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A new year, a new start in India

Promod Nair (J. Sagar Associates) · Wednesday, January 11th, 2012

On Tuesday, 10 January 2012, a Constitution Bench of the Indian Supreme Court began hearings in *Bharat Aluminium v Kaiser Aluminium* (Civil Appeal No. 7019 of 2005) and related matters to reconsider its earlier judgment in *Bhatia International v Bulk Trading SA*, (2002) 4 SCC 105 (“Bhatia”).

In *Bhatia*, the court held that the Indian courts could intervene to order interim measures of protection even in relation to arbitrations seated outside India. The court’s jurisdiction was invoked by a party seeking interim measures of protection in relation to an ICC-administered arbitration seated in Paris. Although section 9 of India’s Arbitration Act expressly empowers Indian courts to grant interim relief, this provision is contained in Part I of the Act which was designed to apply only where an arbitration is seated in India. The Supreme Court was thus faced with a situation where it could not order interim measures of protection since the arbitration clause provided for a Paris seat. Faced with this legal hurdle, the Supreme Court adopted a result-driven approach and held that the general provisions of Part I would also apply also to offshore arbitrations, unless the parties impliedly or expressly excluded the applicability of the Act.

The ratio in *Bhatia* was subsequently extended to permit the Indian courts to reopen and set aside awards rendered in arbitrations seated outside India, and even appoint arbitrators in such arbitrations. The judgment has been subjected to much criticism in India and beyond for authorising Indian courts to exercise long-arm jurisdiction and for introducing substantial uncertainty in offshore arbitrations involving Indian parties. Indeed, in a sign of judicial discomfort with the broad scope of the *Bhatia* ruling, the Supreme Court itself and various High Courts in the country have subsequently sought to narrow down the scope of the decision. They have also displayed a greater willingness in recent years to infer implied exclusions of the Indian Arbitration Act in relation to arbitrations seated outside India.

Nevertheless, in order to mitigate the risk of excessive judicial intervention, it has now become standard market practice in India-related international commercial transactions to exclude the application of Part I in arbitrations seated outside India.

Although legislative intervention has been proposed to remedy the ill-effects of the *Bhatia* ruling, most recently in a Consultation Paper circulated by the Indian Ministry of Law and Justice, such attempts have failed to take off in any meaningful way.

In these circumstances, the Supreme Court’s decision to reconsider its own ruling in *Bhatia* is a welcome step. The court also adopted a refreshingly novel approach by inviting interested parties

to intervene in order to assist the court as *amicus curiae*. In response to this invitation, LCIA India, the Singapore International Arbitration Centre and the Nani Palkhivala Arbitration Centre have all intervened in the proceedings.

The hearing commenced this week with observations from the court to the effect that (i) it was of the *prima facie* view its earlier judgment in *Bhatia International* should be reconsidered, and (ii) it was keen to ensure that foreign investors should not be deterred by the prospect of long-winded litigation in relation to India-related commercial contracts. The court also indicated it was in favour of recommending to Parliament that all matters relating to enforcement of awards be heard directly by the Supreme Court which would cut through the delays caused by enforcement issues having to pass through multiple layers of the Indian court system (as is presently the case).

The Indian Supreme Court has been criticised (sometimes unfairly) in the past for being arbitration-unfriendly. In *Bharat Aluminium v Kaiser Aluminium*, it now has an excellent opportunity to change that perception, and firmly put the development of Indian jurisprudence on a pro-arbitration trajectory.

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