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Indian Supreme Court Declines to Intervene in International Arbitration with SIAC Appointing Authority

Gary B. Born, Jonathan Lim (Wilmer Cutler Pickering Hale and Dorr LLP) · Thursday, January 15th, 2015 · WilmerHale

In the recent case of *Pricol v. Johnson Controls* (Pricol Limited v. Johnson Controls Enterprises Ltd and Ors, Arbitration Case (Civil) No.30 of 2014), the Supreme Court of India declined to intervene in an international arbitration with the SIAC as appointing authority, upholding the parties' chosen mechanism in a well-reasoned decision which was marked by a degree of judicial deference towards the arbitral process that is in keeping with current international best practices. To those familiar with Indian arbitration law, this is a progressive development and marks a welcome contribution to a growing canon of pro-arbitration Indian precedents that began with the *Bharat Aluminium* case (Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 552).

A. Decision of the Supreme Court

In *Pricol v. Johnson Controls*, a dispute had arisen under a Joint Venture Agreement ("JVA") dated 26 December 2011 between Pricol Limited ("Pricol"), an Indian manufacturer of automotive components, and Johnson Controls Enterprise Limited ("Johnson Controls"), a subsidiary of a U.S. multinational company that provides industrial services. The JVA provided at Clause 30.2 that, after an initial period of sixty days for reaching an amicable settlement had lapsed, such disputes "shall be referred to sole arbitrator [*sic*] to be mutually agreed upon by the Parties." Clause 30.2 further provided that "[i]n case the Parties are not able to arrive at such an arbitrator, the arbitrator shall be appointed in accordance with the rules of the Singapore Chamber of Commerce." Clause 30.3 also stated that "[t]he arbitration proceedings shall be held at Singapore."

The reference to a non-existent arbitration institution – the "Singapore Chamber of Commerce" – was the subject of the controversy before the Supreme Court of India. After the dispute arose and the required waiting period had elapsed, Johnson Controls construed Clause 30.2 as a reference to the Singapore International Arbitration Centre ("SIAC") and requested the SIAC to appoint a sole arbitrator on 5 September 2014. The SIAC did so pursuant to its powers under Sections 8(2) and 8(3) of the Singapore International Arbitration Act. Pricol challenged the jurisdiction of the appointed arbitrator in the arbitration itself. After an exchange of written submissions and a jurisdictional hearing on 18 November 2014, the arbitrator issued a partial award on November 27, 2014, affirming his jurisdiction and ruling that the SIAC's appointment was valid because the parties had expressly agreed on Singapore as the seat of arbitration.

On receiving notice of Johnson Controls' request to the SIAC, Pricol made a parallel application to the Supreme Court of India on 15 September 2014 to appoint a sole arbitrator under Section 11(6) of the Indian Arbitration and Conciliation Act 1996 (the "IACA"), contending that the SIAC had no jurisdiction to make the original appointment. The IACA is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, and Section 11(6) provides that where a party fails to act or the parties fail to reach agreement as required under the agreed appointment procedure, a party may request the Chief Justice or his nominee to "take the necessary measure."

Pricol relied on three arguments before the Supreme Court of India. First, Pricol contended that Indian law was the procedural law governing arbitration proceedings, or the *lex arbitri*, on the basis that India was the seat of the arbitration and that Clause 30.3 merely stipulated for Singapore to be the venue of the hearings and not the seat. Second, Pricol argued that the parties had not excluded the application of Part I of the IACA and that it therefore applied to the arbitration because the JVA was signed prior to the SCI's decision in the *Bharat Aluminium* case. Third, Pricol contended that even if Singapore was the seat of arbitration, the curial law of Singapore would only apply to regulate proceedings *after* the appointment of an arbitrator and until the award was made.

The Supreme Court of India did not accept any of these arguments. It decided correctly against intervening in the arbitration, holding that "the most reasonable construction" of Clause 30.2 would be to understand the reference to the "Singapore Chamber of Commerce" as a reference to the SIAC, with the result being that where the parties are not able to name a sole arbitrator by mutual agreement, the SIAC would appoint the sole arbitrator. On this basis, the Supreme Court took the view that the appointment made by the SIAC and the partial award on jurisdiction could not be questioned and examined by the Indian courts in proceedings under Section 11(6) of the IACA – following its own precedent in the *Antrix Corp* case (Antrix Corporation v. Devas Multimedia (2013) 6 SCR 453) – as doing so was inappropriate and would amount to the Indian courts sitting in appeal over the arbitrator's and the SIAC's decisions.

B. Commentary

This might have seemed a straightforward decision for those not used to the idiosyncrasies of Indian arbitration case law. But to those familiar with the Indian courts' past willingness to intervene in foreign-seated arbitrations, the Supreme Court's judgment in *Pricol v Johnson Controls* is an encouraging and highly progressive development.

In fact, the judgment was deftly reasoned to avoid a number of uniquely Indian legal controversies that remained after the landmark *Bharat Aluminium* case, when the Supreme Court reversed its much-criticized decision in the *Bhatia International* case (Bhatia International v Bulk Trading SA (2002) 4 SCC 105). Under the old law, the Supreme Court had previously held that Part I of the IACA was applicable to foreign arbitrations unless parties expressly or impliedly excluded the provisions of Part I, and Indian courts had on this basis asserted broad powers to intervene in foreign-seated international arbitrations – including notably in the *Venture Global* case (Venture Global Engineering Case v. Satyam Computer Services Ltd. (2008) 4 SCC 190) where the Supreme Court held it had the power to set aside awards issued by arbitral tribunals seated outside India.

Although *Bharat Aluminium* was widely celebrated for overruling *Bhatia International* and thus restricting the Indian courts' powers to intervene under Part I of the IACA to only India-seated

arbitrations, it still left open a number of possibilities for parties to urge Indian judicial intervention in foreign-seated arbitrations. First, *Bharat Aluminium* was held to apply only prospectively (i.e. from 6 September 2012), and the old law still applied in respect of arbitration agreements executed before that date. Second, under the existing Indian case law, and in particular the recent *Enercon* case (Enercon (India)Ltd. and Ors v. Enercon GmBH and Anor (2014) 5 SCC 1),[1)] one could credibly argue India to be the seat of arbitration where the parties have chosen Indian law as the substantive governing law of the contract, so long as parties have not specifically designated another forum to be the "seat" using express words to that effect.

Pricol relied on precisely these legal grounds before the Supreme Court to urge its intervention, given that the JVA between Pricol and Johnson Controls was concluded in December 2011 and therefore before the *Bharat Aluminium* case, and the arbitration agreement only provided for Singapore to be the place where "proceedings shall be held" and did not specifically refer to Singapore as the "seat" of the arbitration. Pricol thus sought to argue that the Supreme Court could intervene on the basis that India was the seat, and that in any case the parties had not excluded the application of Part I of the IACA.

The Supreme Court was wise to avoid these points entirely in its judgment, and focus instead on what the parties had intended to achieve in their agreed Clause 30.2. Holding that the best construction of the clause was that parties had agreed on the SIAC as the appointing authority in default of agreement on an arbitrator, and that Section 11 of the IACA would not be engaged in any case, the Supreme Court thus treated as moot the issues of whether the parties had excluded Part I of the IACA, or whether the parties had intended for Singapore or India to be the seat of arbitration.

In the end, the parties were the real beneficiaries of the judicial restraint exercised by the Supreme Court. It is well known that the involvement of Indian courts can significantly delay the arbitral process – as illustrated by the *White Industries* case (White Industries Australia Limited v Republic of India, UNCITRAL), where an appeal from a challenge to the jurisdiction of Indian courts to entertain a set-aside application remained unresolved for some ten years after the award. In contrast, the Supreme Court in *Pricol v Johsnon Controls* gave judgment within three months of Pricol's application and, in declining to intervene, avoided a drawn-out and complicated tussle before the Indian courts that could well have derailed the arbitration.

A final learning point from the Supreme Court's judgment is the importance of drafting into contracts with Indian parties an arbitration clause that provides for the involvement of an established arbitration institution. India has been promoting institutional arbitration for some time now,[2)] and recent statements by senior officials in Prime Minister Nerendra Modi's new government suggest that this remains a policy priority.[3)] In line with this, the Supreme Court of India in *Pricol v Johnson Controls* gave substantial deference to the arbitrator appointment already made by the SIAC – following its own precedent in the *Antrix Corp* case, where the Supreme Court had given similar deference to an arbitrator appointment already made by the ICC. The reference to an appropriate arbitral institution and its rules can thus minimize scope for judicial interference, besides also improving the quality and efficiency of the arbitral process in other ways. Of course, parties would do well to avoid the troubles in *Pricol v Johnson Controls* by referring in their contracts to arbitration institutions that do in fact exist.

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References

?1 In the *Enercon* case, the Supreme Court of India held that the parties did not intend for London to be the seat of arbitration, even though the parties had stated for the "venue" of the arbitration to be London. The Supreme Court found that the parties intended New Delhi, India, to be the seat because Indian law was designated as the substantive law and the parties had expressly provided for the IACA to apply. Before the English courts, in Enercon v EIL *(2012) EWHC 689 (Comm), Mr. Justice Eder had opined that the correct seat of arbitration was London, although he held that the English courts would not assume supervisory jurisdiction to determine the seat for reasons of comity, given that Indian courts were seized of the matter.*

?2 See Government of India Law Commission Report No. 246, Amendments to the Arbitration and Conciliation Act 1996, August 2014, at pp. 9-10.

?3 Federation of India Chambers of Commerce and Industry, Press Release dated 22 December 2014, "Need to promote institutional arbitration to place India amongst top 50 countries in World Bank's ease of doing business ranking – Legal Affairs Secy."

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