

Fifteen years on from *Bhatia*: the Indian Government looks at how to institutionalise arbitration in the subcontinent

In 2002, the Indian Supreme Court decided, in *Bhatia International v Bulk Trading SA*¹ ('*Bhatia*') that Indian courts had exclusive jurisdiction to test the validity of an arbitral award made in India even when the proper law of the contract was the law of another country. The court interpreted section 2 of the Indian Arbitration and Conciliation Act 1996 (the 'Act') to mean that Part I of the Act applied even to arbitrations seated outside India, thereby giving the Indian courts broad scope to intervene in foreign arbitrations. This was widely regarded as a low point for arbitration in India. Fast forward to January 2017 and the Indian Government is trying to promote India as an arbitration hub, and its courts are generally seen to be taking a pro-arbitration stance. India is now clearly focused on becoming an attractive jurisdiction for foreign investment. Hand in hand with this, its legislators and courts are taking steps to make India an arbitration-friendly jurisdiction. This article explores some of the key steps along the road of India's transformation, 15 years on from *Bhatia*.

***Bhatia* overruled**

In 2008, the effect of *Bhatia* was extended in other court judgments to permit Indian courts to set aside foreign arbitral awards (*Venture Global Engineering v Satyam Computer Services Ltd*²) and to appoint arbitrators in arbitrations seated outside India (*Indtel Technical Services Pvt Ltd v WS Atkins Plc*³). These cases were widely criticised for creating uncertainty and delay in arbitrations seated elsewhere but with some connection to India. It became standard practice to

expressly exclude the application of Part I of the Act in arbitration agreements in order to avoid the effect of this line of cases.

In 2012, in *Bharat Aluminium v Kaiser Aluminium Technical Services*⁴, a five-judge constitutional bench of the Supreme Court overruled these controversial decisions. The court in *Bharat* held that Part I of the Act only applies to arbitrations seated within India and therefore, Indian courts cannot order interim relief in support of foreign seated arbitrations⁵. The court further ruled that awards rendered in foreign seated arbitrations are only subject to the jurisdiction of Indian courts when they are to be enforced in India under Part II of the Act. This set the tone for reduced intervention by the Indian courts in arbitrations seated outside India. The decision reflects the principles of certainty, commerciality and party autonomy. Arguably, India has never looked back.

Amendments to the Arbitration Act 1996

In 2015, the Indian Government amended the Act in line with proposals made by the Law Commission and stakeholders (the '2015 Act'). The reforms are clearly aimed at allaying the concerns of those who had been wary of choosing India as a seat of arbitration. Some of the key changes implemented by the 2015 Act are as follows.

Interim measures

The powers of the Indian courts to grant interim measures, such as injunctions, have been reformed. The Indian courts may now grant interim measures in support of arbitrations outside India. If an Indian court grants interim measures before an arbitration has commenced, the arbitration must start within 90 days (or such further time as the court orders), after which the interim measure ceases to be in force. The jurisdiction of the courts to grant interim measures after the tribunal has been appointed is limited to circumstances in which tribunal-ordered interim measures would not be 'efficacious'. An interim measure issued by an arbitral tribunal seated in India is enforceable in the same manner as a court order.

Public policy

'Public policy' is no longer a broad ground to resist enforcement in India of an international commercial arbitration award or foreign award. A refusal of enforcement is limited to circumstances in which there has been fraud or corruption, or contravention of 'the fundamental policy of Indian law' or 'the most basic notions of morality or justice'.

High court

Applications arising out of international commercial arbitration and applications to enforce foreign awards must now be made to a high court and not to a lower court, which may be in a remote part of the country, and where the judges may not be familiar with arbitration.

Awards

The high courts also have powers to set aside awards made in India where arbitrators have failed to comply with new requirements for disclosure of interests; delegate the appointment of arbitrators in ad hoc arbitration to an arbitration institution; limit the fees charged by arbitrators for delays attributable to the arbitral tribunal; award costs in any court application arising out of an arbitration; and allow enforcement of an award made in India to proceed, even if there

is a challenge to that award.

Twelve-month time limit

Perhaps the most striking reform was the imposition of a 12-month time limit on arbitrators sitting in India for issuing an award. This may be extended for six months by party agreement, and then further by the court. This arguably puts parties at the mercy of court scheduling, which the reforms are directed at avoiding. Parties to an Indian arbitration may also agree to follow a fast-track procedure that must be completed within six months.

While the wisdom of all the reforms has been debated, what is clear is that they aim to achieve the worthy objectives of increasing certainty, reducing costs, streamlining procedures, limiting delay, making it easier to arbitrate in India and obtaining assistance from the Indian courts in support of foreign seated arbitrations.

Also introduced in 2015, The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, provides for the swift disposal of arbitration-related court proceedings by establishing special commercial courts at the district level, and commercial divisions in the high courts to deal with such matters.

Pro-arbitration jurisprudence

Following the sea change brought about by Bharat, and in line with the Indian Government's efforts to promote arbitration, recent decisions from the Indian courts evidence a pro-arbitration approach:

- In August 2016, in *Sidharth Gupta and Ors v Getit Infoservices Private Limited*⁶, the Company Law Board, New Delhi Bench, dismissed a petition alleging oppression and mismanagement under the Indian Companies Act and referred the parties to arbitration under the Arbitration Rules of the Singapore International Arbitration Centre (SIAC) in accordance with the arbitration clause in the relevant shareholders' agreement.

- In *Eros International Media Limited v Telex Links India Pvt Ltd* (decided on 12 April 2016), the Bombay High Court held that copyright infringement claims are arbitrable.
- In July 2016, the Delhi High Court rejected *forum non conveniens* arguments in overturning a single judge decision restraining McDonald's from invoking an arbitration clause with the London Court of International Arbitration (LCIA) in a joint venture agreement with a local partner; the division bench set aside the injunction granted by the single judge, thus allowing McDonald's to resume arbitration proceedings⁷.
- In February 2017, a Delhi High Court justice refused to set aside an arbitral award won by investors against the promoters of a cancelled Indian information technology economic zone, concluding that the promoters waited too long to challenge the arbitrators themselves, and that the investors did not breach their end of the bargain⁸. The promoters did not challenge the qualifications of the tribunal until more than a year after their investors launched International Chamber of Commerce (ICC) proceedings against them in 2010. Justice Muralidhar ruled that the ICC was right to reject the challenges first brought up in May 2011.

These are just a few examples to demonstrate the dramatically changed view of the Indian courts in relation to domestic and international arbitrations.

Overhauling of the bilateral investment treaty regime

India has signed bilateral investment treaties (BITs) with 83 countries. According to the United Nations Conference on Trade and Development (UNCTAD), India was one of the top 15 most frequent respondent states to investment treaty arbitration in 2015. As a result of this, in December 2015, the cabinet approved a new model BIT (the 'Model BIT'). In 2016, India gave notice to 57 countries (including the United Kingdom, Germany, France and Sweden) seeking termination of

BITs whose initial duration had either expired or will expire soon. For the remaining countries with similar treaties whose initial duration will expire from July 2017 onwards (such as China, Finland, Bangladesh and Mexico), India has asked for joint statements to clarify ambiguities in treaty texts to avoid expansive interpretations by arbitration tribunals. Through this process, the Indian Government intends to replace existing BITs with a new set of treaties⁹. India's Model BIT will provide the framework for new negotiations with trading partners and current BIT counterparties.

The most debated new provisions in the Model BIT are: (1) the narrower definition of 'investment'; (2) the exclusion of taxation; (3) the absence of the most favoured nation (MFN) clause; and (4) the requirement that the investor exhaust all local remedies before it can proceed to international arbitration. India has abandoned its more expansive 'assets-based' definition and adopted an 'enterprise-based' definition of investment, which essentially narrows the scope of protected investments and reduces India's potential liability. The Model BIT states that the measures of local governments and taxation measures will be outside the purview of the BIT, no doubt a result of recent claims by companies such as Vodafone and Cairn Energy. India's Model BIT does not contain the MFN clause; probably as a consequence of the *White Industries* case in which India was found to have violated its BIT with Australia, which contained a broad MFN provision. The Model BIT also asks investors to voluntarily incorporate standards of corporate social responsibility. This is undoubtedly positive but not framed as a mandatory requirement. A new clause on transparency requests that parties ensure that all the laws, regulations, procedures and administrative rulings of general application regarding matters covered in the BIT are published or made available so that interested persons can become acquainted with them.

Time will tell whether the Model BIT strikes the right balance between attracting and safeguarding foreign investment while protecting public interest. It also remains to be seen, however, how successful India will be in having future BITs or investment chapters conform to the Model BIT. This will no doubt depend on who it is negotiating with and their relative bargaining power. What is clear is that India, a relative latecomer to the world of BITs, now sees investment treaties as vital to the country's development. It has learned from the investment disputes in which it has been involved and its framework for dealing with foreign investors is evolving.

Mumbai Centre for International Arbitration

India's first home-grown international arbitration centre, the Mumbai Centre for International Arbitration (MCIA) opened its doors in October 2016¹⁰. It was set up through a joint initiative between the Government of Maharashtra and the domestic and international business and legal communities in order to promote the use of institutional arbitration in India¹¹. Prior to this, the closest major arbitration centre was in Singapore. According to its annual report, the highest number of case filings in 2015 at the SIAC was generated by parties from India. At MCIA's inauguration, Chief Minister Devendra Fadnavis said, 'A crucial factor to establish ease of doing business and attract foreign direct investments is a healthy arbitration resolving ecosystem. In this, time and space are key. A centre in Mumbai will take care of both these factors'¹². The centre boasts a dedicated secretariat, high-tech hearing rooms, with simultaneous transcription services and a board of leading international and domestic arbitration practitioners.

On a related note, in 2016, LCIA India withdrew its physical presence from India following market feedback that Indian parties were content to continue to use LCIA rules, and owing to insufficient adopters of LCIA India clauses to justify a presence on the ground. Established, with 'the idea of bringing London quality to Indian parties at Indian rates'¹³, LCIA India was only in operation in

India for seven years. Nonetheless, it is likely that, through its presence, its profile-raising initiatives, and the conferences and events it organised, LCIA India did raise awareness of the benefits of institutional arbitration in India.

Indian Government committee on how to institutionalise international arbitration in the subcontinent

On 29 December 2016, it was announced that a committee set up by the Indian Government and chaired by retired Supreme Court judge, Justice BN Srikrishna, would consider ways to institutionalise international arbitration in the subcontinent, in line with the ambitions of Prime Minister Narendra Modi. The committee is made up of judges, lawyers, legal policy-makers, and representatives of industry and government. It was given 90 days to analyse the effectiveness of the present arbitration mechanism; review the facilities, resources, funding and workings of existing arbitral institutions; assess skill gaps; and evaluate the efficacy of the current legal framework for arbitration, according to a broad mandate outlined by a statement of the Ministry of Law and Justice¹⁴. According to the statement, '[t]he Government of India has laid emphasis on making Arbitration a preferred mode for settlement of commercial disputes'. The committee is called on to suggest measures to institutionalise national and international arbitration, and make India a 'hub of international commercial arbitration', including recommending revisions to existing institutional rules.¹⁵

In early March, the committee produced a working paper identifying the following challenges to be addressed: the misconception that institutional arbitration is more expensive and inflexible than ad hoc arbitration, a historic lack of government support for institutional arbitration, years of excessive judicial intervention, a lack of experienced arbitrators for appointment to tribunals, the absence of an arbitration bar of local and foreign lawyers and, crucially, a lack of information as to key performance indicators in respect of existing arbitral institutions.

The paper concludes that there is insufficient data available to analyse and make recommendations to facilitate the growth of arbitral institutions in India, and so the paper attaches a questionnaire to be completed by the existing institutions and one for other stakeholders, inviting suggestions for reform. The committee invited comments from the public and questionnaire responses by 7 April 2017. Data collected in response to the questionnaires is intended to assist in understanding why several Indian arbitral institutions are not 'functioning effectively'¹⁶. Nonetheless, the working paper recommends the creation of an autonomous national regulatory body to set minimum standards for arbitral institutions, the creation of an arbitrator accreditation body, collaboration with international arbitral institutions to develop training for lawyers and law students with a view to the creation of an arbitration bar in India, fixing the judicial roster to permit specialisation in arbitration (to the exclusion of regularly hearing other types of matters), the consideration of further amendments to the Act to deal with ambiguities and keep pace with international arbitration law and practice, the consideration of legislation to promote India as a seat for international arbitration (eg, taking the lead from Singapore and opening the legal market to foreign-qualified lawyers, offering tax incentives), government incentives for developing infrastructure for institutional arbitration and the inclusion of clauses providing for Indian institutional arbitration in government contracts.

Steps in the right direction

The Modi Government wants to make it easier for foreign parties to do business in India. Part of this process means making arbitration in India and with Indian parties easier. India's story shows that a key step in the nation's economic progress is making it an international and domestic arbitration-friendly jurisdiction, supported by institutions, a sophisticated legal system and

a commercial judiciary. This present push to promote arbitration, spearheaded by current and former members of the judiciary, is in stark contrast to the suspicious and heavy-handed approach of the Indian bench less than a decade ago. Less than ten years after its Supreme Court decided it had the power to set aside foreign arbitral awards, India is looking to make arbitration the preferred dispute resolution mechanism for commercial parties.

This article was first published in the Arbitration Committee newsletter, Vol 22 No 1, June 2017, and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association.

Notes

¹ (2002) 4 SCC 105.

² [2008] 4 SCC 190.

³ [2008] 10 SCC 308.

⁴ Civil Appeal No 7019 of 2005.

⁵ The decision was held to apply to arbitration agreements concluded from that date onwards.

⁶ (CA 128/ C – II/ 2014 in CP 64 (ND) 2014).

⁷ McDonalds India Private Limited v Vikram Bakshi and Ors. FAO(OS) 9/2015.

⁸ Shakti Nath And Ors v Alpha Tiger Cyprus Investments, case number 154/2016, before the High Court of Delhi.

⁹ Recently, the European Union has urged India to extend by at least six months the BITs it has with member countries. India's Minister of Commerce and Industry stated that India will not give extensions and the Indian Government will let them lapse: Nayanima Basu, 'EU Pushes India to Extend Investment Pacts by Six Months' Business Line (New Delhi, 20 February 2017) www.thehindubusinessline.com/economy/eu-asks-india-to-extend-by-6-months-trade-pacts-with-member-nations/article9551341.ece accessed 9 May 2017. In other words, fresh investments coming from European nations will not have legal protection under a BIT.

¹⁰ Shubhangi Khapre, 'First international arbitration centre comes up in Mumbai' The Indian Express (Mumbai, 9 October 2016) <http://indianexpress.com/article/india/india-news-india/first-international-arbitration-centre-comes-up-in-mumbai-3072913/> accessed 9 May 2017.

¹¹ SIAC Annual Report 2015.

¹² See number 10 above.

¹³ Comment by then Registrar, Ajay Thomas www.legallyindia.com/litigation-arbitration-disputes/3-year-old-licia-still-to-get-its-10th-dispute-resolves-hiranandani-feud-with-karanjawala-pepper-hamilton-20130808-3898 accessed 9 May 2017.

¹⁴ Government of India Press Information Bureau Ministry of Law and Justice statement 29 December 2016.

¹⁵ All of the over 30 arbitral institutions in India were included in the review, although it is noted that the MCIA is the only institution whose rules, at the time of the review, reflect the most recent amendments to the Act, and it does not suffer from some of the more obvious deficiencies identified by the committee, eg, lack of information in relation to caseload, functioning and rules or a lack of facilities.

¹⁶ Working Paper on Institutional Arbitration Reforms in India: 2.

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