INDIAN ARBITRATION LAW: A NEW REGIME BEGINS

Singhania & Co, Solicitors & Indian Advocates

By: Vijay Goel & Jitender Jain

19-Sep-12

INDIAN ARBITRATION LAW – A NEW REGIME BEGINS

1. Recently, on September 6, 2012, the five members constitutional bench of the Indian supreme court (**"Apex Court"**) in *'Bharat Aluminum Co. Vs. Kaiser Aluminium Technical Service Inc.*[1]*'* after reconsidering its various previous decisions on the Indian Arbitration & Conciliation Act 1996 ("**Indian Arbitration Act**") concluded that the Indian Arbitration Act should be interpreted in a manner to give effect to the intent of Indian Parliament. In this landmark judgment, the Apex Court also took note of the various foreign judgments, UNCITRAL Model Law including commentaries thereon of renowned authors, Geneva Convention & New York Convention and thereafter reversed its earlier rulings in cases of '*Bhatia International v Bulk Trading S.A & Anr*[2]*'* and '*Venture Global Engineering v Satyam Computer Services Ltd and Anr*[3]*'* stating that finding in these judgment were incorrect.

2. BRIEF HISTORY OF MODERN ARBITRATION LAW IN INDIA

2.1 The first Arbitration law in India was the Arbitration Act 1899 which was based on the English Arbitration Act 1899. Thereafter through Schedule II of the Code of Civil Procedure, 1908, the provisions relating to the law of arbitration were extended to the other parts of British India. Later, based on the English Arbitration Act 1934, the Arbitration Act 1940 was enacted in India to consolidate and amend the law relating to arbitration effective from 1 July 1940 ("**IA1940**"). The IA1940 was an exhaustive law relating to the domestic arbitration. The IA1940 empowered the Indian courts to modify the award, remit the award to the arbitrators for reconsideration and to set aside the award on specific grounds.

2.2 On 23 October 1937, India became a signatory to both the Geneva Protocol on Arbitration Clauses 1923 & Geneva Convention of 1927 Convention and the Arbitration (Protocol and Convention) Act 1937 was enacted in India to give effect to the said conventions. The New York Convention which came into force on 7 June 1959 was an improvement on the Geneva Convention of 1927 ("**New York Convention**"). India became a signatory to the New York Convention on 13 July 1960. Accordingly, the Foreign Awards (Recognition and Enforcement) Act 1961 was enacted by Indian Government to give effect to the New York Convention ("**Foreign Awards Act**"). In this Foreign Awards Act, there was no provision for challenging the foreign award on merits similar or identical to the provisions contained in the IA1940. Thus prior to the enactment of the Indian Arbitration Act, the law of arbitration in India was contained in the Protocol and Convention Act 1937, the IA1940 and the Foreign Awards Act.

2.3 Over the period of time, it was generally felt that the arbitration laws in India had failed to keep pace with the developments at the international level.

[1] Civil Appeal No. 7019 of 2005
[2] 2004 (2) SCC 105
[3] 2008 (4) SCC 190

Therefore, Indian Arbitration Act was enacted in 1996 with the aim and the objective to give effect to the UNCITRAL Model Laws as adopted by the United Nations Commission on International Trade Law on 21 June 1985. The Indian Arbitration Act is divided into four parts as under:

(i) Part I which is headed "Arbitration" (sections 2 to 43);
(ii) Part II which is headed "Enforcement of Certain Foreign Awards" (sections 44 to 60);
(iii) Part III which is headed "Conciliation" (sections 44 to 81); and
(iv) Part IV being "Supplementary Provisions" (sections 82 to 86).

3. ARBITRABLE MATTERS UNDER THE INDIAN ARBITRATION ACT

In the matter of *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Ors*, the Apex Court held that generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable. The well recognized examples of non-arbitrable disputes are:

(i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
(ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
(iii) guardianship matters;
(iv) insolvency and winding up matters;
(v) testamentary matters (grant of probate, letters of administration and succession certificate); and
(vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

In this case, the Apex Court further held that the Indian Arbitration Act does not specifically exclude any category of disputes as being not arbitrable. However, sections 34(2)(b) and 48(2) of the Indian Arbitration Act make it clear that an arbitral award will be set aside if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the laws of India for the time being in force.

4. PROBLEMS IN ENFORCING FOREIGN AWARDS UNDER THE INDIAN ARBITRATION ACT

The foreign investors/parties have been facing problems in enforcing foreign awards (awards where seat of arbitration was outside India) in India against Indian parties because earlier the Apex Court ruled that provisions of Part I of the Indian Arbitration Act are applicable to foreign awards as well. Thus, foreign awards were subject to interference by Indian courts both during pendency of

arbitration proceedings and at enforcement stage because Indian parties were entitled to challenge the foreign awards on various grounds available under Part I of the Indian Arbitration Act. Also, under such proceedings, the foreign awards were also challenged on merits in Indian courts.

5. NEW LEGAL POSITION IN THE INDIAN ARBITRATION ACT

Based on this landmark judgment of the Apex Court, the following is new legal position w.r.t. arbitrations law in India:

a) The Indian Arbitration Act has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law. Accordingly, Part I of the Indian Arbitration Act applies only to arbitrations taking place in India irrespective of whether such arbitrations takes place between Indian parties or between the Indian and foreign parties ("**Domestic Awards**"). The Domestic Awards can be challenged (section 34) and are enforceable (section 36) under Part I of the Indian Arbitration Act.

b) Part I of the Indian Arbitration Act has no application to arbitrations seated outside India irrespective of whether parties chose to apply the Indian Arbitration Act or not ("**Foreign Awards**"). The grounds to challenge of awards given in Part I (section 34) of the Indian Arbitration Act are thus applicable only to Domestic Awards and not to Foreign Awards.

c) The law of the seat or place where the arbitration is held is normally the law to govern the arbitration. If the agreement provides for a "seat/place" outside India, Part I of the Indian Arbitration Act would be inapplicable to the extent inconsistent with the arbitration law of the seat/place, even if the agreement purports to provide that the Indian Arbitration Act shall govern the arbitration proceedings.

d) In case of Domestic Awards, Indian laws shall prevail if substantive law conflicts with the laws of India. In case of Foreign Awards, the conflict of laws rules of the country in which the arbitration takes place would have to be applied.

e) There is no provision under the Civil Procedure Code 1908 or under the Indian Arbitration Act for a court to grant interim measures in terms of Part I (section 9) of the Indian Arbitration Act in arbitrations which take place outside India, even though the parties by agreement may have made the Indian Arbitration Act as the governing law of arbitration. An inter-parte suit simply for interim relief pending arbitration outside India would not be maintainable in India.

f) The regulation of conduct of arbitration and challenge would be done by the courts of the country in which arbitration is conducted. Accordingly, a Foreign Award can be annulled by the court of the country in which the

award was made, i.e., the country of the procedural law/curial law ("**First Alternative**") and not before the courts of the country under the law of which the award was made, i.e., the country of substantive law ("**Second Alternative**"). It can be challenged in the courts of the Second Alternative, only if the court of the First Alternative had no power to annul the award under its national laws.

g) The Indian Arbitration Act intentionally limits it to awards made in pursuance of an agreement to which the New York Convention or the Geneva Protocol applies. Therefore, no remedy is provided for the enforcement of the 'non convention awards' under the Indian Arbitration Act.

h) Last but most important, these findings of the Apex Court are applicable only to arbitration agreements executed after 6 September 2012.

6. ISSUES REQUIRES CLARITY

The Apex Court has clarified that in case of Domestic Awards, Indian laws shall prevail if substantive law conflicts with the laws of India. The Apex Court has further clarified that in case of Foreign Awards, the conflict of laws rules of the country in which the arbitration takes place would have to be applied. However, the Apex Court has not clarified what will happen if the parties opt for a foreign seat to circumvent Indian laws and the conflict of laws rules of such a foreign seat disregards the Indian laws where the Foreign Award is to be enforced, e.g., for illegality. In future it will be interesting to see whether in such a case the Indian courts (as the courts of Second Alternative) can annul such a Foreign Award if challenged by the Indian party.

This is an important issue because India is yet to allow the full capital account convertible and a significant number of capital account transactions require approval of the Reserve Bank of India. An apt example to show this lacuna is validity of call and put option in favour of foreign investor under the Foreign Exchange Management Act 1999 ("**FEMA**") wherein the Reserve Bank of India is asking Indian companies to delete such options from agreement and to compound the offence. It would be interesting to see what will happen if parties enter into a put/call option agreement in violation of the FEMA and place/seat of arbitration is outside India and Indian law is not the substantive law. Notably, the agreement for foreign investment in some Indian sectors or where the approval of central government (through FIPB) is obtained, the substantive law must be Indian laws.

7. PROSPECTIVE APPLICABLITY OF JUDGMENT

The Apex Court has made its finding under this judgment applicable prospectively to the arbitration agreements executed after 6 September 2012 and not to all those cases which have not attained finality. Notably, though the Apex Court has overruled all previous rulings which were in conflict with this

landmark judgement but still the adjudication of the disputes arising pursuant to arbitration agreement executed upto 6 September 2012 including the pending disputes will be on the basis of earlier wrongly decided judgments.

8. CONCLUDING REMARKS

In view of this landmark judgment, the Indian parties who were until now protected by the Indian courts on various grounds specially those contained under Part I (sections 9 & 34) of the Indian Arbitration Act will have to be more than careful while agreeing for the seat/place of arbitration because if the seat/place of arbitration is outside the India the Indian party shall not be entitled to any benefit available to Domestic Awards under Part I of the Indian Arbitration Act.

9. ABOUT THE AUTHORS

Vijay Goel is Senior Partner at Singhania & Co, Solicitors & Indian Advocates, London, UK. Jitender Jain is Principal with Singhania & Co, London, UK.

Singhania & Co, established in 1969, is a full services law firm having office across India and overseas offices at London, UK and New York, USA. Our practice areas are Doing Business in India and Foreign Direct Investment; General Corporate & Commercial Laws; Litigation & Arbitration; Mergers & Acquisitions; Private Equity & Venture Capital Investment; Capital Markets & Securities Laws; Infrastructure & Real Estate Projects; Tax Laws; Social Sector including Foreign NGO; Competition and Anti-trust Laws; Corporate Governance, Regulatory Compliances & Policy; Corporate Frauds and Independent Searches; and Employment and HR Laws.

10. DISCLAIMER

This article is an inclusive write up and is not exhaustive. This article, if circulated, will be only for general information purpose and under any circumstances, the contents of this article should not be construed as legal advice. Liability/claims of any nature whatsoever caused by the use of any information provided in this article will therefore be rejected.

11. OUR CONTACT DETAILS

Singhania & Co
Solicitors & India Advocates
1 Queen Anne's Gate, London SW1H 9BT
DX 2305 Victoria
T/ +44 (0)20 7799 1688
E/ vijay@singhaniauk.com
Web/ www.singhania.com