Supreme Court of India delivers landmark arbitration decision in Bharat Aluminium, overruling Bhatia International

As reported in our blog posting on 6 September 2012, the controversial decision of the Indian Supreme Court in *Bhatia International v Bulk Trading SA*[1] has been overruled by the Indian Supreme Court in the case of *Bharat Aluminium v Kaiser Aluminium*, paving the way for an end to intervention by the Indian courts in arbitrations seated outside India. However, for contracts containing arbitration clauses entered into prior to the decision, the previous difficulties will remain, at least for now.

BACKGROUND

The Indian Arbitration and Conciliation Act, 1996 (the "Act") provides the law applicable to arbitrations in two parts – Part I of the Act deals with the initiation and conduct of arbitration, and enforcement and challenge of any arbitral award that may be rendered; Part II of the Act deals with enforcement of arbitral awards delivered in foreign seated arbitrations pursuant to either the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention") or the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (the "Geneva Convention").

In *Bhatia International*, the Supreme Court held that Part I of the Act applied even to arbitrations seated outside of India, unless the parties had expressly or impliedly agreed to exclude Part I of the Act. This decision was a well-intentioned attempt to deal with a perceived lacuna in the Act in that the power for Indian courts to order interim relief in support of arbitration proceedings is found in Part I of the Act (at section 9). If Part I applied only to arbitrations seated inside India, one consequence would be that there was no power for the Indian court to grant interim relief in aid of a foreign-seated arbitration; for example, an injunction preserving property in India. However, difficulties arose as parties relied on *Bhatia International* to invite the Indian courts to apply other provisions of Part I to arbitrations commenced and awards rendered in seats outside India. This produced the significant consequence that even in the context of foreign-seated arbitrations, where Part I of the Act was not excluded, Indian courts could, amongst other things:

- Award interim relief in support of the arbitration;
- Appoint arbitrators in appropriate circumstances; and
- Set aside arbitral awards.

Several authors and commentators had raised concerns about the impact and desirability of such an overarching interpretation. Of great practical concern to commercial parties, given the delays typical of much of Indian court litigation, was that any issue raised for decision with the Indian courts would delay the progress of the arbitration, or the enforcement of the award, by months or years. For example, in the case of *White Industries v Coal India* an award rendered in an ICC arbitration seated in Paris was challenged in the Indian courts under Part I

(section 34) of the Act. A challenge to the jurisdiction of the Indian courts to entertain the setting aside application was made in 2002 which remained unresolved on appeal some 10 years later. This delay resulted in a separate arbitration tribunal[2] making a finding against the Government of India itself on the basis that White Industries had been denied "effective means" for the enforcement of its rights. (See our e-bulletin on the *White Industries* case here.)

THE DECISION

In light of conflicting opinions on the correctness of the decision in *Bhatia International* it was referred to a panel of five judges of the Supreme Court for reconsideration in the case of *Bharat Aluminium v Kaiser Aluminium*. A key issue the court had to consider was whether Part I of the Act applied to arbitrations seated outside of India.

The much awaited decision in *Bharat Aluminium* was delivered by the Supreme Court of India on 6 September 2012. The Supreme Court overruled the decision in the case of Bhatia International and laid the foundation for much improved arbitral jurisprudence in India:

- ### Applicability of Part I of the Act to foreign seated arbitrations

The decision in *Bharat Aluminium* rejected the approach adopted by the court in *Bhatia International* and confirmed that Part I of the Act does not apply to arbitrations seated outside India.

In doing so, the Court adopted a 'seat-centric approach'. The Court held that the only relevant distinction under the Act was between 'domestic arbitrations' (i.e. arbitrations with a seat in India) and 'foreign arbitrations' (i.e. arbitrations with a seat outside India): Part I applies to domestic arbitrations – even if both parties involved are non-Indian; and Part I does not apply to foreign arbitrations – seemingly even if both parties involved are Indian.

The Court also confirmed that awards rendered in foreign arbitrations are only subject to the jurisdiction of Indian courts when they are sought to be enforced in India under Part II of the Act – which part is entirely distinct from and independent of Part I of the Act.

The Court expressly rejected the 'party autonomy approach' urged on it by some of the parties to the case to the extent it was inconsistent with the 'seat-centric approach'. Thus the Court held that it would not be possible for parties to a foreign arbitration to agree to apply Part I of the Act and thereby grant supervisory jurisdiction to the Indian courts. Where such parties did purport to apply Part I in their arbitration agreement, the Court held that this would mean that the parties had contractually incorporated those elements of the Act concerned with 'the internal conduct of the arbitration' into their arbitration agreement to the extent they were not inconsistent with the mandatory provisions of the curial law of the arbitration. The seat-centric approach confirmed by the Court has two quite significant implications in practice:

1) **Setting-aside of Arbitral Awards**: Indian courts will not be empowered to set

aside foreign arbitral awards. The Court specifically clarified that this would be the case even if the law applicable to the substantive aspects of the dispute was Indian law.

The court considered that such an approach was consistent with Article V(1)(e) of the New York Convention. The court noted that under the New York Convention, the only courts empowered to set aside arbitral awards are those at the seat of the arbitration and, where these courts are not empowered, the courts of the country whose laws govern the procedure of the arbitration. The New York Convention does not empower courts of the country whose substantive laws apply to the arbitration to set aside arbitral awards on that basis.

2) **Awarding Interim Relief**: Indian courts will not be empowered to order interim relief in support of foreign-seated arbitrations, notwithstanding any contrary intention or purported agreement of the parties.

The Court clarified that a separate suit for the grant of interim relief (based on general civil procedure law remedies) would also not be maintainable. Absent an explicit power to grant interim relief in aid of foreign arbitration, the Court considered that Indian courts are not empowered to order interim relief independently where the matter is one over which they do not have jurisdiction to grant final relief.

The Court explained that the lack of interim relief in India to assist foreign arbitrations is to be considered a 'necessary incident and consequence' of choosing a foreign seat for India-related arbitrations. The Court also noted that any perceived lacuna in this area was one for the legislature to correct and not one the court could fill.

The decision also considered in detail the distinction between the 'venue' and the 'seat' of arbitration, and clarified that it is open to the parties and the tribunal to choose a venue for the conduct of hearings different from the seat of the arbitration. Such a choice cannot in itself alter the seat of the arbitration or the law governing the arbitration. Seemingly, therefore, if the seat of arbitration is not in India, the holding of hearings in India for convenience would, in itself, be insufficient to attract Part I of the Act.

- Applicability of the decision

The Court stated that in order to do complete justice, the law laid down by the Supreme Court in *Bharat Aluminium* should be prospective and would only apply to arbitration agreements executed after the date of the judgment (6 September 2012). Therefore, for arbitrations initiated pursuant to arbitration agreements executed before this date, the decision of the Supreme Court in *Bhatia International* and its consequential developments will continue to apply. We understand that this aspect of the decision may be the subject of a further petition for reconsideration to the Supreme Court.

COMMENT

The decision of the Supreme Court appears promising and should put an end to the intervention of Indian courts in arbitrations seated outside India. The courts

have granted primacy to parties' choice of seat and aligned Indian jurisprudence with that adopted in the UNCITRAL Model Law and that prevalent in most other arbitration friendly jurisdictions.

The mere fact that the parties have chosen Indian law or that the dispute has connections with India (either because of the residence of one of the parties or because the subject matter is inside India) will no longer, on its own, create jurisdiction for Indian courts to exercise supervisory jurisdiction over arbitration proceedings.

In terms of drafting arbitration clauses in India-related contracts for non-India seated arbitrations, where parties wish to avoid the jurisdiction of Indian courts, they will no longer need to exclude the application of Part I of the Act. However, in light of the decision in *Bharat Aluminium*, the decision to choose a non-Indian seated arbitration will have a significant downside. The inability to obtain interim relief inside India is a serious restriction (especially if the subject matter of the dispute is within India, and/or there is a need to restrain a party inside India from altering the status quo pending a decision in the arbitration). It is unlikely that wording currently common in India-related arbitration agreements which seeks to retain the powers for the Indian court to grant interim relief (under section 9 of the Act) and collect evidence (under section 27 of the Act) in support of foreign arbitrations will have any effect as a matter of Indian law given the Supreme Court's analysis of this issue. In such a situation, parties will need to consider carefully the relative importance of obtaining interim relief, while choosing a seat for arbitration.

A significant limitation of the decision in *Bharat Aluminium* however is that it only applies to arbitration agreements entered into after 6 September 2012. If parties who have executed their arbitration agreements prior to this date wish to come within the fold of the ruling in *Bharat Aluminium* (bearing in mind the limitations associated with obtaining interim relief etc.), they should consider re-executing their contracts, or at least the arbitration agreements within those contracts.

Otherwise, and for the time being, the legacy of the decision in *Bhatia International* will continue to be felt. In respect of arbitrations initiated pursuant to such agreements, Indian courts will continue to be able to exercise all the powers available under Part I of the Act, unless the parties have expressly or impliedly chosen to exclude the provisions of Part I of the Act. That said, in recent times, several Indian courts have incrementally reduced the impact of *Bhatia International* by extending the situations where parties can be taken to have impliedly excluded Part I of the Act (see, for example, the position adopted by the Calcutta High Court in the recent case of *Coal India v Canadian Commercial Corporation* described in our previous e-bulletin). This has had the effect of limiting judicial intervention in foreign-seated arbitrations considerably. It is hoped that the Indian courts will continue to adopt such an approach in those legacy cases that do come before them in the future, especially in light of the clear message of non-intervention sent out by the Supreme Court.

The decision of the Supreme Court in *Bharat Aluminium* appears to turn a page in the approach taken by the Indian courts in relation to their supervisory role in international arbitration. However, the decision in *Bharat Aluminium* is only part of the landscape for arbitration in India. The Supreme Court's clear cut analysis of the non-application of Part I of the Act to foreign arbitrations has left parties with a

stark choice between arbitrating inside India and thereby having access to the Indian courts to apply for interim relief, and arbitrating outside India but having no such access. This decision is made more difficult by the challenges that remain in conducting domestic arbitration in India, including the risk of delays, and the increased costs and complexity arising from parties making tactical applications to the Indian courts under Part I of the Act.

Parties who succeed in foreign arbitrations which require enforcement inside India will also have to contend with the challenges of enforcing their awards through the Indian courts which, again, can be subject to considerable delays. Albeit the ultimate record of the Indian courts in upholding foreign arbitration awards is strong, commercial parties will be concerned at the time taken for challenges to enforcement to be decided and at the prospect of the Indian courts conducting effective re-hearings of the merits of decided cases in order to decide challenges brought under the expanded definition of 'public policy' applied in the Indian courts (see the case of *OOO Patriot v Phulchand* described in our previous e-bulletin).

Please note that Herbert Smith LLP does not practise Indian law, and the contents of this e-bulletin do not constitute an opinion upon Indian law. If you require such an opinion, you should obtain it from an Indian law firm (we would be happy to assist in arranging this).

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1. (2002) 4 SCC 105.

2. White Industries Australia Limited v Republic of India, Final Award (UNCITRAL), 30 November 2011.