From Regressive to Progressive: The Changing Face of Arbitration in India

Introduction

The growth of international arbitration has helped in reducing the transaction costs of business through quick resolution of disputes. This has been possible because of minimal court interference, especially at the stage of enforcement of arbitral awards. In India, the Supreme Court delivered judgments which increased the scope of judicial interference in enforcement of foreign arbitral awards. This led to a decrease in the confidence of international businesses to arbitrate in India. However, the 2012 judgment of the apex court in *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc.*[1] ("**BALCO**") ushered in a new era of arbitration in India. Heralded as a "new dawn" for Indian arbitration, the case has served as a precedent for progressive judgments by courts in the area of international commercial arbitration.

The newsletter highlights the judgements which have eased the process of enforcement of awards thereby contributing towards making India an arbitration friendly nation.

1. The legislative framework and its misinterpretation by the courts

Based on Article V of the New York Convention on the Enforcement of Foreign Arbitral Awards, 1958 ("**New York Convention**"), section 48 of the Indian Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") lays down the conditions for enforcement of foreign awards. The Arbitration Act is divided into two parts: part I applies to domestic arbitration and part II applies to international arbitrations.[2] Section 48 contained in part II provides for the enforcement of foreign arbitral awards. In direct contradiction to the well defined demarcation between the two areas of the Arbitration Act, the Supreme Court in *Bhatia International v Bulk Trading SA*[3] held that part I of the Arbitration Act is applicable to foreign-seated arbitrations. The respondent in this case sought interim relief under section 9 of the Arbitration Act, despite the fact that the seat of arbitration was in Paris. The court justified this on the reasoning that by not expressly excluding the provisions of part I of the Arbitration Act in the arbitration agreement, the parties impliedly included these provisions in their agreement.

Extending the reasoning of *Bhatia International* in *Venture Global Engineering v Satyam Computer Services Ltd,*[4] the Supreme Court held section 34 of the Arbitration Act to be applicable for enforcement of foreign awards. The appellants sought to set-aside the foreign award, which ordered transfer of shares,[5] on the basis of violation of public policy of India. Before this judgement, a narrower concept of "public policy" was considered by the Indian judiciary while setting aside foreign arbitral awards under section 48. This ensured that the foreign awards were not set aside on mere technicalities of law, but honoured for their conformity with the foreign law of the place where the arbitration was seated. However, in this case the court favoured a

[1] (2012) 9 SCC 552
[2] Part I contains Sections1-34 and Part II contains Sections 44-60
[3] (2002) 4 SCC 105
[4] (2008) 4 SCC 190
[5] This was contended to be in violation of Indian laws and regulations specifically the Foreign Exchange Management Act, 1999 and its notifications

broader definition of public policy, and set aside the award on basis of "patent illegality." Till this judgment, "patent illegality" of an award was only used to set aside domestic awards under section 34. With the precedent set in *Bhatia International,* the Supreme Court failed to differentiate between the two parts of the Arbitration Act.

This interpretation by the judiciary blurred the distinction between the two distinct parts of the Arbitration Act. The main objective behind the Arbitration act was the speedy resolution of disputes with minimal interference by the Courts[6], which was defeated by these cases.

2. Striking the difference between international and domestic arbitration

Given the state of the existing law, every award that was passed outside India became open to challenge in India. Petitions were being filed in courts, seeking to set aside foreign awards on the most frivolous grounds. One such petition filed before the High Court of Chhattisgarh sought to set aside an award passed in England under section 34. The court dismissed this petition, and the petitioner appealed to the Supreme Court. Till this time, a number of appeals in the apex court had been filed on similar grounds. Clubbing these appeals, the Supreme Court aligned its position with the legislative framework.

In *BALCO,* the court distinguished between parts I and II of the Arbitration Act and held that part I cannot apply to arbitrations whose seat is outside India. The intention of the legislature behind section 48 of the Arbitration Act and its demarcation from section 34 was that the judiciary should not delve into the merits of a foreign award. Such interference should only be accepted by the courts of the country where the award is passed. The underlying motivation of part II was to reduce the hurdles and produce a uniform, simple and speedy system for enforcement of a foreign arbitral award. This reasoning given by the court was in conformity with Article V of the New York Convention, which served as the basis for framing section 48. The court gave judicial sanction to the intent of the legislature behind framing of section 48 and recognised India's obligation under the New York Convention.

3. Easing the enforcement process: India steps towards being arbitration friendly

149 countries around the world have ratified the New York Convention. Many jurisdictions have either adopted it in their national legislations or have made provisions analogous to Article V. The "pro-enforcement bias" of the New York Convention urges minimal judicial intervention and narrow construction of the grounds for refusal. Similarly, the language of section 48 is permissive, not mandatory. The section provides that "enforcement of a foreign award *may* be refused..." thereby conferring discretion on courts to not refuse enforcement of foreign arbitral awards, on a case to case basis. This reasoning has been adopted by courts in other New York Convention jurisdictions and the grounds for refusing recognition and enforcement of arbitral awards are usually applied restrictively.[7]

[6] Ministry of Law and Justice, Government of India, *Proposed Amendments to the Arbitration and Conciliation Act, 1997: A Consultation Paper* (2010), lawmin.nic.in/la/consultationpaper.pdf. Last retrieved July 16th, 2015

[7] Alan Redfern & Martin Hunter, *The Law & Practice of International Commercial Arbitration* (4th ed., Sweet & Maxwell, London, 2006) 445

The Supreme Court, post *BALCO,* seemed to adopt this approach. A number of judgments delivered by it have indicated its pro-arbitration stance. In *Escorts Ltd v Universal Tractor Holding,*[8] the respondent sought execution of a US award, in the Delhi High Court who granted the execution. The petitioner then challenged this decision in the Supreme Court. The basis of their challenge was that the award was not confirmed as per the provisions of the arbitration agreement and the Federal Arbitration Act of the United States. Confirmation of the award means that the award must receive judicial sanction, so that it becomes equivalent to a decree passed by a civil court. The petitioner contended that this was sufficient reason for denying enforcement under section 48. However, the apex court did not accept this argument. It pointed out that the requirement of *double exequatur* was removed by the enactment of the New York Convention. Double exequatur requires that the award be confirmed by the court of the country where it has been passed, before its enforcement can be sought in another jurisdiction. The court held that section 48 is on Article V of the New York Convention and the doctrine of double exequatur is inapplicable in India.

Continuing their pro-enforcement stance, the Supreme Court corrected its position of *Venture Global* in 2013 in *Shri Lal Mahal v Progetto Grano Spa.*[9] In this case, the award issued in London was enforced by the Delhi High Court. The petitioner challenged this decision in the Supreme Court and contended that the award was contrary to the public policy of India since it was not in conformity with the provisions of the contract between the parties. The Supreme Court upheld the decision of the lower court and refused to go into the merits of the dispute. It held that the public policy exception provided in section 48 must be construed narrowly while enforcing international awards. Alleged errors of fact (even if made out) could not justify refusing recognition and enforcement of the award. Only if the award was contrary to the fundamental policy of Indian law or to basic notions of morality and justice, would the courts interfere in the enforcement of a foreign award.

In *Govind Rubber v Louids Dreyfus Commodities Asia P. Ltd.*[10] the Supreme Court in 2014 further upheld a Bombay High Court decision of enforcing an award in the absence of a valid arbitration agreement. The contention of the petitioner was that since the contract was not signed by the parties, the arbitration agreement was not valid. The seat of arbitration was in Singapore and *lex arbitri* or the law of the seat of arbitration mandated that the arbitration agreement be signed by the parties. According to the petitioner, the arbitral tribunal did not consider this before passing the final award. The court held that the New York Convention requires an arbitration agreement to be signed, which does not imply that it must be signed by the parties. Further, it opined that, "*a commercial document having an arbitration clause has to be interpreted in such a manner as to give effect to the agreement rather than invalidate it.*"

The pro-enforcement trend has also been adopted by different High Courts. In *Perma Container (UK) Line Limited v Perma Container Line (India) Pvt Ltd*[11] the petitioner sought for the enforcement of a UK award in the Bombay High Court. The respondent challenged this petition, seeking to declare the award "null and void" for violation of public policy and the

[8] (2013) 10 SCC 717
[9] (2014) 2 SCC 433
[10] (2014) 14 SCALE 92
[11] Arbitration Petition Nos. 259 and 406 of 2013 (Bombay High Court)

main contention was that the arbitrator *suo moto* ruled on the issue of forgery of some documents. They contended that forgery is a serious issue with criminal consequences and penalties which should be sufficient cause to deny enforcement. However, the Bombay High Court did not accept the argument of the respondent. By citing *Shri Lal Mahal,* the court held that the public policy exception under section 48 must be construed narrowly as the section mandates that the award must be *induced* by fraud for it to be set aside. Further, the court also held that any opinion of the arbitrator on forgery could not be used by the respondent as evidence against the petitioner in any subsequent proceedings in a criminal court. The court refused to go into the merits of the dispute and enforced the award.

The Calcutta High Court also followed in the steps of the Supreme Court when it refused a petition seeking to vacate a foreign award. The petitioner in *Coal India Ltd v Canadian Commercial Corporation*[12] sought to set aside an ICC award. The contention of the respondent was the governing law of contract was India and, thus, the award could be set aside under section 34.

However, the court refused to interfere under section 34. Quoting the *BALCO* judgment, the court held that foreign awards cannot be subject to part I of the Arbitration Act. The seat of arbitration was in Geneva, Switzerland and any petition for setting aside be moved in Swiss courts. Further, no petition for setting aside a foreign award can be filed under section 48. This section only provides for enforcement of an award and does not allow the courts to look into the merits of the dispute. The High Court held that section 48 does not contemplate a situation where a foreign award could be challenged in an Indian court and, therefore, dismissed the petition.

Conclusion

One of the biggest advantage of arbitration is the expected speedy resolution of disputes. Needless to say, it is necessary that finality is given to the award which requires minimal court interference. Indian courts earned a reputation of being anti-arbitration since reasoned awards were often challenged. Further, pre-*BALCO*, a number of "arbitration-unfriendly" judgments had given rise to concerns about India's commitment to arbitration. The sanctity and efficacy of arbitration is at risk where enforcement is stalled. However, with *BALCO* setting the tone, the courts appear to have progressed to adopting pro-enforcement interpretation of the Arbitration Act. Clearly, it is necessary to provide legislative sanction to various judgments of the different courts. An amendment to section 48 expressly enumerating the components of "public policy" would help in reducing the time taken to enforce awards in India. A dynamic business environment demands that the efficiency of its functions are not disrupted by protracted legal disputes. The Supreme Court has recognised this and is developing jurisprudence to support and encourage arbitration.

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[12] (2013) 2 CHN 494