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A Giant Leap for Indian Arbitration

On 6 September 2012, the Supreme Court of India handed down its long-awaited decision in the case of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, Inc.*[1] In this landmark judgment, the Court held that the Indian judiciary cannot grant injunctions or set aside arbitral awards in arbitrations seated outside India. This reverses the interventionist approach adopted previously by Indian courts towards international arbitration, and is good news for foreign investors looking for greater certainty when resolving disputes with Indian parties.

Background

The Indian Arbitration and Conciliation Act 1996 (the "1996 Act") contains two distinct parts: Part I deals with domestic arbitrations (meaning those seated in India, regardless of the parties' origin), and provides courts with limited powers to set aside arbitral awards on public policy grounds; Part II addresses issues of recognition and enforcement of foreign arbitral awards, meaning those issued in arbitrations seated outside India.

The 1996 Act, which closely follows the UNCITRAL Model Law, was initially hailed as a major step towards making India an arbitration-friendly jurisdiction, as it promoted party autonomy and limited the courts' involvement in the arbitral process. However, in a string of widely criticised rulings, the Court extended the scope for judicial interference far beyond that which had been originally anticipated:

- In *Bhatia International v. Bulk Trading*,[2] the Court held that Part I of the 1996 Act applied equally to arbitrations seated outside India, thereby blurring the distinction between domestic and foreign arbitrations.
- In *Oil & Natural Gas Corporation v. SAW Pipes*,[3] the Court gave an expansive interpretation to the set-aside provision on grounds of public policy in Part I. It held that any arbitral award that contravened Indian statute was "*patently illegal*", contrary to public policy and liable to be set aside. This effectively introduced substantive judicial review of arbitral awards by the Indian courts.
- In *Venture Global Engineering v. Satyam Computer Services Ltd*,[4] the Court followed the logic of the *Bhatia* decision in ruling that the Indian courts' far-reaching powers to set aside arbitral awards applied to arbitrations seated outside India as well.

Unsurprisingly, this line of authority caused significant unrest among foreign investors doing business in India, not least because, even with an arbitration seated in a neutral place, there remained a risk of being dragged into lengthy and uncertain Indian court proceedings.

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1 Civil Appeal No. 7019 of 2005.
2 (2002) 4 SCC 105.
3 (2003) 5 SCC 705.
4 2008 (1) SCALE 214.

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Kaiser Aluminium

Kaiser Aluminium was a consolidation of several appeals against first instance decisions, giving the Court an opportunity for a comprehensive review of the case law on the 1996 Act. The Court sat as a special five-member "Constitutional Bench" and delivered its verdict unanimously, lending extra weight to the *Kaiser* decision.

Significantly, it overturned *Bhatia* and *Venture Global* going forward, stating that Part I of the 1996 Act is "*applicable only to all the arbitrations which take place within the territory of India*."

The rationale was that the 1996 Act "*has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law*" and hence, Part I of the Act "*would have no application to International Commercial Arbitration held outside India…such awards would be only subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996.*"

This means that, post-*Kaiser*, there is no basis for the Indian courts to review or set aside foreign awards which are not being sought to be enforced in India.

The Court also looked at the availability of interim relief in support of arbitral proceedings. The provision granting the courts the power to do so is contained in Part I of the 1996 Act. Based on the clear distinction between the two parts, the Court concluded that the Indian courts can grant interim relief only where the arbitration is seated within India, *i.e.*, they cannot do so in relation to foreign arbitrations.

Conclusions

The fact that international awards are no longer in danger of being set aside by the Indian courts brings much-needed certainty to parties involved in India-related transactions. *Kaiser Aluminium* is therefore to be welcomed.

Some concerns remain, however. Crucially, the ruling is prospective and will not apply to arbitration agreements entered into before 6 September 2012.

Further, the Court's decision that no interim relief is available from the Indian courts under any circumstances where the arbitration is seated outside India sets India apart from most arbitration-friendly jurisdictions, where some relief in support of foreign arbitrations is generally available. Parties should bear this in mind when selecting the seat and rules of arbitration for an India-related deal. Ideally, the law of the seat should grant its courts robust powers to award interim relief in support of arbitrations seated there (as is the case, for example, under English law for arbitrations seated in England). Likewise, the institutional rules chosen should confer similar powers on the arbitral tribunal to grant interim relief (as with, for instance, the LCIA Rules or the ICC Rules).

In addition, the Indian courts still retain discretion to deny enforcement of awards rendered outside India if it they are contrary to Indian public policy, and the scope of "public policy" under Indian law remains broad.

Finally, it remains to be seen whether the High Courts and subordinate judiciary in India put into practice the non-interventionist approach articulated by the Supreme Court. Nonetheless, the *Kaiser* judgment provides a welcome succor to the investment climate in India.