. The Supreme Court overruled *Bhatia* and categorically stated that Part I of the 1996 Act shall *not* apply to arbitrations seated outside India. The choice of a foreign seat was enough – there would be no need to expressly or impliedly exclude the application of Part I in an arbitration agreement to prevent the Indian courts from interfering in arbitrations outside India.

The sting in the tail was that the ruling in *BALCO* was prospective and so applied only to arbitration agreements entered into after 6 September 2012. Older arbitration agreements continued to be governed by

the faulty *Bhatia* regime. This was unsatisfactory, not least because the question of what constitutes an express/implied exclusion for *Bhatia* purposes has always been mired in legal uncertainty.

Reliance Industries - Softening the blow of *BALCO's* temporal restriction

The good news is that the Supreme Court has now corrected this anomaly in its 22 September 2015 judgment in *Union of India v. Reliance Industries*. The Court clarified that even when dealing with pre-2012 arbitration agreements stipulating a seat outside India, the Indian courts have no basis to intervene. The same holds true where a foreign law is chosen to be the law governing the arbitration agreement (with or without the choice of a foreign seat). The Court made it clear that:

"…where the Court comes to a determination that the juridical seat is outside India or where law other than Indian law governs the arbitration agreement, Part-I of the Arbitration Act, 1996 would be excluded by necessary implication."

Reliance Industries therefore narrows the temporal restriction imposed by *BALCO*, and reassures companies with pre-2012 arbitration clauses which do not expressly exclude the application of Part I of the 1996 Act. As long as such agreements specify a foreign seat, or a foreign law governing the arbitration agreement, or where facts and circumstances point to the parties having made such a choice, Part I of the 1996 Act has no application and the Indian courts have no basis to intervene. The *Bhatia* dictum therefore no longer has any application in such cases. Foreign investors and Indian companies alike should welcome this clarification and the underlying pro-arbitration approach adopted by the Supreme Court.

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