Lexis®PSL ARBITRATION

Indian Supreme Court upholds choice of foreign seat by an arbitral institution (IMAX v E-City)

First published on Lexis®PSL Arbitration on 20/03/2017

Arbitration analysis: Durga Manda, Kshama Loya and Vyapak Desai of Nishith Desai consider the Indian Supreme Court's decision in IMAX Corporation v E-City in which the Supreme Court held that the choice of ICC Rules and the consequent choice of London as the seat by the ICC operated as an exclusion of Part I of the Indian Arbitration and Conciliation Act 1996, thereby ousting the jurisdiction of Indian courts to maintain and entertain a challenge to the foreign award.

Original news

IMAX Corporation v E-City Entertainment Pvt Ltd 2017 SCC OnLine SC 239 (not reported by Lexis®PSL)

Practical implications

In these proceedings, the Indian Supreme Court (the Court) considered whether to maintain a petition challenging a foreign award under s34 of the Arbitration and Conciliation Act, 1996 (the Act) in India, under the pre-BALCO regime, which permits challenges to foreign awards in India unless the parties have expressly or impliedly excluded the operation of Part I of the Act. The Court held that the choice of institutional arbitral rules (ICC Rules in this case) and the consequent choice of seat by the arbitral institution (London) operated as exclusion of Part I of the Act, thereby ousting the jurisdiction of Indian Courts to maintain and entertain a challenge to the foreign award. The Court in allowing the appeal, dismissed the order of the Bombay High Court.

The Indian Supreme Court's decision is a peculiarly interesting pro-arbitration judgment:

- an arbitral institution's choice of seat, made in consultation with parties, was upheld as a valid and binding choice of seat in the absence of an express choice of seat
- this was recognized as exclusion of Part-I of the Arbitration and Conciliation Act, 1996 (the Act), for arbitration agreements entered into prior to the judgment of the Supreme Court in *BALCO v. Kaiser Aluminum* (2012) 9 SCC 552
- the Supreme Court set aside the decision of the Bombay High Court

The decision is of particular interest as it relates to the pre-BALCO regime which has long been considered as a regressive regime in Indian arbitration. With respect to choice of governing law of the contract i.e. Singapore law, the Bombay High Court had in the most surprising manner, cast away the express choice by

parties and had applied the close nexus test in a manner that defeated the principle of party autonomy in arbitration. The Supreme Court did not elaborate on the close nexus test or the improper application of the test in the present case. Instead, it adopted a simplistic approach by respecting the clear choice made by two parties in choosing an unconnected law to govern the contract.

With respect to absence of choice of seat, the Supreme Court noted that the parties had merely chosen institutional arbitration rules, while not choosing the seat. However, in the next stroke of furthering party autonomy, it recognized that the parties were presumably aware that the ICC Rules contained provisions to fix a seat of arbitration. This power of arbitral institutions to fix a seat, employed after due consultation and agreement of the parties, has been upheld by the Supreme Court as a valid and binding choice of seat by and upon the parties. The Supreme Court duly noted that the choice of ICC Rules demonstrated willingness of the parties to choose a seat outside India. This was recognized as an exclusion of Part I of the Act, consequently ousting the jurisdiction of Indian courts. Needless to mention, the choice of London as a seat attracted English law as the curial law for conduct of the arbitration proceedings.

Thus, in this crisp and well-reasoned decision, the Supreme Court has not only identified the express intentions of the parties but has also adopted a pro-institutional arbitration stance by respecting the choice of institutional arbitration rules and the consequent procedures of the institution. As part of the institutional arbitration framework of the ICC, the Court of Arbitration, follows specific mechanisms and timelines to initiate an arbitration, receive pleadings, accept consolidation of claims, appoint arbitrators, determine the seat and scrutinize an award before it becomes binding on the parties. These internal processes are unique to each institution, and respect party autonomy at each stage of the arbitration.

This judgment promises relief to parties whose contracts date back to the pre-BALCO era where choice of seat remains absent, while choice of arbitral institution remains alive. If the chosen institutional rules contain provisions for designating the seat of arbitration, the parties will be in a position to exclude the operation of Part I of the Act where foreign seat is chosen by the arbitral institution. This will save the parties from potential situations where foreign awards might be amenable to challenge before the Indian courts.

Background

IMAX, a Canadian corporation specializing in the projection of large format films, leased six Projection Systems to E-City in India, under a Master Agreement (the Contract) in 2000.

According to Clause 14 of the Contract, the parties agreed that the contemplated transaction was contingent upon obtaining regulatory approval of the Reserve Bank of India, and further, that the parties agreed to any reasonable restructuring requested by the Reserve Bank of India, so long as such restructuring did not negatively impact E-city or IMAX in a material fashion.

The dispute resolution clause under the Contract provided that:

'This Agreement shall be governed by and construed according to the laws of Singapore and the parties attorn to the jurisdiction of the Courts of Singapore. Any dispute arising out of this Master Agreement or concerning the rights, duties or liabilities of E-City or IMAX hereunder shall be finally settled by arbitration pursuant to the ICC Rules of Arbitration.'

Thus, the governing law of the Contract was chosen to be Singapore law. ICC Rules were chosen to govern the arbitration proceedings. The seat was not chosen, nor was a law chosen as proper law of the arbitration agreement. Since the Contract did not specify a place or seat of arbitration, the Secretariat to the Court of Arbitration, ICC, in exercise of its powers under Art. 14 of the ICC Rules, recommended to the parties that

London be chosen as the seat of arbitration. This proposal was accepted by the parties, and the constituted tribunal accordingly conducted arbitration proceedings in London.

In February 2006, the tribunal found E-City to be in breach of the Contract and issued an award on liability. This was followed by another partial award on damages on August 24, 2007, and a final award on March 27, 2008 (collectively, "ICC Awards") in favor of IMAX, for a total sum of $US 11m. The ICC Awards form the subject matter of challenge and enforcement -related litigation in three jurisdictions - London, India and the U.S.A. These proceedings are briefly outlined below.

Sl. No	Jurisdiction/Forum	Year	Proceedings initiated by IMAX	Proceedings initiated by E-City	Outcome
1.	London (England)	2004	Initiation of ICC Arbitration under the Master Agreement		Successful final award for damages obtained in 2008
2.	Bombay High Court (India)	2008		Delayed Arb. Petition filed under s. 34 of the Act, to set aside the ICC Awards. Notice of Motion filed against maintainability of s.34 and condonation of delay	Successful in 2013;
3.	Superior Court of Justice, Ontario (Canada)	2011	Proceedings for confirmation of ICC Awards		Successful in 2011
4.	Supreme Court of New York (U.S.A.)	2012	Enforcement proceedings of the ICC Final Award		Default judgment passed in 2012 (despite being made aware of the pending s. 34 proceedings in the Bombay High Court)
5.	Supreme Court of India	2013	Special Leave Petition, in appeal against the Bombay High Court decision on allowing maintainability of the s. 34 Petition filed by E-City		Successful dismissal of Bombay High Court's order by the Court in 2017
6.	Supreme Court of New York (U.S.A.)	2014	Execution proceedings against Essel Group, E-City's parent group		Pending
7.	Superior Court of Justice, Ontario (Canada)	2014		Appeal against its 2011 decision in favour of IMAX	Pending
8.	Bombay High Court (India)	2014		Anti-Suit Injunction against IMAX for executing the recognised ICC Final Award.	Rejected in 2015

The s 34 petition before the Bombay High Court

In 2008, the Indian chapter of this litigation started with E-City filing a petition in the Bombay High Court ([2013] 6 Bom CR 654) to set aside the ICC Awards under s. 34 of the Act (the Petition). E-City claimed operation of Part-I of the Act to the ICC Awards rendered in London, in a pre-BALCO regime where parties had not expressly or impliedly excluded operation of Part-I of the Act. This petition was opposed by IMAX on the grounds that the ICC Awards were foreign awards and the present challenge was not maintainable.

The main issue before the Bombay High Court was whether or not the Petition was maintainable, in light of the decision of the Court in *Bhatia International v. Bulk Trading* (2002) 4 SCC 105.

The Bombay High Court recognized that there was no express exclusion of Part I of the Act in the arbitration agreement. The Court did not delve into the possibility of an implied exclusion by choice of Singaporean law, the ICC Rules or the choice of London by the ICC Court of Arbitration as the seat of arbitration. Instead, it held that Part I of the Act was applicable to the Contract since there was no express exclusion.

Further, the Bombay High Court agreed with E-City's argument that although Singapore law was agreed to be the governing law of the Contract, the proper law of the contract applicable to the Contract ought to be Indian law. The Bombay High Court employed the doctrine of 'close nexus' to arrive at its decision. It considered the following factors while reaching its decision:

- the parties were required to comply with Indian laws (Clause 14 of the Contract)
- the surrounding circumstances of the case and events leading to the breach arose in India
- correspondence and agreements, including legal obligations of the parties, arose in India
- the subject matter of the dispute (the leased IMAX systems) was located in India
- the cause of action had arisen in India

Given the above factors, the Bombay High Court reasoned that a 'vague' choice of Singaporean law would not be appropriate, and therefore, the Contract ought to be governed by Indian law. Further, since there was a reference to Singaporean law and Singaporean courts while the Contract had a close nexus with India, the Bombay High Court ruled that the proper law of contract is indeterminate, leading to the application of conflict-of-law rules. This, coupled with the absence of express exclusion of Part I of the Act, led to operation of Indian law as 'proper law' and application of Indian judicial decisions, namely *Bhatia International*. This proper law, according to the Bombay High Court, would:

"*govern the validity, interpretation and effect of all clauses including the arbitration clause in the contract as well as the scope of the Arbitrator's jurisdiction… Therefore, the agreement, even if any, which excludes the jurisdiction of [the competent courts of India] and the governing laws of India is totally inconsistent with the other clauses of the agreement between the parties.*"

The Bombay High Court also ruled that the agreed seat i.e. London would not take away the right of the parties to challenge the final award in India. The Bombay High Court appears to have made a misplaced distinction between the powers of English Courts to supervise the arbitration during the conduct of the proceedings, and the more effective powers of Indian courts to exercise jurisdiction and enforce the final award in India. The Court held that the former cannot be compared with the latter, and that the agreed venue i.e. London did not take away the right of the parties to challenge the award in any of the available fora.

The Bombay High Court concluded that in the absence of express exclusion of Part I of the Act by the parties, along with the close nexus of the Contract with Indian laws, Indian law would be the governing law of the Contract as well as the applicable law for entertaining the challenge to the ICC Awards in India Therefore, the petition was held to be maintainable in India.

Decision of the Supreme Court

IMAX preferred a Special Leave Petition against the decision of the Bombay High Court. The Court first considered the applications and various pleadings filed by E-City in the arbitration proceedings, the Bombay High Court and the Court, where E-City expressly admitted that the seat of arbitration was London.

On the issue of choice of Singaporean law as governing law of the Contract, the Court noted that the parties had expressly agreed upon Singaporean law to govern interpretation of the Contract. Further, if any non-arbitrable dispute arose between the parties, the Court noted that the parties had agreed to approach Singaporean Courts. Therefore, the Court did not find reason to exercise its jurisdiction on the issue of governing law of the Contract as there was no ambiguity in the clause.

The Court then moved to laying emphasis on the choice of arbitral institutional rules by the parties i.e. the ICC Rules, for conduct of the arbitral proceedings. The Court relied on specific procedures under the ICC Rules, particularly article 14, which permitted the ICC Court of Arbitration to fix the seat of arbitration unless agreed upon by the parties, after consultation with the parties. The Court noted that the ICC Court had accordingly consulted with the parties before fixing London as the seat of arbitration. Thus, the Court found that "*the parties expressly agreed that the arbitration will be conducted according to the ICC Rules of Arbitration and left the place of arbitration to be chosen by the ICC. The ICC in fact, chose London as the seat of arbitration after consulting the parties. The arbitration was held in London without demur from any of the parties. All the [ICC Awards] were made in London and communicated to the parties.*" Accordingly, the Court found that "*this was a clear case of the exclusion of Part-I of the Act.*"

Therefore, the Court held that "the two reasons for Part-I not being applicable were as follows:

- *(i) "Parties agreed that the seat maybe outside India as may be fixed by the ICC; and*
- *(ii) It was admitted that the seat of arbitration was London and the award was made there."*

The Court held that the challenge to the ICC Awards rendered in London was not maintainable in India, since the Parties had excluded the operation of Part I of Act by choice of ICC Rules, and further choice of London as the seat of arbitration upon consultation conducted with the Parties by the ICC Court of Arbitration. Therefore, the Court rejected the maintainability of the Petition in India and granted the appeal filed by IMAX.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.