SC Overrules Bhatia... Prospectively!

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By: Payaswini Upadhyay, CNBC-TV18

In a landmark judgment yesterday, the Supreme Court overruled the 2002 Bhatia International order that gave Indian courts jurisdiction over arbitral awards seated outside of India. CNBC TV18's Payaswini Upadhyay gets quick reactions from experts on the implications of this order

Promod Nair, Partner, JSA
"In overruling its previous decision in Bhatia International, the Supreme Court held:

1. The principle of territoriality is the governing principle of the (Indian) Arbitration & Conciliation Act 1996 (the "Arbitration Act"). Accordingly, the seat of arbitration determines the jurisdiction of the courts.

2. Part I of the Arbitration Act will apply only to arbitrations seated in India. Therefore, an Indian court will no longer be able to hear challenges to awards made in arbitrations seated offshore.

3. The Indian courts will also not have jurisdiction to order interim measures in support of arbitration seated outside India. A suit cannot be filed for this purpose under the general law (the Code of Civil Procedure) either.

4. The law laid down by this judgment will apply prospectively i.e., only to agreements which are concluded after the date of the judgment."

Hiroo Advani, Senior Partner, Advani & Co
"In my view, the decision is an excellent outcome and one that undoes many of the mistakes of the past. The main consequence of this judgment will be to insulate arbitrations seated outside India from unwelcome interference by the Indian courts. However, if Indian courts consistently take a more sensible approach to arbitration (and hopefully this judgment will spark such a trend), that will equally give a fillip to India-seated arbitrations and the country will not be an unwelcome place to arbitrate anymore.

From 2002, India has been the black-sheep of the International Arbitration community after the judgement in Bhatia International and Venture Global which effectively held that even in an International Arbitration, the seat for which was in a foreign country (city) such as London, Paris, Singapore, etc could be challenged in Courts in India. it is well recognised that the courts in India could take atleast ten years to decide the challenge and that courts liberally entertained challenges to arbitration awards.

This is all changed with the judgement in Bharat Aluminium which effectively over-ruled Bhatia International and Venture Global. This will be a source of great comfort for foreign companies which had serious reservations on the applicability of the Indian law and the international arbitration process which gave rise to challenges in India. India has only aligned itself with a large number of foreign courts setting out that awards can only be challenged at the seat of the arbitration.

The effectiveness of the judgement has been seriously diluted by the last sentence of the judgement setting out " that the law now declared by this Court shall apply prospectively, to all arbitration agreements executed hereafter." This has almost set the stage to open the floodgates to challenges in India even for arbitration awards rendered in London Paris, Singapore, etc for all agreements that have been entered into prior to 06 September 2012. This will apply even if the arbitrations take place several years from now, in foreign countries.

Some clarity and limiting the challenges from the full bench of the Supreme Court on this issue

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could go a long way in allaying the fears of both lawyers and companies involved in international arbitration."

Mamta Tiwari, Partner, FoxMandal Little

In a verdict that is expected to boost the sentiment of global firms, a five-judge Constitution Bench of the Supreme Court of India headed by Chief Justice SH Kapadia on September 6, 2012 in its decision in Bharat Aluminum Co. v Kaiser Aluminum Technical Service, Inc. and other tagged matters, held that the courts in India do not have jurisdiction over international commercial arbitral awards where the seat of arbitration is outside India.

Pronouncing the verdict given by the Supreme Court in Bhatia International v Bulk Trading S.A & Anr and Venture Global Engineering v Satyam Computer Services Ltd and Anr, to be incorrect, the Constitution Bench of the Supreme Court of India held that Part I of the Arbitration and Conciliation Act, 1996 ("Act") had no application to arbitrations which were seated outside India, irrespective of the fact whether parties chose to apply the Act or not.

Supreme Court has held that the omission of the word "only" from Section 2(2) does not mean that Parliament intended to make Part I applicable to foreign-seated arbitrations. Part I of the Act would have no application to international commercial arbitration held outside India. The Court held that Act being based on the territoriality principle excludes applicability of Part I to foreign seated arbitrations even if the agreement is governed by the provisions of the Act. The Apex court held that no civil suit can be instituted purely for interim relief, because interim relief is granted on the strength of the final relief sought on a recognized cause of action. The prayer for interim relief cannot itself constitute the cause of action for a suit and such a suit would not be maintainable.

Supreme Court has also held that in international commercial arbitrations held outside India, interim relief cannot be granted by Indian courts under Section 9 (which falls under Part I) or any other provision of the Act as applicability of Part I of the Act is limited to arbitrations which take place in India.

The apex court further held that Section 34 of the Act (which provides for setting aside of an arbitral award on the grounds available under the said section), would apply only if the seat of arbitration is in India.

It is also held by the Supreme Court that enforcement of awards rendered in international commercial arbitration held outside India would only be subject to the jurisdiction of the Indian courts when such award are sought to be enforced in India in accordance with the provisions contained in Part II of the Act.

A non-convention award cannot be incorporated into the Act by a process of interpretation and could only be done by suitable amendments made to the Act by Parliament. The seat of arbitration will decide the applicable law of arbitration. According to the court, the seat of arbitration would be the seat provided for in the arbitration agreement. However, the venue of the arbitration may be elsewhere.

Supreme Court has held that the law declared by it in the present case "shall apply prospectively, to all the arbitration agreements executed hereafter". This suggests that the law declared in Bharat Aluminium will apply only to arbitration agreements made after September 6, 2012.

This is a welcome judgment and a very good decision which will boost the morale of the parties wanting to arbitrate disputes outside India.

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