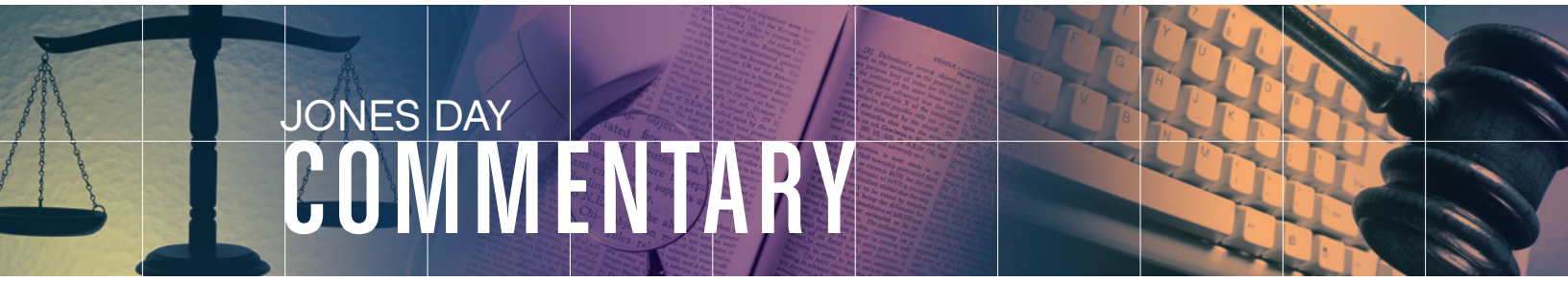
SEPTEMBER 2012



UPDATE: DISPUTE RESOLUTION ISSUES IN INDIAN CROSS-BORDER TRANSACTIONS

In February, we disseminated a *Commentary* discussing challenges parties to Indian cross-border transactions face when they invoke contractual dispute resolution clauses.[1] Among other things, we wrote that enforcement of foreign arbitral awards faced unique hurdles in India. Fortunately, at least two of these impediments have been eased.

ENFORCEMENT OF ARBITRAL AWARDS

Arbitration in India is governed by the Arbitration and Conciliation Act, 1996. Part I of the Act regulates arbitration that is held within India (including international arbitration held in India) and the enforcement of domestic 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.

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. However, Part I contains a section—34(2)(b)(ii)—permitting an Indian court to disregard arbitral awards if the court decided that the award "is in conflict with the public policy of India."[2]

Nevertheless, it was assumed for years that Part I applied only to arbitral proceedings that took place in India and that a foreign arbitral award could be enforced reliably in India under Part II of the Act. However, in 2002, a panel of the Indian Supreme 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. *See Bhatia International v.*

1 *See* "Dispute Resolution Issues in Indian Cross-Border Transactions," *available at* http://www.jonesday.com/dispute_resolution_issues/.

2 Although the language comes from Ch. 36, ¶(1)(b)(ii) of the UNCITRAL Model Law, courts in other countries have been reluctant to invoke it and, even then, do so mainly when the award implicated fundamental principles pertaining to justice or morality.

Bulk Trading S.A., (2002) 4 SCC 105; *see also Venture Global Engineering v. Satyam Computer Services Ltd.*, (2008) 4 SCC 190. Thus, a party who successfully obtained a foreign arbitral award against an Indian respondent still faced the challenge of relitigating the merits of its case in the Indian courts when it took steps to enforce the award. Indeed, an Indian court could refuse altogether to enforce a foreign arbitral award if it concluded that "the award [was] 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.

Fortunately, the Constitution bench of the Indian Supreme Court in the recent case of *Bharat Aluminium Co. vs. Kaiser Aluminium Technical Services Inc.* overruled *Bhatia International*. In particular, the Court clarified that Part I and Part II of the Act were not intended to overlap. Several important conclusions flow from this ruling.

Part I does not apply to international commercial arbitration held outside India. (However, Part I does still apply to such arbitrations if they are held within India.)
Section 34 of the Act would apply only in cases where the seat of arbitration was in India. Thus, lawsuits brought in India to enforce international arbitral awards under Part II of the Act no longer face the "public policy" test of §34(2)(b)(ii).
In international commercial arbitrations held outside India, interim relief—such as lawsuits to enjoin the arbitration—cannot be granted by Indian courts.
Instead, Indian courts' jurisdiction over a matter arises only when a party comes to India and files a proceeding under Part II to enforce its award.

However, *Bharat Aluminium* has not removed all doubt.

Its holding applies only to arbitration agreements executed after September 6, 2012; thus, the decision in *Bhatia International* will continue to control many disputes for years to come.

Although it now is clear that Part I will not apply to proceedings brought in India to enforce foreign arbitral awards, §34(b)(ii) of Part I—that is, the troubling section excusing the enforcement of awards that are "in conflict with the public policy of India"—has an exact counterpart in §48(2)(b) of Part II.[3] Thus, it remains possible that Indian courts handling Part II enforcement proceedings may still balk at enforcing certain foreign arbitral awards for the same reasons they cited under §34(b)(ii).

GAZETTING OF ADDITIONAL FOREIGN JURISDICTIONS

India is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but it limits its recognition of foreign arbitral awards to those Convention countries that the Indian government "notifies" in India's Official Gazette, a process sometimes called "gazetting." Although most major jurisdictions had been gazetted, China was conspicuous by its absence. The Indian government remedied this on March 19, 2012, identifying the People's Republic of China (including the Hong Kong Special Administrative Region ("SAR") and the Macao SAR) as countries whose arbitral awards Indian courts would enforce.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Geoffrey S. Stewart
Washington / New York
+1.202.879.5445 / +1.212.326.7877
gstewart@jonesday.com

Mike Pollen
Singapore
+65.6233.5985
mpollen@jonesday.com

Karthik Kumar
Singapore
+65.6233.5980
kkumar@jonesday.com

3 §48(2)(b) 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.