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THE LONG AND WINDING ROAD OF ARBITRATION IN INDIA: Examining 20 Years of the Indian Arbitration and Conciliation Act of 1996

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INDIA CANNOT SUSTAIN ITS QUEST FOR GLOBAL CREDIBILITY AND ENDEAVOR TO BE AN ATTRACTIVE DESTINATION FOR FOREIGN INVESTMENT IF IT IS BELIEVED TO BE AN UNRELIABLE VENUE FOR ENFORCING FOREIGN ARBITRATION AWARDS.

Many companies around the world are exclusively adopting arbitration to resolve cross-border commercial disputes. Their reasons for doing so are both numerous and varied — from mistrust of foreign courts and laws to confidence that impartial decisions

will be implemented through arbitration to the predictability, expediency and lower costs that arbitration promises. The enhanced efficiency and fairness of arbitration proceedings is strengthened by the easy enforceability of a foreign award in the forum where assets or funds that can satisfy the award are located.

As such, a common standard of enforcement of foreign awards is central to a successful international arbitration system. Two international instruments — the United Nations Commission on International Trade Laws (UNCITRAL) Model Law on International Commercial Arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) — provide the bases upon which contracting states may adopt domestic laws to implement a cross-border arbitration system. India is a signatory to the New York Convention and has adopted, in large measure, the UNCITRAL Model Law through the Indian Arbitration and Conciliation Act of 1996 (the Arbitration Act).[1] Despite these positive measures, India is far from being deemed an arbitration-friendly nation, owing primarily to the heightened interference by Indian courts in the enforcement of foreign arbitral awards.

This article proposes that the heightened interference causes foreign and domestic companies to lose confidence that Indian courts will recognize and enforce foreign arbitral awards. As a result, foreign companies may be deterred from doing business in India or with Indian entities, especially in situations where the Indian entity does not have assets or funds in an arbitration-friendly jurisdiction. The attractiveness of arbitration may similarly diminish in the eyes of domestic companies seeking to enforce foreign awards. Further, the intense judicial scrutiny of a system designed as an alternative to judicial processes proves contradictory to the spirit and purpose of arbitration and disadvantages India as an arbitration venue.

Below we briefly discuss how the relevant statutory provisions and key Supreme Court decisions have shaped arbitration in India.

The Indian Arbitration Act

The Arbitration Act is divided into four parts: of these, Part I and Part II are relevant to this discussion. Part I of the Arbitration Act comprehensively governs domestic arbitration matters where India is the venue of arbitration. Part II covers the recognition and enforcement of foreign arbitral awards.

For a foreign award to be considered under Part II, it must be from a state that is both a contracting state under the New York Convention and notified as a Convention Country in

The Gazette of India (notified country).[2] However, if the award is issued by a non-notified country, the party seeking enforcement must file a civil suit in India, which often devolves into a *de novo* trial on the merits of the case.[3]

Important provisions contained in Parts I and II that are relevant to the present discussion include judicial review of domestic awards (section 8), judicial review of foreign awards (section 45), the power of courts to set aside an arbitral award (section 34), and the controversial "public policy" challenge to enforcing an award (section 48).

Important Supreme Court Decisions

The Infamous Public Policy Exception

ONGC v. SAW Pipes[4] is probably the most significant decision on the scope of the term "public policy." In this case, the Supreme Court of India adopted the definition of public policy as "an error of law" and rejected the earlier understanding of it being "more than a violation of law of India."[5] Now, enforcement of foreign and domestic arbitral awards can be refused on grounds of public policy when the award or enforcement would be contrary to the fundamental policy of Indian law, the interest of India, justice or morality, or if the award is patently illegal. This has had the unfortunate effect of making most arbitral awards susceptible to challenge in Indian courts, causing the public policy exception to be dreaded by the party who seeks enforcement under Indian arbitration law. The exact scope of public policy, however, is far from settled.[6]

To Plea or Not To Plea: Limits of Court Intervention

Two years after *Saw Pipes* in 2005, the Indian Supreme Court held that, following a *prima facie* showing of the validity and the existence of the arbitration agreement, it was for the arbitral tribunal, and not the court, to decide the case on its merits.[7] Although the *Shin-Etsu Chemicals Co. v. Aksh Optifibre Ltd.* decision was hailed as a more progressive, less interventionist and pro-arbitration stance, the court in this case nevertheless expressly acknowledged the right to challenge the decision of the arbitral tribunal to retain jurisdiction post-award.

Mixing It Up: Part I and International Commercial Arbitration Held Outside India

In the strongly criticized 2002 decision in *Bhatia International*,[8] which was later reaffirmed in 2008 by *Venture Global*,[9] the Supreme Court ruled that the provisions of Part I of the Arbitration Act would apply in the case of international commercial arbitrations held outside India unless the parties indicated otherwise in their arbitration agreement, even

though Part I expressly states that "[t]his Part shall apply where the place of the arbitration is in India."[10]

In 2012, the Supreme Court delivered the much-awaited BALCO judgment,[11] which reversed the preceding *Bhatia* and *Venture Global* decisions, establishing that Part I indeed does not govern international arbitrations held outside India. The decision further restored the territoriality principle enshrined in the Arbitration Act, recognizing that jurisdiction over arbitration would vest in the courts at the forum. Recently, the Supreme Court held that, even if the contract is governed by Indian law, the decision to exclude India as either the seat or the venue of the arbitration indicated the parties' agreement to exclude application of Part I.[12]

Recent Significant Developments

Although these alterations to the Indian arbitration law framework are too recent to have begun yielding measurable results, they are likely to be extremely impactful.

The Arbitration and Conciliation (Amendment) Act 2015

In the final week of 2015, the Indian legislature passed the Arbitration and Conciliation (Amendment) Ordinance and the Commercial Courts Ordinance into law. The latter Ordinance was designed to make the resolution of commercial disputes easier and more efficient. But the real clincher is the amendment to the Arbitration Act itself. Some of the significant changes it introduces are as follows:

1. International arbitration disputes will be filed directly in high courts; domestic arbitration disputes may be filed in high courts having appropriate (original) jurisdiction.

2. Certain provisions of Part I will apply to international commercial arbitrations regardless of whether the venue is in India or not, unless the parties agree otherwise.

3. Courts shall have a duty to refer parties to arbitration unless there is a finding that the arbitration agreement is not valid.

4. Courts will only provide interim relief where the parties cannot obtain similar relief from the arbitral tribunal. After any such interim order, the parties will be time-bound to complete the arbitration proceedings.

5. The statutory definition of "public policy" was expanded to conform more closely with the case law (discussed previously).

6. General time periods were introduced with options to extend, requiring all arbitrations to be completed within 12 months, and similarly requiring all court cases to be disposed of within one year.

A New Model BIT Law

In the past few years, several multinational corporations have claimed against the Indian government for violating its obligations under various Bilateral Investment Treaties (BITs), including Vodafone, Nokia and, recently, Cairn Energy. In response, Indian authorities released a draft BIT law in early 2015, and a final version was recently published, which will serve as a basis for ongoing and future BIT-related negotiations. Although the draft BIT law sought to cortain, as much as possible, the rights of foreign investors, the model BIT law affords better protection, though perhaps not enough. Notably, the Model BIT Law contains a broad definition of "investment," affording protection to a wider spectrum of investment-related activities; a narrow definition of "investor," limiting protection to entities having significant business activity in the country; non-discrimination obligations for states with regard to indemnification or compensation of losses suffered due to war, civil strife or natural disaster; a nonactionable obligation on states to publish laws in a timely manner; and, notoriously, vague investor obligations pertaining to corruption, disclosure and maintenance of records.

Conclusion: The Future of Arbitration in India

India cannot sustain its quest for global credibility and endeavor to be an attractive destination for foreign investment if it is believed to be an unreliable venue for enforcing foreign arbitration awards. A combination of experience and need have driven the Indian legislature to pass laws giving effect to the global standards for enforcement of arbitral awards, wherever they may be rendered. It remains to be seen whether these changes will be fully respected by Indian courts and whether they will be enough to overcome the difficulties in the current framework.

Endnotes

1 Act No. 26 of 1996 (16 August 1996).

2 This was also a requirement in the preceding Foreign Awards (Recognition and Enforcement) Act, 1961.

3 *See* "Proposed Amendments to the Arbitration and Conciliation Act, 1996," a consultation paper published by the Ministry of Law and Justice, Government of India, *available at* http://lawmin.nic.in/la/consultationpaper.pdf.

4 *See Oil & Natural Gas Corp. Ltd. v. SAW Pipes Ltd.*, (2003) 5 SCC 705.

5 See *Renusagar Power Co. Ltd. v. General Electric Company*, (1984) 4 SCC 679. Here, the Court considered the interpretation of section 3 of the Foreign Awards Act, 1961, which was a precedent to the current Arbitration Act. Thus, *Saw Pipes* is distinguishable on the basis that it considered a similar, although not identical, provision under the new law.

6 *See, e.g. Associate Builders v. Delhi Development Authority*, (2014) SCC OnLine SC 937; *Oil & Natural Gas Corp. Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263.

7 *See Shin-Etsu Chemicals Co. v. Aksh Optifibre Ltd.*, (2005) 7 SCC 234.

8 *See Bhatia International v. Bulk Trading*, (2002) 4 SCC 105.

9 *See Venture Global Engineering v. Satyam Computers*, (2008) 4 SCC 190

10 The Indian Supreme Court noted that, while attractive, accepting the opposite argument (i.e., where Part II does not apply) would leave a gap in the Act as neither Part I nor Part II would apply to arbitrations held in a country that is not a signatory to the New York Convention or the Geneva Convention, and so no law would govern such arbitrations, and a party would be remediless because there would be no basis for interim relief in India, even though the properties and assets are in India.

11 *See Bharat Aluminium Co v. Kaiser Aluminium Technical Services*, (2012) 9 SCC 649.

12 *See Reliance Industries Limited & Anr. v. Union of India (UOI)*, (2014) 7 SCC 603.