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Interventionist, No More?

Vivekananda N. (Singapore International Arbitration Centre (SIAC)) · Wednesday, November 30th, 2011

International consciousness that India is an arbitration unfriendly jurisdiction has existed for some time now. This feeling owes in part to seemingly interventionist judicial views, in part to the delays that are oft complained of about the Indian judicial system and in part to the lack of infrastructure necessary for any arbitration friendly destination. This piece seeks to briefly examine the first of these issues.

Interference by Indian courts in arbitral proceedings has especially been striking in the grant of interim measures of protection and interim relief. This is normally in exercise of the power under Section 9 of the [*Indian*] Arbitration and Conciliation Act, 1996 (the "1996 Act"). Section 9 forms part of Part I of the 1996 Act that largely incorporates the provisions of the Model Law on the conduct of arbitrations. Part II of the 1996 Act codifies the New York and Geneva Conventions and provides for the recognition and enforcement of foreign awards in India.

In the beginning was Bhatia

In the specific area of grant of interim measures of protection, of foremost importance, is the *Bhatia* (2002) decision of the Supreme Court taking the view that Part I of the 1996 Act applies equally to international commercial arbitrations that are seated outside India. The decision came about in the context of a request for interim relief made by a party to an ICC arbitration seated in Paris. The request was made to, and rejected by a District Judge. The appeal to the High Court was also rejected. The Supreme Court, however, took the view that unless expressly or impliedly excluded, the provisions of Part I would also apply to arbitrations seated outside India. The argument that succeeded, amongst others, was that Section 2 (2) of the 1996 Act which provided that Part I would apply where the place of arbitration was in India, did not use the word 'only', implying that the legislature had not provided that Part I is not to apply to arbitrations which take place outside India.

The post Bhatia conundrum

Given that a court could pass interim orders before the commencement of arbitral proceedings, the *Bhatia* decision led to scores of 'Section 9 applications' for interim relief being filed in courts across the country in relation to arbitrations, whether seated in India or outside. The decision remains a topic of debate.

However, the only carve out that the Court provided for was the parties' express or implied

exclusion of Part I. There was no guidance on what constituted an implied exclusion of Part I. This only served to complicate matters further since Part I also included important provisions for appointment of arbitrators and setting aside of awards, amongst others. Unclear with whether Part I had been impliedly excluded or not in specific instances, Indian courts began to appoint arbitrators in arbitrations seated outside India, for instance in *National Agricultural* (2007) and *Indtel* (2008) and permit setting aside of foreign awards, for instance in *Venture Global* (2008).

Recent trends

In this context, a brief look at some of the recent cases in India on the issue is interesting. The following table seeks to demonstrate the factors that have weighed with Indian courts in determining the question of whether parties had impliedly agreed to exclude the applicability of Part I of the 1996 Act.

It is interesting to see that courts are increasingly willing to exercise restraint where parties have chosen to apply laws of other jurisdictions to govern the arbitration agreement. Similarly, foreign seats of arbitration appear to be an important factor. The choice of specific institutional rules for the conduct of arbitration is also of considerable influence in making the determination that parties had impliedly excluded the application of Part I.

Of some interest to Indian parties is the *Videocon* decision where the Supreme Court, albeit seized with other issues concerning the distinction between the seat and venue of arbitration, was willing to respect the choice of English law as the governing law of arbitration while the substantive contract continued to be governed by Indian law. This is a clear positive option for Indian entities negotiating dispute resolution clauses with foreign entities.

Equally of interest is the mention of Rule 26 of the SIAC Rules, being the SIAC Emergency Arbitrator provisions in *Unknown* by the Madras High Court as an alternate remedy for interim relief. Since their introduction in the 2010 Rules, the SIAC Emergency Arbitrator provisions have most often been used by Indian parties to seek and obtain emergency interim relief, in one case within three days and in another within ten days of the application. In these cases, as luck would have it, the disputes were consensually and amicably resolved by parties subsequent to the grant of such emergency interim relief.

Also of some interest is news that the Supreme Court of India has now constituted a five judge Bench to hear a batch of cases which will consider whether Indian courts can entertain a challenge to a foreign award under Section 34 and in effect reconsider *Bhatia* (2002) and *Venture Global* (2008).

The views in these cases should serve as an important guideline for drafting dispute resolution clauses effectively with a view to ensuring that the correct jurisdiction can be approached to seek reliefs to aid arbitral proceedings. Needless to say, it is also perhaps reason for some measured optimism on the hitherto held view that Indian courts are interventionist and mindless of jurisdictional limitations.

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