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Indian Supreme Court scales back intervention in foreign-seated arbitrations

The Supreme Court of India has significantly limited the extent to which Indian courts can intervene in foreign-seated arbitrations.

The ruling, given by a five-judge constitutional bench in *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc*, reverses the controversial *Bhatia International* decision from 2002 which had opened the door for heavy-handed intervention by the Indian courts.

Part I only applies to arbitrations seated in India

Bharat Aluminium concerned the application of Part I and Part II of the Arbitration and Conciliation Act 1996 (the **Indian Act**). Part I relates to the commencement and conduct of arbitration proceedings. It includes provisions relating to the appointment of arbitrators, the granting of interim measures and grounds upon which an award may be set aside. Part I was intended to apply to arbitrations conducted in India. Part II provides for the enforcement of awards made outside India.

Controversially, the Supreme Court had extended the application of Part I to arbitrations seated outside India, unless the parties expressly or impliedly agreed otherwise, in *Bhatia International v Bulk Trading SA*. In *Venture Global Engineering v Satyam Computer Services Ltd*, the Supreme Court held that an LCIA award made in London could be set aside on the basis that it was contrary to Indian law (pursuant to section 34 in Part I of the Indian Act). Usually an award can only be set aside or annulled by the courts of the place where the award was made, not by any other courts.

Bharat Aluminium has reversed those decisions. Focusing on the plain reading of Part I and the original rationale for the Indian Act, the Supreme Court concluded that Part I only applies to arbitrations seated in India. This decision appears to lay the foundation for a less interventionist approach by the Indian courts and has already met with a positive response from the international arbitration community.

Foreign awards can no longer be set aside by the Indian courts

Importantly, *Bharat Aluminium* has restricted the Indian court's power to set aside or annul an award under section 34 (Part I) to awards made in India. According to accepted international arbitration law and practice, an arbitral award can only be set aside in one place, i.e. by the courts of the seat of the arbitration.

An award may then be enforced by the courts of a State that is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Enforcement may be resisted only on the limited grounds set out in the New York Convention. Those grounds are replicated in section 48 (which is in Part II of the Indian Act).

Key issues

- Part I only applies to arbitrations seated in India
- Foreign awards can no longer be set aside by the Indian courts
- No interim measures in support of foreign-seated arbitrations
- Application to arbitration agreements executed after 6 September 2012

No interim measures in support of foreign-seated arbitrations

The Supreme Court also clarified that the provisions for interim relief under section 9 (which is in Part I of the Indian Act) are restricted to supporting arbitrations which are seated in India. Consequently, it will not be possible for parties to apply to the Indian courts under section 9 to freeze assets or bank accounts or obtain an anti-suit injunction in support of an arbitration taking place outside India. This is a less welcome development.

Previously parties could seek interim relief in support of foreign-seated arbitrations before the Indian courts under section 9 (provided they had not excluded section 9 in their arbitration agreement). Now, unless the Indian Act is amended (and the implementation of long-discussed consultations for reform still appear distant), parties can no longer seek interim measures under section 9 in support of a foreign-seated arbitration.

Application to arbitration agreements executed after 6 September 2012

The Supreme Court has acknowledged the impact of the *Bhatia International* and *Venture Global* decisions on existing arbitration agreements involving Indian counterparties. For this reason, it has declared that the restricted application of Part I will only apply to arbitration agreements executed after the date of the decision – 6 September 2012.

As a result, it may be some time before the impact of *Bharat Aluminium* is felt and international parties enjoy the benefit of a less interventionist approach by the Indian courts. In the meantime, parties involved with or contemplating arbitration proceedings pursuant to an existing arbitration agreement must continue to be aware that some Indian judges may still be inclined towards intervention in foreign-seated arbitration proceedings under Part I of the Indian Act.

Moreover, the Supreme Court has not addressed the expanded definition of "public policy" that has been adopted by the Indian courts in both cases challenging an award and cases resisting the enforcement of an award. A more restrictive definition of "public policy" is being considered as part of the long awaited reforms. In the meantime, it remains an issue of considerable concern.

Nonetheless, the Supreme Court's decision brings a welcome end to the *Bhatia International* controversy, which had cast a shadow over the Indian arbitration landscape. Foreign investors can now be increasingly confident that international arbitration provides a stable and predictable dispute resolution mechanism when contracting with Indian counterparties.

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