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India Is Moving In Right Direction On Int'l Arbitration

Law360, New York (April 11, 2014, 12:24 PM ET) -- The September 2012 decision of the Indian Supreme Court in the case of Bharat Aluminum v. Kaiser Aluminum (BALCO)[1] effectively reversed the trend of Indian courts' judicial intervention in international arbitrations. A spate of judgments since BALCO makes it apparent that Indian courts are now adopting a less interfering role in the international arbitration process and are willing to enforce arbitration agreements between parties in accordance with the UNCITRAL model law and the New York Convention.

This new pro-arbitration policy is exemplified by the Supreme Court's latest decision in Enercon (India) v. Enercon GmBH,[2] where it emphasized the court's role to enforce arbitration clauses wherever possible; to "interpret them to make them work." The change in judicial attitude toward international arbitration is reflective of the courts' desire to make India a more arbitration-friendly jurisdiction and to bring it up to international standards. The reduced risk of an Indian court's intervention in international arbitrations is a significant development to be noted by global practitioners in the field.

In its BALCO judgment the Supreme Court overruled (prospectively) the existing law as it had developed under Bhatia International v Bulk Trading SAand Anr.[3] In Bhatia International the Supreme Court exercised jurisdiction in an arbitration held outside India, holding that Part 1 of the Indian Arbitration Act, which applied to domestic arbitrations would also apply to international commercial arbitrations held outside of India, unless the parties by agreement, express or implied excluded the provisions of Part 1 of the act.

Bhatia International led to an era of judicial activism by Indian courts applying the more expansive provisions of Part 1 of the act to international arbitrations, including by allowing a review of foreign awards on their merits.[4] These judgments were widely criticized as negating the object of the act, which based on the UNCITRAL model law, was to "to minimize the supervisory role of the courts in the arbitral process." The decision in BALCO unequivocally found that Part 1 of the act would have no application to international commercial arbitrations held outside India.

Despite the fact that the decision in BALCO is to be applied prospectively, that is to agreements executed after Sept. 6, 2012, a review of the subsequent case law shows that courts are adopting a more pro-arbitration approach and will not interfere in every case. In the post BALCO period it is much

more likely that in cases where the seat of arbitration is outside India and the parties have chosen a foreign procedural law, Indian courts will rule that Part 1 has been deemed excluded by the parties and will decline to intervene.

In Sakuma Exports v. Louis Dreyfus Commodities Suisse SA[5] the Bombay High Court found that that where the governing law of the contract and the seat of the arbitration was outside India, the parties had impliedly excluded the provisions of Part 1. The court held that "even in the absence of an express choice by the parties in regard to the substantive law governing the arbitration agreement or curial law, when the proper law of the contract has been specifically chosen that law would, in the absence of an unmistakable intention to the contrary govern the arbitration agreement." On this bases the court concluded it had no jurisdiction to entertain the case under Part 1.

A similar judgment was passed in Yograj Infrastructure Ld. V. Ssang Yong Engineering & Construction Company Ltd.,[6] where the court found that Bhatia International was not applicable because the applicant had specifically agreed for the arbitration proceedings to be conducted in accordance with Singapore International Arbitration Center rules. Both these decisions indicate that where apart from the foreign seat of the international commercial arbitration, there are other indicative factors emanating from the agreement by which the choice of law in regard to the governing law is a foreign law and the rules of a foreign arbitral institution has been adopted that is indicative of an implied exclusion of Part 1.

In another positive development the Supreme Court held in Shri Lal Mahal Ltd. v. Progetto Grano Spa[7] that Part 2 of the act, which deals with enforcement of foreign awards, does not permit a review of a foreign arbitral award on its merits. The court held that such awards cannot be challenged on the ground that they are contrary to "public policy." The term "public policy" of India must be narrowly interpreted in the context of enforcement of foreign awards.

The court overruled earlier decisions where a wider interpretation of public policy had been held to include "patent illegality" and also an award which was "so unfair and unreasonable that it shocked the conscience of the court," holding that this wider interpretation should be limited to grounds for challenge of a domestic award under Part 1 of the act. The court noted "while considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction nor does it enquire as to whether, while rendering foreign awards, some error has been committed. Enforcement of a foreign award can only be refused if its enforcement is found contrary to (1) fundamental policy of Indian law; (2) the interests of India; (3) justice or morality."

Two recent decisions demonstrate Indian Supreme Court's new pro-arbitration approach. In World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.[8] the court restricted the applicability of an earlier decision, which found that disputes involving allegations of fraud can only be inquired into by a court and not by the arbitrator. The Supreme Court stated that this ruling did not apply to foreign arbitrations held under the New York Convention to which Section 45 of the act applies.

Under Section 45 the court can decline to make a reference of a dispute covered by the arbitration

agreement only if it comes to the conclusion that the arbitration agreement is "null and void, inoperative or incapable of being performed." The Supreme Court found that “the arbitration agreement does not become "inoperative or incapable of being performed" where allegations of fraud have to be inquired into and the court cannot refuse to refer the parties to arbitration” on this ground. This is a welcome decision for foreign parties involved in international arbitrations with Indian companies, allegations of fraud can no longer be used as an excuse to remove the matter to domestic courts.

Enercon (India) v. Enercon GmBH, involved a long-standing dispute between joint venture partners, the Indian partner argued that the agreement which contained the arbitration clause was not concluded, it did not bind the parties, and hence there was no binding arbitration agreement. Proceedings were initiated in India and in England, the venue of the arbitration, seeking declaratory judgment and other reliefs.

The Supreme Court upheld the separability of the arbitration clause from the underlying agreement; it held “the parties have irrevocably agreed to resolve all the disputes through Arbitration. Parties cannot be permitted to avoid arbitration, without satisfying the Court that it would be just and in the interest of all the parties not to proceed with arbitration. Furthermore in arbitration proceedings, courts are required to aid and support the arbitral process, and not to bring it to a grinding halt.”

The court further rejected the argument that the arbitration clause was unworkable because of its failure to specify a mechanism of appointing the third arbitrator. The court held that it must “adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause.” It declared that “the arbitration clause cannot be construed with a purely legalistic mindset” and in such cases, “the court ought to adopt the attitude of a reasonable business person.” The court felt that the omission in the arbitration clause that the two party-appointed arbitrators should appoint the third arbitrator was so obvious that the court could legitimately supply the missing line.

In another important finding, the court concluded that though the venue of the arbitration had been chosen as London it could not be presumed that the parties had intended London to be the seat of arbitration as well. Since all three laws applicable in arbitration proceedings were Indian laws, the Supreme Court used the "closest and intimate connection to arbitration" test to conclude that the seat of arbitration was India.

Finally, the court concluded that once the seat of arbitration has been fixed in India, its courts would have exclusive jurisdiction to exercise supervisory powers over the arbitration. Allowing the English courts to have concurrent jurisdiction over the proceedings would lead to “unnecessary complications and inconvenience” … which would be contrary to the aim and objective of arbitration to enable parties “to resolve the disputes speedily, economically and finally.”

While it will be important to keep a close watch on future judicial developments in the field, for now it appears that the Indian Supreme Court is sending a strong message that it will not allow excessive

interference in international arbitrations held outside India.

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[1] 2012(3)ARBLR515(SC).

[2] Civil Appeal no. 2086 of 2014 (Arising out of SLP (c) No. 10924 of 2013), decided on February 14, 2014.

[3] AIR 2002 SC 1432.

[4] See Venture Global Enginerring v. Satyam Computer Services Ltd. & Anr, AIR 2010 SC 3371.

[5] 2013(6)BomCR218.

[6] ILR[2013]MP1466.

[7] 2013(3)ARBLR1(SC).

[8] Civil Appeal No. 895 of 2014 (Arising out of S.L.P. (C) No. 34978 of 2010), decided on January 24, 2014.
