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Further Encouraging Developments in the Indian Treatment of Foreign Seated International Arbitrations

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Yograj Infrastructure Ltd. Vs. Ssang Yong Engineering and Construction Co. Ltd. (on 1 September 2011)

As reported in this blog, in May 2011 the Supreme Court of India (SCI) moderated the controversial principle it established in 2002 that allowed the Indian courts to intervene in arbitrations held outside of India unless that possibility was expressly excluded by the parties (see *Videocon Industries Ltd. Vs. Union Of India & Anr. (2011) 6 SCC 161*). In a decision which should be welcomed by the international legal and commercial communities, on 1 September 2011 the SCI further restricted the scope for the Indian Courts to interfere in international arbitrations seated outside the country in its decision in *Yograj Infrastructure Ltd. Vs. Ssang Yong Engineering and Construction Co. Ltd.*

Legal background

In *Bhatia International Vs. Bulk Trading SA (2002) (4) SCC 105* it was held that the provisions of Part I of the Indian Arbitration and Conciliation Act 1996 (the Act) (which allow the Indian Courts to grant interim measures (Section 9), to make arbitral appointments in the absence of agreement by the parties (Section 11) and to set aside arbitration awards (Section 34) among other measures) would apply to international arbitrations held outside of India unless the parties agreed to exclude their application.

Since the *Bhatia* case, the requirement of "express exclusion" appears to have been relaxed through judgments given by the Gudjarat High Court in *Hardy Oil & Gas Vs. Hindustan Oil Exploration (2006) 1 GLR 658* and the SCI in *Videocon Industries Ltd. Vs. Union Of India & Anr. (2011) 6 SCC 161*. However, the courts' reasoning in those decisions was not without fault.

In *Hardy Oil* the Gudjarat High Court confirmed that Part I of the Act could be impliedly excluded, in that case by express agreement by the parties to a contract providing that "*[t]he place of arbitration shall be London and the … law governing the arbitration shall be English law*". *Hardy Oil* suggests that the reference to a law governing the arbitration, in other words, the law of the seat of the arbitration, should have been determinative.

In *Videocon*, the SCI followed that line of reasoning but appeared to misjudge the distinction between the law of the arbitration agreement and the curial law, relying instead on the law

governing the arbitration agreement as determinative. The SCI held that, since the parties had agreed to an arbitration clause governed by English law, even though the main contract was governed by Indian law, they too had implied an exclusion to Part I of the Act. Had the SCI correctly applied *Hardy Oil* the result may have been no different, as the curial law in *Videocon* was not Indian law either and therefore Part I of the Act should have been excluded in any event. However, it is concerning that this fundamental distinction was mishandled at all.

In *Yograj Infrastructure* the SCI gets the distinction right.

Facts

In April 2006 a Korean incorporated Company, SSang Yong Engineering and Construction Co. Ltd. (SSY) entered into a sub-contract (the Agreement) with Indian-incorporated Yograj Infrastructure Limited (YAL) for a highways infrastructure project in the province of Madhya Pradesh which had been granted to SSY by the National Highways Authority of India, New Delhi. In September 2009, SSY terminated the agreement with YAL on the grounds that YAL had delayed in performing the construction work.

SSY (who was the Respondent in the present proceedings) and YAL (who was the Applicant) each applied for interim relief before the Indian courts. The court referred the parties to arbitration in Singapore in accordance with Clause 27 of the Agreement which specified that "*All disputes, differences arising out of or in connection with the Agreement shall be referred to arbitration. The arbitration proceedings shall be conducted in English in Singapore in accordance with the Singapore International Arbitration Centre (SIAC) Rules as in force at the time of signing of this Agreement … [t]he arbitration shall take place in Singapore…*".

Once the arbitral tribunal was composed, the Respondent applied for, and was granted, certain relief against the Applicant in an interim order. The Applicant appealed the tribunal's interim order to the Indian District Court which rejected the appeal. Following another appeal to the Madhya Pradesh High Court (also rejected) the Appellant brought an appeal to the SCI.

The SCI's decision

The SCI examined the arbitration clause in the Agreement noting that there was "*no ambiguity*" surrounding the fact that the governing law (or "proper" law) of the Agreement was the law of India (provided for at Clause 28 of the Agreement). However, quite correctly, the SCI differentiated the proper law from the "curial" law governing the arbitration itself, which the parties were free to nominate.

As is normal, the parties had not expressly provided for a curial law governing the arbitration, rather they had simply referred to Singapore as the seat of the arbitration. While this should not normally lead to any ambiguity regarding the correct curial law, as the *Videocon* decision demonstrates the Indian courts have not always appreciated the distinctions between the various laws at play in the international arbitration context. However, that Singaporean law was the applicable curial law in this case was beyond issue by application of the Singapore International Arbitration Centre ("SIAC") Rules 2007.

Article 32 of the SIAC Rules 2007 (which has since been replaced by Article 27 of the 2010 SIAC Rules which allows the tribunal greater discretion in this regard) provides that "*Where the seat of arbitration is Singapore, the law of the arbitration under these Rules shall be the [Singaporean]*

International Arbitration Act … or its modification or reenactment thereof".

Accordingly, as the parties had by implication of the SIAC Rules 2007 agreed Singaporean law as the curial law, the SCI concluded that they had impliedly excluded the application of Part I of the Act.

Commentary

It is encouraging that the SCI has correctly distinguished between the general law of the arbitration clause (Indian law in this case) and the law governing the procedure and conduct of the arbitration (Singaporean law). While the decision as a whole is welcome insofar as it further reduces the scope for the Indian courts to interfere in arbitral proceedings seated outside of India. The SCI is to be applauded for further restricting the application of the controversial principle established in the *Bhatia* case.

However, it is hoped that the SCI may yet go further. At the time of writing, the SCI had just begun hearing a number of consolidated appeals that could lead to full reversal of the *Bhatia* line of authority. The SCI has invited amici curiae briefs and those submitting briefs include the LCIA India and the SIAC. Commentators are therefore quietly hopeful that this may spell the end for *Bhatia*.

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