INTERNATIONAL ARBITRATION AND INDIA: "A TRULY EXCELLENT JUDGMENT!"[1]

GARY B. BORN[G]& SUZANNE A. SPEARS[GG]

The inaugural edition of the Indian Journal of Arbitration Law could not have been published at a more auspicious time for international arbitration in India. As readers will know, India's Supreme Court gave the country's standing as a jurisdiction hospitable to international commercial arbitration a major boost last month. The Court's decision was an historic event, which both marks a turning point in the development of international arbitration and illustrates the complexity of the field's challenges.

As widely reported, the Supreme Court handed down a landmark judgment in *Bharat Aluminium v. Kaiser Aluminium*[2] ("Bharat Aluminium") on 6 September 2012. The Court held that Indian courts would no longer exercise authority to annul awards, or remove and appoint arbitrators in arbitrations seated outside India. In doing so, the Court relied on international authority to overrule three decades of domestic decisions in which Indian courts had claimed the right to set aside awards made outside India – notwithstanding the New York Convention and essentially uniform international authority to the contrary.

It is important to recall that India was one of the first signatories to the New York Convention in 1958 and that the Indian Parliament was one of the first national legislatures to give effect to the Convention, through its enactment of the 1961 Foreign Awards (Recognition and Enforcement) Act ("FARE Act"). The FARE Act was, in the words of the Supreme Court, calculated and designed

---

[1] Peter Schlosser, *Comment*, 6 Arb. Int'l 86 (1990). The title is borrowed from the first line of a comment by Professor Schlosser on a decision by the German Bundesgerichtshof, *Judgment of 27 February 1970*, 53 BGHZ 315, 6 Arb. Int'l 79, 86 (1990) (German Bundesgerichtshof).

[*] Gary Born is the author of INTERNATIONAL COMMERCIAL ARBITRATION (2009), INTERNATIONAL ARBITRATION: CASES AND MATERIALS (2010) and other works on international arbitration and litigation and Head of the International Arbitration Group at Wilmer Cutler Pickering Hale and Dorr LLP.

[**] Suzanne Spears is a counsel in the International Arbitration Group at Wilmer Cutler Pickering Hale and Dorr LLP. The authors would like to thank Shalaka Patil for research assistance. All views contained in this article are the views of the authors alone.

[2] C.A. No. 7019/2005

to facilitate and promote international trade by providing for speedy settlement of disputes arising in trade through arbitration.[3]

Despite a generally supportive legislative framework, however, international commercial arbitration came to be regarded with a considerable measure of mistrust by the Indian courts in the decades that followed enactment of the FARE Act. Among other things, Indian courts were hesitant initially to refer cases involving Indian parties to arbitration outside of India, even where there was a valid agreement to arbitrate.[4] Moreover, in a series of widely publicized decisions, Indian courts also asserted the power to set aside or annul an arbitral award, under domestic Indian law, even if the award was made outside of India, provided that Indian law governed the arbitration agreement.[5] These decisions were contrary to the structure of the New York Convention (which generally permits annulment actions solely in the arbitral seat) and to the consensus of international authority; they attracted a considerable measure of domestic and international notoriety.[6]

With the advent of liberalization in India in 1991, there were calls to reform Indian law relating to international arbitration, as the 1961 FARE Act had originally been intended to do.[7] Thus, the Arbitration and Conciliation Ordinance of 1996 ("Act") was promulgated, with the objective of beginning a new era in alternative dispute resolution in India and reflecting the Government's new market-friendly policies. The Act consolidated and amended the law relating to domestic and international commercial arbitration in India (Part I), and the enforcement of foreign arbitral awards (Part II), and established the law relating to conciliation (Part III).[8] One of the Act's main objectives, as

---

[3] Renusagar Power Co. Ltd. v. General Electric, A.I.R. 1985 SC 1156 (India).

[4] *See, e.g.,* RamjiDayawala v. Invest Import, A.I.R. 1981 SC 2085 (India). The Supreme Court largely rectified this problem in 1985, when it held that courts did not have the discretion to refuse enforcement of international arbitration agreements and could only refuse if conditions prescribed in the FARE Act were met. *See* Renusagar Power Co. Ltd. v. General Electric, A.I.R. 1985 SC 1156 (India).

[5] National Thermal Power Corp. v. Singer, A.I.R. 1993 SC 998 (India). *See also* Oil & Natural Gas Commission v. Western Co. of North Am., A.I.R. 1988 SC 674 (India). In particular, the Supreme Court held that the FARE Act could not govern the enforcement of such an award, and instead resort had to be made to the statute relating to domestic arbitration, the Indian Arbitration Act of 1940.

[6] *See e.g.,* J. Paulsson, *The New York Convention's Misadventures in India*, INT'L ARB. REP. (1992) (advising practitioners to avoid subjecting their contracts to Indian law as a result of the Singer and Oil & Natural Gas Commission decisions).

[7] *See e.g.,* V. Raghavan, *New Horizons for Alternative Dispute Resolution in India – The New Arbitration Law of 1996*, 13 J. INT'L ARB. 5, fns 94, 96 (1996) (citing commentators, associations of Indian industry, and the judiciary).

[8] Arbitration and Conciliation Ordinance of 1996 ("Act"), Preamble.

set forth in its General Provisions, was to minimize the supervisory role of courts in the arbitral process.[9]

Despite this proviso, courts continued to exercise wide-reaching supervisory authority over arbitrations, including arbitrations seated outside of India. In *Bhatia International v. Bulk Trading SA* ("Bhatia"), the Supreme Court held that all of Part I of the Act, which confers significant powers on Indian courts to grant provisional measures (Section 9), to make arbitral appointments in the absence of agreement by the parties (Section 11), to obtain evidence (Section 27) and to set aside arbitration awards (Section 34), applied to all arbitrations, including foreign arbitrations, unless expressly or impliedly excluded by agreement of the parties.[10] The holding in *Bhatia* paved the way for the Supreme Court's subsequent holding in *Venture Global Engineering v. Satyam Computer Services Ltd* ("Venture Global") that Indian courts were authorized to annul awards made outside India under Part I, Section 34 of the Act.[11] The *Venture Global* and *Bhatia* decisions led to renewed criticism of India for adopting an outlier position that was incompatible with the New York Convention.[12]

In the wake of *Venture Global* and *Bhatia*, new proposals were advanced to reform India's arbitration law to bring it into line with the New York Convention.[13] In response, the Indian Ministry of Justice released a consultation paper on proposed amendments to the Arbitration Act in 2010, in which it proposed that Part I of the Act be revised to expressly provide that it only applies to arbitrations seated in India except with respect to the provisions allowing for court-ordered provisional measures (Section 9) and the taking of evidence (Section 27).[14] Additionally, in early 2012, a five-judge constitutional bench of the Supreme Court agreed to hear consolidated appeals that presented the question whether to reconsider the Court's holding in *Bhatia* that the provisions of Part I of the Act apply to arbitrations seated outside of India except where expressly or impliedly excluded by the parties.

---

[9] *Id.,* Section 5.

[10] A.I.R. 2002 SC 1432 (India).

[11] A.I.R. 2008 SC 1061 (India).

[12] R. Sharma, *Bhatia International v. Bulk Trading S.A.: Ambushing International Commercial Arbitration Outside India?,* 26 J. INT'L ARB. 357 (2009); S. Rai, *Proposed Amendments to the Indian Arbitration Act: A Fraction of the Whole?*, 3 J. INT'L DISPUTE SETTLEMENT 169, 172 (2011).

[13] *Id. See also,* F. S. Nariman, *Ten Steps to Salvage Arbitration in India: The First LCIA-India Arbitration Lecture*, 27 ARB. INT'L 115 (2011).

[14] *Proposed Amendments to the Arbitration and Conciliation Act, 1996, A Consultation Paper*, Ministry of Law and Justice, the Government of India (2010), http://lawmin.nic.in/la/consultationpaper.pdf

On 6 September 2012, the constitutional bench of the Supreme Court issued a meticulously-reasoned decision holding that Part I of the Act does not apply to arbitrations seated outside of India and that Indian courts therefore may not annul awards made outside of India under Section 34 of the Act.[15] In particular, the Supreme Court held that arbitrations seated outside India are dealt with only in Part II of the Act, which addresses the recognition and enforcement in India of foreign arbitral awards under the New York Convention and which provides for no judicial supervisory or annulment authority for foreign-seated arbitrations.[16]

In holding that Part I of the Act does not grant Indian courts supervisory authority with respect to arbitrations seated outside India, the Court in *Bharat Aluminium* expressly overruled both *Bhatia* and *Venture Global*. Relying on international authority and the New York Convention, the Court also clarified a number of other issues regarding the meaning of the Act. In particular, it affirmed that Part I of the Act adopted the territorial principle embraced by the UNCITRAL Model Law;[17] that the law of the arbitral seat governs the conduct of the arbitration,[18] and that an annulment action may be brought outside of the arbitral seat only in the very rare circumstance of the parties having agreed upon a procedural law other than that of the arbitral seat.[19]

At the same time, the *Bharat Aluminium* Court also declared that its holding would only "apply prospectively, to all arbitration agreements executed hereafter,"[20] leaving parties with arbitration agreements executed before 6 September 2012 subject to the Court's *Bhatia* decision and its progeny. Although the Court's prospectivity ruling was understandable, given the significance of the changes resulting from the *Bharat Aluminium* decision, purists will no doubt object that compliance with the New York Convention ought not to be delayed further.

Despite its effective date and challenges remaining in its implementation, *Bharat Aluminium* is of momentous significance. The decision represents a significant

---

[15] Bharat Aluminium v. Kaiser Aluminium, C.A. No. 7019/2005. In *Bharat Aluminium*, the appellant had filed applications under Part I, Section 34 of the Act to set aside two ad hoc arbitral awards rendered by a tribunal seated in London.A.I.R. 2005 Chh. 21.

[16] *Id.*,

[17] *Id.* at pp. 69-75.

[18] *Id.* at pp. 72-74 (citing arbitration legislation in other countries and English court decisions); 105 (citing ALBERT VENN DICEY & LAWRENCE COLLINS, DICEY MORRIS & COLLINSON THE CONFLICT OF LAWS541-542 (11th ed. 1987)).

[19] *Id.* at pp. 138, 139, 142, 148-149 (citing G. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2333-2425 (2009)), 150-155 (citing courts of the United States and Hong Kong), 156, 158.

[20] *Id.* at 201.

affirmation by the Indian Supreme Court's commitment to the New York Convention and the international arbitral process. In looking to international authority and the Convention to overrule domestic precedent, the Court took an historic step, contributing significantly to the role of the Convention and the efficacy of the international arbitral process. Its decision will have substantial and continuing importance, not just in India but more widely; it can be expected to mark a genuine new beginning for international arbitration in the region.

On a practical level, knowing that arbitrations with Indian parties seated outside of India will not be subject to interference by local courts will encourage parties to do business on more favourable terms with Indian parties. Consistent application of such an approach should also give parties more confidence in choosing India as a seat of arbitration and Indian law as a substantive law. And *Bharat Aluminium* may prompt the Indian legislature to act on proposed amendments to the 1996 Act, including suggestions that Part I's provisions relating to court ordered interim relief and taking of evidence be revised to apply to international arbitrations held outside of India. Such a change would further enhance the standing of India's arbitration law and reflect the objectives of the UNCITRAL Model Law and New York Convention.