E-Update 2011/2 – December 2011

Yograj Infrastruction Ltd v Ssang Yong Engineering & Construction – A departure from the interventionalistic approach of Indian Courts in foreign arbitrations?

Background

In this case, the Supreme Court of India heard an appeal by an Indian sub-contractor in an arbitration with a Korean company over the termination of an agreement to upgrade a highway in the state of Madhya Pradesh. By way of background, the Korean company, Ssang Yong Engineering & Construction ("Ssang Yong"), was awarded a contract by the National Highways Authority. Ssang Yong then sub-contracted this project to Yograj Infrastructure Ltd ("Yograj"). The sub-contract provided for disputes to be determined by way of arbitration in Singapore under the applicable Singapore International Arbitration Centre Rules ("SIAC Rules"). The governing law for the sub-contract was Indian law. Subsequently, a dispute arose between parties and Ssang Yong terminated the sub-contract alleging delay on the part of Yograj.

In May 2010, the dispute between parties was referred to arbitration in accordance with the arbitration agreement. Both parties had applied to the Tribunal for interim relief. In June 2010, the Tribunal directed, amongst other things, that Yograj immediately release various forms of plant, machinery and equipment to Ssang Yong so that construction work could continue on the project. Yograj appealed against the Tribunal's interim order before the Indian Courts. After failing with the appeal in the District Court and the High Court in India, Yograj brought its case before the Supreme Court of India.

The Judgment issued by the Supreme Court of India

It must be noted that the arbitration agreement provided that the dispute shall be determined by way of arbitration in Singapore under the applicable SIAC Rules (the 2007 Version). Rule 32 of the SIAC Rules 2007 provides that where the seat of arbitration is Singapore, the law applying to the arbitration shall be the Singapore International Arbitration Act ("IAA"). The SIAC Rules 2007 further provide that "*if any of the SIAC Rules is in conflict with a mandatory provision of the applicable law of the application from which parties cannot derogate, that provision shall prevail*".

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In its appeal before the Indian Courts, Yograj argued that since Indian law was the governing law in the arbitration agreement, the Indian Arbitration and Conciliation Act 1996 ("IACA") shall apply accordingly. More specifically, Yograj relied on Sections 9 and 37 of the Indian Arbitration and Conciliation Act 1996 (the "IACA"). Section 9 of the IACA allows the Court to grant interim measures before or during arbitral proceedings or at any time after the making of an award, but before the enforcement of an award. Section 37 of the IACA then allows for an appeal to the Court against an order of the arbitral tribunal granting or refusing to grant an interim measure sought. Although these two sections, strictly speaking, relate to domestic arbitration in India (and not international arbitration overseas), there are case authorities in India, such as the Supreme Court decision of *Bhatia International v Bulk Trading SA* [2002] INSC 132, which held that these provisions can also apply to arbitrations taking place outside India, *unless* parties have expressly excluded this possibility in the arbitration agreement. What this effectively means is that despite parties having already chosen a foreign seat of arbitration, an appeal from the Tribunal's decision may still find its way before the local Indian Courts and subject to local Indian law. Essentially, the nub of Yograj's argument was that Section 37 of the IACA can be invoked as the basis of its appeal, given the absence of a specific clause in the arbitration agreement excluding the application of the same to the SIAC proceedings.

Consequently, the Supreme Court of India rejected the arguments raised by Yograj. It agreed with the findings of the District Court and the High Court that Rule 32 of the SIAC Rules 2007 was sufficient to exclude the application of Sections 9 and 37 of the IACA and the general jurisdiction of the Indian Courts in this matter. The Supreme Court held that having agreed to the SIAC Rules, it was now not available to Yograj to argue that the "proper law" of the agreement would apply to the arbitration proceedings. The Supreme Court stated that "*once the parties had specifically agreed that the arbitration proceedings would be conducted in accordance with the SIAC Rules, which includes rule 32, the decision in Bhatia International and the subsequent decisions on the same lines would no longer apply*…" The Supreme Court further commented that from the point when the arbitrator was appointed and arbitration proceedings commenced in Singapore, any appeal from the Tribunal's decisions would have to be heard by the local Courts in Singapore.

Observations

The international consensus is that India is not an arbitration-friendly jurisdiction – Indian Courts are seen as being extremely keen to assume jurisdiction and intervene in foreign arbitrations. At first blush, this latest decision appears to mark a change in that tradition.

However, it must be noted that this decision was made having regard to the SIAC Rules 2007, where Rule 32 clearly provides for the applicable law of the arbitration. The SIAC has since amended its Rules in 2010 and the original Rule 32 has been deleted. In the circumstances, this decision is unlikely to apply to many SIAC arbitrations going forward, on the assumption that they are subject to the latest SIAC Rules 2010. It is also likely that this judgment would only apply to

arbitration proceedings involving Indian parties and foreign parties (i.e. there must be a foreign element involved) – Indian Courts are likely to want to retain jurisdiction should the matter involve two local Indian parties, in which case this judgment is unlikely to be of much help.

Having said that, this decision would be very useful in scenarios where the arbitration institutions have rules specifying the curial law of the proceedings. Should parties wish to take advantage of this judgment and avoid the scenario of having the Indian Courts seize jurisdiction when parties have already chosen a foreign arbitration seat, they can expressly state that the SIAC Rules 2007 shall apply (in the event of a Singapore arbitration) or specifically exclude the relevant parts of the IACA.

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