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DISPUTE RESOLUTION ISSUES IN INDIAN CROSS-BORDER TRANSACTIONS

Experienced lawyers typically include dispute resolution provisions in their transaction documents, even when all parties expect that their relationship will be a successful one. Subtleties in Indian law and recent decisions by the Indian courts, however, complicate the task of crafting meaningful dispute resolution mechanisms in cross-border Indian deals.

INDIA'S LEGAL SYSTEM

Business lawyers handling cross-border matters customarily insist upon contract provisions to give speed and clarity to dispute resolution. Usually, this is done with clauses specifying the choice of forum, choosing the law of a particular jurisdiction and, often, agreeing to arbitrate disputes. However, complex commercial litigation before Indian courts can be a challenging experience for foreign parties due to the perceived limitations on India's judicial resources, unfamiliar civil procedure, and different judicial priorities. Furthermore, Indian courts will not always enforce the judgments of foreign courts or the awards of international arbitral panels. Thus, a party who succeeds in winning its case overseas still may be forced to litigate the matter again in the Indian courts to finally obtain relief.

CHOICE OF FORUM

Customarily, cross-border transaction documents include a choice-of-forum provision vesting jurisdiction over lawsuits in a specified court or jurisdiction. Examples of this are provisions where parties stipulate to the exclusive jurisdiction of the courts of one place (*e.g.*, New York), consent to personal jurisdiction in that jurisdiction, agree to expedited means for service of process, and waive objections to the convenience or suitability of the venue. Yet this approach is ill-suited to Indian cross-border deals because Indian courts do not consider themselves necessarily bound by choice-of-forum clauses. Instead, they may permit a disgruntled counter-party to bring its own suit in the Indian courts even if the contract prohibits it. Moreover, India has agreed to recognize

and enforce the judgments of the courts of only a handful of foreign countries (including the U.K., Hong Kong, and Singapore, but excluding Argentina, Australia, Brazil, France, Germany, the United States, and many other places). Thus, unless the successful litigant can obtain its relief wholly outside of India, it must file a new action in Indian courts to enforce its judgment.

ARBITRATION

Arbitration in India is governed by the Arbitration and Conciliation Act, 1996 ("ACA"). Part I of the Act regulates arbitration that is held within India (including international arbitration held in India) and the enforcement of Indian arbitral awards. Part II deals with enforcement of foreign arbitral awards in commercial cases and implements the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Thus, by implication, the Act seems to say that arbitration within India is governed by Part I; foreign arbitration is regulated by the law of the foreign jurisdiction; and enforcement in India of a foreign arbitral award follows the procedures of Part II. However, it is not that simple.

Part I. Part I of the Act generally follows the UNCITRAL Model Law on International Commercial Arbitration. Among other things, it limits the degree of judicial interference with arbitral proceedings, requires judges to refer cases to arbitration where there is an arbitration agreement, and specifies that "an arbitral award shall be final and binding on the parties and persons claiming under them respectively." §§ 5, 8.1, 35. At first blush, these provisions seem to ensure that arbitration in India should proceed much as it does elsewhere in the world. Unfortunately, a series of decisions from the Indian courts have undermined the efficacy of arbitration involving India or Indian parties.

The first impediment is that Indian courts may take a narrow view of disputes that can be arbitrated. In *N. Radhakrishnan v. M/S Maestro Engineers*, (2009) AIR 2008 SC 1061, for example, the Supreme Court of India ruled that a case involving allegations of fraud and misappropriation should be handled by a court, despite the fact that the dispute "squarely fell within the purview of the arbitration clause." The Court suggested that an alternative basis for its ruling was that the interests of justice required the case to be "tried in a court of law which would be more competent and have the means to decide such a complicated matter."[1] Thus, even when parties have agreed to arbitrate their differences, the arbitration agreement might be evaded if either party argues that the case involves complex financial issues.

A second concern is the emerging view of Indian courts that, when confronted with a preliminary dispute over such matters as the appointment of an arbitrator or the question of the arbitrability of a dispute, the court has the authority to question the credentials of arbitrators, construe the arbitration agreement, and determine whether the dispute falls within the scope of the arbitration clause. *See S.B.P. & Co v. Patel Engineering Ltd.*, (2005) AIR 2006 SC 450. This once again insinuates Indian courts into areas that elsewhere are the province of the arbitration authority or the arbitration panel itself.

The third, and most troubling, trend is the willingness of Indian courts to disregard arbitral awards altogether if the court decides that the award "is in conflict with the public policy of India." The "public policy" exception to enforcement of arbitral awards is found in Ch. 34, ¶2(b)(2) of the UNCITRAL Model Law and duplicated in §34(2)(b)(ii) of the Indian ACA. However, under UNCITRAL, the concept of "public policy" has been one of "fundamental principles, pertaining to justice or morality." *See* International Law Association, Report of Committee on International Commercial Arbitration, New Delhi Conference, Recommendation 1(d); *see also, id.*, ¶¶ 12-17 (2002). Indian courts, however, have gone further, holding that arbitral awards violate Indian public policy "if the award is erroneous on the basis of record with regard to proposition of law or its application." *Oil & Natural Gas Corp. Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705. In other words, Indian courts have reserved to themselves the right to review the merits of the arbitral award, especially if Indian law is involved; thus, enforcement of an arbitral award under §34 can entail some degree of re-trying the case in India.

Part II. Ordinarily, none of this should concern parties to a cross-border transaction, since by definition their disputes would be international and therefore not fall within Part I of the ACA.[2] But in two cases, *Bhatia International v. Bulk Trading S.A.*, (2002) 4 SCC 105, and *Venture Global Engineering v. Satyam Computer Services Ltd.*, (2008) 4 SCC 190, the Indian

Supreme Court held otherwise. With reasoning at odds with other jurisdictions that have adopted UNCITRAL and at variance with its own precedent in *Renusagar Power Company v. General Electric Company*, 1994 Supp (1) SCC 644, the Court ruled that Part I of the Act applied to a foreign arbitral award if and when a party attempted to enforce the award in India under Part II. Among other things, this means that the Indian courts' problematic construction of various elements of Part I now is imported into Part II as well. This includes the troubling *Saw Pipes* doctrine requiring the awards of foreign arbitral panels to survive a "public policy" review under § 34(2)(b)(ii).

The *Bhatia International* decision suggested, and later decisions seem to confirm, that this issue could be avoided if the parties clearly signaled their intention that Part I of the Act was to be excluded from the scope of their arbitration agreement. In *Dozco India Pvt. Ltd. v. Doosan Infracore Co. Ltd.*, (2011) 6 SCC 179, for example, the Supreme Court held that parties who chose foreign law and a seat of arbitration outside India would be deemed to have excluded Part I. Obviously, an express disclaimer that the parties agree to exclude all provisions of Part I would eliminate doubt on the issue.

This expedient would seem to fix the issues raised in the Supreme Court's *Bhatia* and *Venture Global* decisions. However, it may not be so simple. Section 34(b)(ii) of Part I—that is, the section *Saw Pipes* relied upon—happens to have a counterpart in §48(2)(b) of Part II, which states:

> (2) Enforcement of an arbitral award may also be refused if the Court finds that- …
>
> (b) the enforcement of the award would be contrary to the public policy of India.

Thus, although no Indian court has yet decided the issue, the "public policy" exception to enforcement of international arbitral awards in India may still be an open question after all. Fortunately, the principles laid down in *Bhatia International* and similar cases are presently under review by a Constitution Bench of the Supreme Court, which may bring clarity to this area. Similarly, the Indian legislature is in the process of considering amendments to the ACA to minimize the interference of courts.[3]

CHOICE OF LAW

Although it sometimes is compromised as a point in the negotiation of cross-border deals, selection of Indian law to govern a contract raises significant issues of its own. As pointed out above, Indian courts reserve to themselves the right to reject foreign arbitral awards if they find that the arbitrators incorrectly applied Indian law. Consequently, a party to a contract governed by Indian law may be stepping straight into the "public policy" trap.

This is an especially tricky issue if both parties to a cross-border transaction are Indian entities. Under the ACA, an arbitration between two Indian nationals is automatically deemed to be a domestic arbitration—governed by Part I—and not an international arbitration. *See TDM Infrastructure Pvt Ltd v. UE Development India Pvt Ltd.*, 2008 (8) SCALE 576. Moreover, §28(1)(a) of Part I can be read to say that Indian corporations contracting with each other are *required* to use the substantive law of India, automatically triggering §34(b)(ii).

RECIPROCITY

India is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but it has conditioned its recognition of foreign arbitral awards in two ways. First, Indian courts will recognize awards made only in jurisdictions that are also signatories to the Convention. Second, under § 44(b) of the ACA, Indian courts will recognize awards only from those territories that provide reciprocity to India *and* that the Indian government so "notifies" in India's Official Gazette. To date, India has notified 46 states, including most major jurisdictions; however, there are some notable exceptions, including China and the United Arab Emirates. Thus, arbitral awards from those seats do not enjoy the benefits of Part II and must be enforced by filing a lawsuit in the courts of India.

CONCLUSION

Dispute resolution in Indian cross-border transactions lacks the clarity that lawyers and clients have come to expect. Until the Indian legislature or courts bring practice under the ACA more in line with that of other countries,

there are several precautions lawyers should take in drafting transaction documents:

- If the parties intend for their disputes to be adjudicated in court, they should specify England, Hong Kong, or Singapore as the forum, since India recognizes the judgments of those jurisdictions.
- If the parties intend for their differences to be arbitrated, they should specify that the seat of arbitration is a country "notified" by the Indian government, such as the United Kingdom, the United States, or Singapore. Until India expands its list of notified territories, the arbitration agreement should avoid specifying such non-notified jurisdictions as Dubai and Hong Kong, despite their prominence as centers for dispute resolution.
- If tax issues and other structural considerations permit, at least one of the parties should be incorporated and headquartered outside of India to avoid the unanticipated application of ACA Part I. This may be more practical in M&A deals and joint ventures than in other forms of transactions.
- The parties should expressly exclude the provisions of Part I in their arbitration agreement.[4]
- Whenever possible, parties should specify that arbitration will be held before internationally recognized bodies such as the International Court of Arbitration of the ICC, the London Court of International Arbitration, or the Singapore International Arbitration Centre, instead of ad hoc arbitration panels, since Indian courts are more likely to uphold awards given by established and reputable arbitration authorities.

Finally, because Indian law is likely to remain ambiguous for some time, lawyers handling cross-border Indian transactions should take the additional step of engaging Indian counsel to advise them of developments in the area of dispute resolution. Lawyers should do so even when representing clients that have no direct presence in India if the transaction could foreseeably lead to proceedings in India.

Jones Day does not practice Indian law, and the contents of this* Commentary *do not constitute an opinion on or advice about Indian law.

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ENDNOTES

1 It also cited with approval the 1999 decision in *Haryana Telecom Ltd. vs. Sterlite Industries (India) Ltd.*, AIR 1999 SC 2354, where it had ruled that an arbitrator lacked competency to order winding up of a company, notwithstanding a sufficiently broad arbitration provision.

2 An exception would be if the parties nonetheless chose India as the seat of their arbitration. In that case, Part I would apply. ACA § 2.

3 The Ministry of Law and Justice, Government of India has announced that it intends to overhaul the arbitration laws of the country and released a consultation paper on April 8, 2010 seeking views of interested parties on the proposed amendments.

4 In their exclusion of Part I, the parties may wish to carve out those provisions of Part I that would be procedurally helpful to them in an international arbitration. Examples would be ACA §9 (providing for Indian courts to grant interim relief to parties in an arbitration) and §27 (allowing arbitration parties to apply to the Indian courts for assistance in taking evidence). Obviously, this exclusion must be carefully drafted to make clear that the parties are nonetheless excluding all other provisions of Part I.