

## A NEW CHAPTER IN INDIAN ARBITRATION: An analysis of the Apex Court ruling in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc.*

In a ruling which would have far reaching implications on the development of international arbitration disputes seated outside India, a Constitutional Bench of the Indian Apex Court in [Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc](#) (**Bharat Aluminium**) on 6 September 2012 overruled its earlier decision in *Bhatia International v. Bulk Trading S.A.*<sup>1</sup> (**Bhatia**).

### BACKGROUND

In *Bhatia*'s case, the Court interpreted Part I of the Indian Arbitration and Conciliation Act, 1996 (**Act**) in a manner which allowed Part I (*which, amongst others, contains provisions relating to interim reliefs and setting aside of arbitral awards*) to be applied to international arbitration disputes seated outside India. The ruling in *Bhatia* not only resulted in Indian Courts entertaining challenges to foreign awards in India (*See Venture Global v Satyam Computer Services*<sup>2</sup>) but interfered in appointment of arbitrators in international arbitration disputes seated outside India as well (*See Indtel Technical Services v W.S. Atkins*<sup>3</sup>). Although attempts were made to limit the applicability of Part I of the Act (*See Dozco India v. Doosan Infracore*<sup>4</sup>, *Videocon Industries Ltd v. Union of India & Ors.*<sup>5</sup> and *Yograj Infrastructure v Ssang Yong Engineering*<sup>6</sup>), it was widely accepted that the ruling in *Bhatia* required reconsideration.

### APPLICABILITY OF PART I

*Bhatia* had concluded that since Section 2 (2)<sup>7</sup> of the Act did not specify that Part I applied "only" where the place of arbitration was in India, Part I would be applicable to arbitrations seated outside India as well. The seminal question which the Court was required to consider in *Bharat Aluminium* was whether Part I of the Act<sup>8</sup> would be applicable to international arbitration disputes seated outside India.

The Court, in *Bharat Aluminium*, noted that the UNCITRAL Model Law had not been bodily adopted in the Act and the mere absence of the word "only" from Section 2 (2)<sup>9</sup> would not extend the applicability of Part I to arbitrations seated outside India. The scheme of the Act, the Court held, made it abundantly

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<sup>1</sup> [2002] 4 SCC 105

<sup>2</sup> [2008] 4 SCC 190

<sup>3</sup> [2008] 10 SCC 308

<sup>4</sup> [2011] 6 SCC 179

<sup>5</sup> [2011] 6 SCC 161

<sup>6</sup> [2011] 9 SCC 735

<sup>7</sup> Section 2(2) of the Act reads "This Part shall apply where the place of arbitration is in India".

<sup>8</sup> The Act is divided into four parts viz Arbitration (*Part I*), Enforcement of Certain Foreign Awards (*Part II*), Conciliation (*Part III*) and Supplementary Provisions (*Part IV*).

<sup>9</sup> Section 2 (2) of the Act is analogous to Article 1(2) of the UNCITRAL Model Law. Article 1(2) of the UNCITRAL Model Law reads "The provisions of this law, except Articles 8, 9, 17(H), 17(I), 17(J), 35 and 36 apply "only" if the place of arbitration is in the territories of this State".

clear that the territorial principle, accepted in the UNCITRAL Model Law, had also been adopted by the Indian legislature. The Court concluded that Section 2 (2) was a legislative declaration that Part I of the Act applied to arbitration(s) seated in India and not to arbitration(s) seated outside India.

However, the ruling appears to suggest that where “*the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the English Procedural Law/Curial Law*” the same maybe given effect - even though the arbitration is seated outside India.

## IMPLICATION ON ARBITRATIONS IN INDIA

In elucidating the definition of “*court*”<sup>10</sup>, Bharat Aluminium, has clarified that the “*subject matter of the arbitration*” was distinct from the “*subject matter of the suit*”. Now, in domestic arbitrations, in addition to the courts which ordinarily had jurisdiction, the courts where the arbitration is seated would also enjoy jurisdiction over the arbitral proceedings. Such an interpretation is likely to have far reaching consequences in domestic arbitrations, especially where the seat of arbitration is at a neutral venue. However, for foreign awards, the court enjoying jurisdiction over the subject-matter of the award would continue to be the court to which an enforcement application would lie.

## RELATIONSHIP BETWEEN PART I & II

On the inter relationship between Part I and Part II of the Act, the ruling clarifies that while Part I regulates the *commencement* and *conduct* of arbitration as well as the *challenge* and *recognition or enforcement* of the award, Part II regulates only the *commencement* of arbitration<sup>11</sup> and *recognition or enforcement* of the award<sup>12</sup>. Hence where the seat of arbitration is outside India, regulatory control over the arbitration and challenge to an award would lie within the domain of the courts of the country in which the arbitration is being conducted.

## INDIAN COURTS AND FOREIGN AWARDS

In construing Section 48(1)(e)<sup>13</sup> of the Act the Court observed that only the courts in the country in “*which the award was made*” and the courts “*under the law of which the award was made*” would be competent to annul a foreign award. The latter category, the Court opined, is introduced as an exception to the general rule, to challenge an award, only if the courts of the former category lacked

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<sup>10</sup> Section 2(1)(e) of the Act defines ‘court’ as “*in this Part, unless the context otherwise requires, “Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes*”.

<sup>11</sup> Section 45

<sup>12</sup> Sections 46 to 49

<sup>13</sup> Section 48 (1) (e) of the Act states that “*enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*”

powers to annul the award. Setting to rest prevailing uncertainties, the ruling clarifies that the expression “*under the law of which the award was made*” does not confer any jurisdiction on Indian courts to annul an award made in international arbitration disputes seated outside India and no such power has been conferred by the Act.

## INTERIM RELIEF

In light of the Court’s ruling that Part I of the Act would apply only to arbitrations seated in India, Indian Courts would now be precluded from granting interim reliefs when the seat of arbitration is outside India. The Court held that parties having voluntarily chosen arbitration seated outside India, knowledge of the consequences would be imputed. The onus to remedy any perceived lacuna, resulting from such an interpretation, would now lie exclusively within the legislative domain. The Court further clarified that no suit for an interim injunction would be maintainable in cases where the seat of arbitration is outside India.

## CONCLUDING REMARKS

*Enforcement of Interim Orders:* Bharat Aluminium clarifies the extent to which Indian courts may interfere in international arbitration disputes seated outside India but, simultaneously, raises questions on enforcement of foreign interim orders (such as an order of injunction) against the losing party in India. How does a successful party enforce an interim order passed by a foreign court or an international arbitration tribunal against the counterparty in India?

*Prospective Application of the Judgment:* Given that the principles laid down in Bharat Aluminium apply to arbitration agreements executed on or after 7 September 2012, clearly Bhatia will continue to haunt parties whose arbitration agreements were executed prior to that date. Therefore, it would result in a rather anomalous situation where the law laid down in Bhatia would continue to apply to arbitration agreements executed before 7 September 2012; whereas the law laid down in Bharat Aluminium would apply only to disputes arising out of arbitration agreements executed post 6 September 2012. There will be two parallel and inconsistent legal regimes functioning in the arbitration field depending on the date of the arbitration agreements which would naturally lead to more confusion.

*Enforcement of Non-Convention Awards:* The Bharat Aluminium ruling has put a question on the status and enforcement of awards passed in non-convention countries (**Non-Convention Awards**). As per Bhatia, Non-Convention Awards would be deemed to be domestic awards and Part I of the Act would apply to such Non-Convention Awards. However, Bharat Aluminium has held that the intention of the Legislature was *not* to include Non-Convention Awards within the Act. This means that there is no law in India governing such arbitrations held in Non-Convention countries which certainly indicates a lacuna in the Act.



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