International arbitration in India

A tale of gradual progression

By Sherina Petit and Matthew Townsend with Sneha Janakiraman

Over the last year, the Indian judiciary has made significant strides in establishing India as an arbitration-friendly jurisdiction. However, further reforms are still needed to remedy the pitfalls left unaddressed following the Supreme Court of India's decision in *Bharat Aluminium Co Vs Kaiser Aluminium Technical Services Inc* (BALCO). We trace the development of the recent arbitration-friendly approach of the Indian judiciary, the pitfalls that remain within the legal regime and suggest precautions that may be taken by investors.

Before *BALCO*

The *BALCO* decision closed the door on a controversial line of authority, which since 2002 had allowed the Indian courts to intervene in arbitrations seated outside the country.

The judgment, widely viewed as a positive (and overdue) step for India-related arbitration, overruled the principle that the provisions of Part I of *the Indian Arbitration and Conciliation Act 1996* (the Act) would apply to international arbitrations held outside of India, unless excluded by the parties to those arbitrations. This principle was first laid out in an earlier Supreme Court of India decision in *Bhatia International Vs Bulk Trading SA*.

Part I of the Act, which is drafted to apply "where the place of arbitration is in India", provides the Indian courts with substantial procedural and determinative powers in respect of arbitration proceedings, including the power to grant interim measures (section 9), the authority to make arbitral appointments in the absence of agreement by the parties (section 11) and the power to set aside arbitral awards (section 34).

The *Bhatia* principle, that Part I could in certain circumstances be exercised in "offshore" arbitration, gave the Indian courts effective supervisory jurisdiction over certain arbitrations seated outside India – a practice considered to have had an adverse impact on the efficiency, certainty and finality of India-related arbitrations.

On the basis of the *Bhatia* decision, the Indian courts went on to set aside a foreign arbitration award (*Venture Global Engineering Vs Satyam Computer Services Limited*) and appointed an arbitrator in proceedings seated outside of India (*Indtel Technical Services Pvt Ltd Vs WS Atkins Plc*).

The effect of these and other judgments was to prompt many parties to commercial contracts to draft arbitration clauses explicitly excluding the application of Part I of the Act. At the same time, in response to growing professional and academic criticism of the arbitration "unfriendliness" of the *Bhatia* principle, the Indian lower courts started to take a narrow view of the Indian court's right to intervene in foreign arbitrations. Notably, in *Hardy Oil and Gas Vs Hindustan Oil Exploration*, the Gujarat High Court ruled that Part I of the Act was excluded *implicitly* by the parties' nomination of a foreign law as the governing law of the arbitration.

In *Videocon Industries Ltd Vs Union Of India & Anr* and *Yograj Infrastructure Ltd Vs Ssang Yong Engineering and Construction Co Ltd*, the Supreme Court attempted to clarify what constitutes such an implicit agreement. In *Yograj*, it was held to be sufficient that the parties nominated Singaporean law as the law of the seat of the arbitration (or *curial* law). Unhelpfully, however, the Supreme Court confused matters by ruling in the *Videocon* judgment that the relevant law was not the curial law of the arbitration – in that case Singaporean law – but the law governing the arbitration agreement – that was English law.

The delay in resolving the issues arising from *Bhatia* was widely perceived as doing harm to India's investment and business climate, leading to the first ever successful investment treaty claim against India. In *White Industries Australia Limited Vs The Republic of* India, the tribunal found that delays faced by the applicant in enforcing a Paris-seated ICC award, due in part to set-aside proceedings brought before the Delhi High Court, put India in breach of its obligation under the India–Kuwait bilateral investment treaty to provide an "effective means of asserting claims and enforcing rights".

In early 2012, the Supreme Court began hearing a number of consolidated appeals on the *Bhatia* issue. The court invited *amici curiae* briefs and received briefs from LCIA India and SIAC.

The Supreme Court's decision in *BALCO*

On September 6, 2012, a five-member constitutional bench that included the then presiding Chief Justice SH Kapadia, overturned the *Bhatia* principle and held that Part I of the Act applies only to arbitrations seated in India.

In supporting its judgment, the court made clear that in its view it was the parties' choice of seat, as opposed to the law governing the contract or arbitration agreement, which determined whether the Indian courts had jurisdiction. This was welcome clarification of a point which had been a source of confusion in previous Supreme Court judgments.

In the Supreme Court's words:

"...the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings."

Therefore:

*"*Only *[sic] if the agreement of the parties is construed to provide for the "seat"/"place" of Arbitration being in India- would Part I of the Arbitration Act, 1996 be applicable".*

The court further clarified that, due to the territoriality principle adopted by the Act, Part I and Part II of the Act are mutually exclusive.

Accordingly, the power to set aside an arbitration award under section 34 of Part I of the Act does not apply to arbitrations seated outside India. Such power applies only to arbitrations seated in India.

Developments post *BALCO*

While *BALCO* limited the scope for the Indian courts to interfere in the conduct of foreign seated arbitrations, it nonetheless left untouched other controversial pronouncements of the Supreme Court as to the public policy grounds for challenge to an award including the scope of such challenge.

Notably, in *ONGC Vs Saw Pipes* the Supreme Court had held that an award that conflicted with Indian law would be contrary to public policy and therefore unenforceable. This expanded public policy ground had since been applied in *Phulchand Exports Ltd Vs OOO Patriot*, as a standard for challenging enforcement of foreign-seated awards in India.

The obvious concern for parties was that the *Saw Pipes* and *Phulchand Exports* cases opened the door at the enforcement stage to the substantive review of the merits of any award rendered outside of India. Parties to offshore arbitration proceedings, having evaded the interference of the Indian courts at the procedural stage, may have nonetheless had to encounter it at enforcement. However, in *Shri Lal Mahal Ltd Vs Progetto Grano Spa*, the Supreme Court addressed this concern. The Supreme Court held that the expression "public policy of India" should be given a narrow meaning and that the enforcement of a foreign award would be refused on this ground only if it is contrary to the fundamental policy of Indian law; interests of India; and justice or morality. The Supreme Court reinforced its decision in *Renusagar Power Company Ltd Vs General Electric Company* and overruled the expansive interpretation of public policy as laid down in *Phulchand Exports*. This has provided welcome relief to parties involved in foreign seated arbitrations.

Pitfalls

The *BALCO* decision was a positive development for India's investment and business climate, as it reduced the scope of interference by the Indian courts in offshore arbitration. This has been reinforced by the decision in *Shri Lal Mahal Ltd*. Nonetheless, there remain at least two elements of the post-*BALCO* arbitral regime which may have a negative impact on the certainty of the arbitral process.

Pitfall 1

Parties to older arbitration agreements still subject to the pre-*BALCO* regime

Parties with arbitration agreements executed before September 6, 2012 are still subject to the pre-*BALCO* system. This is because the judgment is phrased only to "...apply prospectively, to all arbitration agreements executed hereafter". Parties with arbitration agreements executed before September 6, 2012 therefore remain subject to the *Bhatia* regime.

The Indian courts have indicated a clear will to apply and develop the restrictive approach to judicial intervention in offshore arbitrations. In fact, the Supreme Court led the way in *Vale Australia Pty Ltd Vs Steel Authority of India Limited*, by refusing to reassess the merits of the dispute when dealing with a petition to set aside a foreign seated arbitral award.

Further post-*BALCO* developments include the May 2013 judgment of the High Court of Madhya Pradesh concerning a different phase of the arbitration proceedings contemplated in the *Yograj* case. The court refused an application to set aside an interim award rendered in Singapore-seated arbitral proceedings on the basis that the parties had, by nominating the application of the SIAC Rules 2007, implicitly excluded Part I of the Act. Similarly, the Delhi High Court, in *NNR Global Logistics Vs Aargus Global Logistics*, rejected an application for a foreign award to be set aside on public policy grounds under Part I of the Act, although the agreement pre-dated the *BALCO* decision. The court reasoned that the applicable curial law was the law of the seat.

The most emphatic statement has been made by the decision of the Bombay High Court in *Konkola Copper Mines (PLC) Vs Stewarts and Lloyds of India Ltd*. The Bombay High Court held that it is only the determination of whether Part I of the Act would apply to an arbitration which would be made prospectively. However, it would be inappropriate to also determine that the meaning, scope and purport of various provisions of the Act as analysed by the Supreme Court in *BALCO* would apply only prospectively.

The *BALCO* judgment has sent out a strong anti-intervention

message to the Indian courts. It appears unlikely that the courts will support excessive interference in offshore arbitration. Nonetheless, parties should ensure that, where their arbitration clauses pre-date the *BALCO* judgment, they have explicitly excluded the application of Part I of the Act. If necessary, this can be done through entering into a supplemental arbitration agreement.

Pitfall 2

Interim measures now not available in support of foreign arbitral proceedings

For parties entering into new arbitral agreements, to which the *BALCO* judgment applies, a substantial benefit of "offshore" arbitration – the ability to apply to the Indian courts for interim measures in support of such proceedings – is no longer available.

In its judgment, the Supreme Court held that there is "complete segregation" between Part I and Part II of the Act, meaning that "...any of the provisions contained in Part I cannot be made applicable to Foreign Awards...". Unfortunately, Part I contains not only powers which can be used to derail offshore arbitration proceedings but also those which can assist them, principally the power laid out in section 9 of Part I of the Act to order interim measures in support of arbitration proceedings.

While the Supreme Court acknowledged that the segregation doctrine would prohibit Indian courts granting interim measures in support of foreign arbitrations, they observed that this issue could not be resolved by the Supreme Court but instead was "a matter to be redressed by the legislature". Until such reforms are implemented, parties to arbitration proceedings seated outside of India will be unable to apply to the Indian courts to preserve assets or evidence, compel attendance of a witness or obtain an order for security for costs in India.

While parties may attempt to agree in their arbitration clauses that the Indian courts be empowered to issue such interim measures, such a provision is unlikely to be effective given the pronouncements of the Supreme Court.

Conclusion

The *BALCO* and *Shri Lal Mahal Ltd* decisions have demonstrated a will to bring India into the fold of "arbitration friendly" jurisdictions. There are still questions left unanswered, some of which need to be resolved through legislative reform. In 2010, the Indian Law Ministry released a consultation paper proposing amendments to the Act, including reversal of the effect of *Saw Pipes*. The Supreme Court's decision in *Shri Lal Mahal* indicates the necessity for such reform. We shall report back on developments in India in subsequent editions of *International arbitration report*.

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